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SUBJECT INDEX

'A'

Arbitration and Conciliation Act, 1996- Section 37- An arbitrator was appointed in the year 1995, who closed the proceedings without making the award- proceedings were revived and the award was made by the second arbitrator- State had not questioned the appointment of second arbitrator and joined the proceedings- held, that State is caught by its own conduct, omission and waiver- no findings were given by the learned Judge on issues No. 1 to 4 therefore, matter remanded to the Learned Judge for decision on issues No. 1 to 4.

Title: Jagdish Chand Gupta Vs. The Executive Engineer, National Highway Division, HP PWD (D.B.) Page-348

'C'

Code of Civil Procedure, 1908- Section 24- Petitioner approached the Court for transfer of the suit from the Court of Civil Judge (Senior Division) Kinnaur at Rekcong Peo to Civil Judge (Sr. Division), Shimla on the ground that respondent was an influential political person and Advocates practising at Rekcong Peo were not prepared to provide adequate legal services to the petitioner under the influence of the respondent- held, that one advocate was representing the respondent at Rekcong Peo and no aspersion was cast on the professional competence of that advocate- further held, that acceptance of the submission on behalf of the petitioner would tantamount to a vindication of the inherent fact ingrained in the aforesaid submission that the Courts of law in Himachal Pradesh were under political influence- no merits in the petition, hence, dismissed.

Title: Rajwant Singh Vs. Tejwant Singh Page-98

Code of Civil Procedure, 1908- Section 100- Plaintiff sought injunction against the defendants for restraining them from raising construction on the best portion of the suit land-plaintiff claimed the suit land to be joint and asserted that the defendants were raising construction without partitioning the land-the defendants asserted that co-sharers had sold the suit land to them specifically and had delivered the possession - similarly part of the land was sold to the husband of the plaintiff- the defendants further claimed that separate khatonies were carved out - the trial court decreed the suit - first appellate court allowed the appeal and dismissed the suit- held that the longstanding revenue entries prove that previous co-owner was in exclusive possession of the suit land and had sold specific portion of the suit land - Separate khanaunis were also assigned - A specific portion of the land was sold to husband of the plaintiff and he was put in possession of the same- thus, husband of the plaintiff ceased to be the co-sharer of the suit land- the plaintiff ought to have filed suit for possession instead of injunction- there is no merit in this appeal and the same is dismissed.

Title: Krishna Devi Vs. Ulfat & ors. Page- 304

Code of Civil Procedure, 1908- Section 100- Plaintiffs challenged the revenue entries showing the defendants No. 1 to 8 as tenants and co-sharers over the suit land asserting that defendants no. 1 to 8 were never inducted as tenants-they further challenged the conferment of the proprietary rights by AC 2nd Grade- injunction also sought against the defendants to prevent their interference over the suit land-the defendants justified the entries and asserted their status as non-occupancy tenants before the ownership rights were vested-suit dismissed by the trial court- the first appellate court reversed the judgment

of trial court and decreed the suit- held that, the tenancy is a bilateral act and payment of rent is a sine-qua-non for its creation-the revenue record shows that there is no entry in the rent column- Assistant Collector 2nd Grade, has no jurisdiction to confer proprietary rights upon the defendants, therefore, the order passed by him is nullity- appellate court had rightly decreed the suit- appeal dismissed.

Title: Lal Singh & ors. Vs. Gauri Dutt & another Page-55

Code of Civil Procedure, 1908- Section 100- Plaintiffs challenged the sale deed executed by the defendants No. 2 & 3 and father of defendant No. 4 to 8 in favour of defendant No. 1 alleging that plaintiffs and the defendants No. 2 to 8 were owners to the extent of 3/4th share in the suit land but they had sold the entire suit land- defendant No. 1 contested the suit on the plea that the entire land of the vendors with other co-sharers was 69 bighas and 10 biswas out of which vendors were in exclusive possession of the suit land which was sold by them- the trial court declared the sale deed null & void to the extent of the share of the plaintiffs-first appellate court partly allowed the appeal- held, that the suit land is proved to be in exclusive possession of vendors, therefore, the sale deed dated 20.3.1975 cannot be termed illegal or void-further held that, the sale deed by vendors was valid since they were in exclusive possession of the same subject to determination of their share at the time of partition-appeal accordingly dismissed.

Title: Krishan Datt alias Krishan Chand & ors. Vs. Parma Nand & ors. Page-379

Code of Civil Procedure, 1908- Section 100- **Specific Relief Act, 1963-** Section 39- - Plaintiffs filed civil suit for mandatory injunction directing the defendants to remove the blockade caused by them by raising construction over the path- defendants claimed the suit land as Abadi Deh- further claimed that the verandah was raised by them over the suit land- suit and first appeal were both dismissed- in regular second appeal held, that plaintiffs had claimed the encroachment over the path on the basis of demarcation report prepared by the Revenue Officer but the demarcation report was not placed on record- there was no satisfactory evidence to show obstruction by the defendants to the path – suit and appeal were rightly dismissed.

Title: Dhian Singh & others Vs. Kashmir Singh & another Page-291

Code of Civil Procedure, 1908- Order 7 Rule 11- Plaintiff filed a civil suit for permanent prohibitory injunction- defendants filed an application for rejection of the plaint pleading that suit was barred by the provisions of Arbitration and Conciliation Act, 1996 as it was provided in the partnership agreement that in event of any dispute, same shall be referred to the Arbitrator, whose decision shall be final- plaintiff filed a reply pleading that partnership deed had been dissolved and it was not permissible to rely upon the arbitration clause- trial Court held that complicated question of law and fact are involved which could not be referred to the Arbitrator and Civil Court will have jurisdiction to decide those questions- held, that arbitration clause will continue to be operative even after the dissolution of the partnership - suit is for injunction but the claim arises out of the partnership deed – therefore, matter is required to be referred to the Arbitrator – mere fact that complicated questions of law and fact are involved is no ground for not referring the dispute to the Arbitrator- the plaint ordered to be rejected leaving the parties to approach the Arbitrator.

Title: Sukhwinder Singh and another Vs. Kusum Sharma Page-82

Code of Civil Procedure, 1908- Order 20 Rule 18- Suit for partition of super structure decreed by the Court and preliminary decree for partition declaring the share of the plaintiffs

to be 2/5th and share of the defendant to be 1/5th passed -the decree became final as no appeal was filed- 'T' was appointed as Local Commissioner to partition the land in accordance with preliminary decree- he suggested mode of partition- plaintiff accepted the report, but defendant objected to the same on the ground that Local Commissioner had not taken into account the observation of the Court in preliminary decree and the documents qua the tenancy of the shop, and secondly, report was not as per law- held, that tenancy is not proved from the evidence led on record as the alleged executant was not examined- further, held that report of Local Commissioner is as per law - objections dismissed and final decree passed on the basis of report of Local Commissioner.

Title: Sanjeev Aggarwal and other Vs. Roshan Lal Sood Page-70

Code of Civil Procedure, 1908- Order 21- A decree was passed for possession and injunction of the suit land- petition was filed for execution of the decree pleading that judgment debtors had taken forcible possession of the suit property in absence of the decree holder- Judgment debtor pleaded that they were in possession of the suit property prior to filing of the suit- trial Court dismissed the Execution Petition- held, that Decree Holder had failed to prove that after getting the possession of the share- Judgment Debtor had dispossessed him and had constructed the house – Decree Holder also admitted that shops were constructed in the year 1995 by the Judgment Debtor – held that the trial Court had rightly dismissed the petition- petition dismissed.

Title: Mahli Devi and another Vs. Jagdish Chand Page-383

Code of Civil Procedure, 1908- Order 21 Rules 64 and 66- A decree was put to the execution- when the decree was not satisfied, property of J.D. was attached and put to auction- however, Court had not recorded the satisfaction, whether the entire property was required to be sold or sale of a portion was sufficient to satisfy the decree- held, that sale is nullity- sale set aside and amount ordered to be refunded to the legal representatives of auction purchaser.

Title: Rama Kundra Vs. M/s. Esskay Woolen & Spinning Mills and others Page-119

Code of Civil Procedure, 1908- Order 22 Rule 4- Defendant 'G' died during the pendency of suit and his legal representatives were brought on record- defendant had also filed a counter-claim but his legal representatives were not substituted in counter-claim - later on, an application was filed by his legal representatives to bring themselves on record as counter-claimants- application was dismissed by the trial Court but Lower Appellate Court allowed the same- held, that once Legal Representatives of deceased 'G' were substituted in the main suit, there was no necessity of their impleadment in the Counter-Claim- order of Lower Appellate Court upheld and petition dismissed.

Title: Madan Lal Vs. Soma Devi & ors. Page-1

Code of Civil Procedure, 1908- Order 22 Rule 4(4)- It was noticed in Regular Second Appeal, that defendant No. 3 had died when the matter was pending before the First Appellate Court- defendant No. 3 has neither filed written statement nor had she contested the suit before the trial Court- since the death had taken place during the pendency of appeal before First Appellate Court; therefore, the application under Order 22 Rule 4(4) read with Section 151 C.P.C. shall only lie before the Court of first appeal- matter remanded to the First Appellate Court for the decision afresh as per the Law after deciding the question of abatement of appeal, if any.

Title: Saroj Vs. Brikam Jeet & Others Page-32

Code of Civil Procedure, 1908- Order 22 Rule 4(4)- It was noticed in Regular Second Appeal, that defendant No. 7 had died when the matter was pending before the First Appellate Court- although, defendant No. 7 has neither filed written statement nor had he contested the suit before the trial Court- since the death had taken place during the pendency of appeal before First Appellate Court; therefore, the application under Order 22 Rule 4(4) read with Section 151 C.P.C. shall only lie before the Court of first appeal- matter remanded to the First Appellate Court for the decision afresh as per the Law after deciding the question of abatement of appeal, if any.

Title: Chet Ram (since deceased through LRs) Vs. Ami Chand & Others

Page-17

Code of Civil Procedure, 1908- Order 23 Rule 3- Parties entered into a compromise which is taken on record as Ex.PA- compromise is lawful and, therefore, compromise decree ordered to be prepared; and revision disposed of in terms of compromise.

Title: Khem Chand s/o Shri Dhanna Ram & others Vs. Jiwa Nand s/o Shri Dhanna Ram & others Page-375

Code of Criminal Procedure, 1973- Section 311- During trial the Magistrate suo motu exercising the power under Section 311 Cr.P.C ordered summoning of victim of offence 'N' and also one 'R', owner of offending vehicle as witness- accused felt aggrieved and challenged the order by way of revision- held, that power under Section 311 of Cr.P.C can be invoked at any stage before the pronouncement of judgment- since, one 'N', victim of the offence had appeared as witness before the MACT Court, therefore, he was rightly summoned by the trial Court suo motu being material witness - N was not associated by the investigation officer as a witness as he was incapacitated by the accident-similarly, owner of the offending vehicle was rightly summoned- petition dismissed.

Title: Amit Kumar Vs. State of H.P Page-418

Code of Criminal Procedure, 1973- Section 311- Petitioner/accused filed applications under Sections 311 and 315 of Cr.P.C and under Section 45 of Indian Evidence Act before the trial Court- applications were dismissed - prior to filing of applications under Sections 311 and 315 of Cr.P.C, defence of the accused was closed by the trial Court- in revision, Sessions Judge granted opportunity to the accused to adduce defence evidence- again no defence evidence was led, therefore, evidence was subsequently closed by the order of the Court- in the aforesaid background applications under Sections 311 and 315 of Cr.P.C filed before trial Court were dismissed - held, that applications under Sections 311 and 315 of Cr.P.C, were rightly dismissed by the trial Court as the order of trial Court closing the right of the accused to adduce his evidence had attained finality- however, application under Section 45 of Indian Evidence Act was wrongly dismissed by the trial Court as it had no connection with closing of the evidence- hence, order of the trial Court qua dismissal of applications under Sections 311 and 315 of Cr.P.C upheld, whereas, order qua dismissal of application under Section 45 of Indian Evidence Act set aside.

Title: Ramesh Chauhan Vs. Rajvir Singh Page-122

Code of Criminal Procedure, 1973- Section 313- Accused pleaded ignorance to the prosecution case regarding his consent for being searched by police officer and being told of his legal right to be searched before Magistrate or a Gazetted Officer - held, that this evasive denial does not make any difference as inference of estoppel cannot be drawn against the

accused – further held that provision of estoppel has been engrafted in the Code of Civil Procedure and not in Code of Criminal Procedure.

Title: Aam Bahadur Vs. State of Himachal Pradesh (D.B.) Page-364

Code of Criminal Procedure, 1973- Section 438- An FIR for the commission of offences punishable under Sections 419 and 466 of IPC was registered against the accused - as per police report, accused was not required for custodial interrogation - statements of the witnesses had also been recorded- accused is to be presumed innocent till he is convicted by the competent Court of law- hence, accused is ordered to be released on bail in the event of arrest.

Title: Dinesh Kumar S/o Sh. Sher Singh Vs. State of Himachal Pradesh Page-371

Code of Criminal Procedure, 1973- Section 438- An FIR was registered for the commission of offences punishable under Sections 363, 366, 376, 342, 195A & 506 read with Section 34 IPC- marriage between applicant and the prosecutrix was solemnized and an affidavit was executed to this effect- marriage was duly registered under the Registration of Marriages Act- prima facie it can be inferred that parties had entered into a valid marriage- the fact that no protest was made at the time of registration of the marriage shows that registration was voluntary- no material was brought on record to show that applicant will interfere with the investigation and evidence- hence, bail application allowed.

Title: Dev Raj Malhotra Vs. State of Himachal Pradesh Page-52

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the accused for the commission of offences punishable under Sections 341, 342, 363, 376, 506 read with section 34 of IPC- held, that allegations against the accused are serious and grave in nature- offences of rape are increasing day by day in society- sexual assault is an attack upon the dignity and honour of a girl- 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 evidence being tampered with and the larger interest of the public and State- in view of gravity of the offence, it is not expedient to release the petitioner on bail- petition dismissed.

Title: Suresh Kumar son of Sh Jhabe Ram Vs. State of Himachal Pradesh Page-187

Code of Criminal Procedure, 1973- Section 439- An FIR was registered for the commission of offences punishable under Sections 366, 370, 376 and 506 of IPC and Section 8 of Protection of Children from Sexual Offences Act, 2012- 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 evidence being tampered with and the larger interest of the public and State- allegations against the petitioner are serious and grave in nature relating to rape- rape is not only crime against the person but it is crime against society- investigation is at initial stage and would be adversely affected in the event of release of the petitioner on bail- petition dismissed.

Title: Thakur Singh son of Sh.Bharat Singh vs. State of H.P. Page-395

Code of Criminal Procedure, 1973- Section 482- An FIR was registered under Sections 363 and 366 of IPC and Section 4 of POCSO Act against the petitioner- petitioner approached the Court for quashing of the FIR on the ground that he had married 'P' after having attained the age of majority and thereafter a daughter was also born to them- held, that FIR and complaint can be quashed under Section 482 Cr.P.C in appropriate cases to meet the ends of justice, where the Court is satisfied that parties have settled the dispute amicably and without any pressure- since, petitioner and 'P' were married after attaining the age of majority and had a daughter from the wedlock and were residing together amicably, thus, it is a fit case, where FIR requires to be quashed.

Title: Satpal Vs. State of H.P. and another Page-224

Code of Criminal Procedure, 1973- Section 482- Petitioner sought quashing of FIR registered for the commission of offences punishable under Sections 420 and 120-B of the Indian Penal Code and Section 13(2) of the Prevention of Corruption Act- it was alleged in the FIR that petitioner had entered a false report in rapat roznamcha regarding exchange of the land and mutation was attested on the basis of this rapat roznamcha- it was contended that rapat roznamcha was entered at the instance of one 'L' in accordance of H.P. Land Records Manual- report was verified by Field Kanungo- Field Kanungo and Tehsildar had been arrayed as accused along with petitioner, which clearly shows that there was conspisracy/collusion between the parties- submission that allegations made in the FIR are not true was not established on record- petition dismissed.

Title: Hans Raj Vs. State of H.P. and another Page-293

Code of Criminal Procedure, 1973- Section 482- The marriage between the petitioner No. 1 and the respondent was solemnized in the year 2012- child was also born from the wedlock- a petition u/s 9 of Hindu Marriage Act was filed by the petitioner No. 1, which was also allowed exparte- respondent filed a complaint against the petitioners under Section 12 of the Act- the process was issued by the Chief Judicial Magistrate- the respondent No. 1 approached the court to quash the proceedings in this complaint being the abuse of the process of law- held that, a prima-facie case for commission of offence is disclosed, as per the averments made in the complaint and the proceedings cannot be stifled or scuttled, at this stage, when the parties have yet to lead their evidence- petition dismissed.

Title: Rohit Kalia and ors. Vs. Sangita Sharma Page-317

Constitution of India, 1950- Article 226- A news item was published in the newspaper regarding the cutting of trees on which cognizance was taken- held, that after the publication of the news item in the news paper, it was the duty of the Deputy Commissioner to ascertain the correctness of the report- Superintendent of Police and Authorities of the forest department were bound to look into the matter as well- directions issued to the Authorities to verify the correctness of the news item and to submit compliance report.

Title: Court on its own motion Vs. State of H.P. and others (D.B.) Page-108

Constitution of India, 1950- Article 226- An advertisement was issued for inviting the applications for filling up the posts of Lecturers (College Cadre) in the subject of Music (Vocal)- one post was reserved for ex-servicemen and in case of non-availability, the dependent sons/daughters of ex-servicemen were eligible for the post - respondent no. 3 was selected as a ward of ex-servicemen- writ petition was filed challenging his appointment- Writ Court dismissed the writ petition- contention of the petitioner that respondent no. 3 ceased to be a dependent ward of ex-servicemen on appointment as ad-hoc lecturer is not

acceptable, as advertisement specifically provided that a person given appointment on ad-hoc/volunteer/daily wages/contract or tenure basis shall be considered as dependent- further, merely because father of the respondent No. 3 had taken benefit of reservation made in favour of ex-servicemen is not sufficient to deprive the dependent of seeking employment- appeal dismissed.

Title: Satish Kumar Vs. State of H.P. and others (D.B.) Page-126

Constitution of India, 1950- Article 226- Appellants were working as Panchyat Inspectors and the private respondents were working as Auditors with the respondent no. 2- prior to the year 1999, the Auditors used to be promoted as D.A.O. (12 posts) and Panchayat Inspector as Instructor (6 posts)- rules were amended on 15.7.1996 and the provision of promotion to the extent of 50% to the category of Auditors and 50% to the category of Panchayat Inspectors was made for the post of D.A.O.- rules were again amended in the year 2007, and the provision of 50% reservation was done away with - it was provided that Auditors and Panchyat Inspectors having five years of service were eligible for promotion to the post of D.A.O.- these rules were challenged by way of writ petition on the plea of arbitrariness and other grounds- writ petition was dismissed by the Writ Court holding that rules were based upon rationality and reasoning- in writ appeal held, that rules though not being in tune with executive instructions shall prevail over executive instructions- chances of promotion as pleaded by appellants was not condition of service but condition of service was right to be considered for promotion- questions relating to constitution, pattern, nomenclature of posts, cadres, categories, creation and other conditions of service pertaining to the field of policy are within exclusive discretion and jurisdiction of the State, subject to certain limitations provided by the Constitution- it is not for the Courts to direct the Government to have a particular method of recruitment or criteria for further promotion- appeal is without merits and dismissed.

Title: Satish Jamwal and others Vs. State of H.P. and others (D.B.) Page-468

Constitution of India, 1950- Article 226- Brother of the petitioner died in harness- his brother is in government service but is living separately- his mother abandoned her claim for compassionate appointment in favour of the petitioner- petitioner preferred a claim for compassionate ground which was declined- petitioner filed original application before Administrative Tribunal which was dismissed on the ground of delay- held, that delay in filing the claim shows that financial distress or indigency stood over come- the purpose of compassionate appointment is to provide immediate relief to the family- one brother of the petitioner is in government service- therefore, in these circumstances, claim was rightly rejected- petition dismissed.

Title: Niku Ram Vs. State of H.P. & others (D.B.) Page-432

Constitution of India, 1950- Article 226- Division Office was shifted from Balakrupi to Jaisinghpur – a writ petition was filed challenging the shifting order on the ground that order is against the public interest, bad in law, arbitrary and mala fide- respondents pleaded that it is for the government to decide the suitability of Division Office and the decision was made in the public interest- held, that Court should not interfere in the policy decision, unless there is arbitrariness- State had examined all aspects and had taken the decision thereafter- it cannot be said that process of decision making is bad- - petition dismissed.

Title: Rikhi Ram & another Vs. State of H.P. & others (D.B.) Page-466

Constitution of India, 1950- Article 226- Father of the petitioner was working as Class-I employee who died while in service- petitioner filed many representations for appointment on compassionate grounds which were rejected on the ground that family income of the petitioner exceeded the ceiling fixed by the government- held, that grant of terminal benefits and income from the family pension cannot be equated with the employment assistance on compassionate ground- no maximum income slab has been provided in the Scheme and the claim cannot be rejected on that ground- respondent directed to examine the case of the petitioner in the light of judgment titled **Surinder Kumar Vs. State of H.P. and others, ILR, 2015 (V) H.P. 842 (D.B.).**

Title: Deepika Kumari Vs. State of H.P. and another (D.B.) Page-155

Constitution of India, 1950- Article 226- Issue involved in the writ petition is similar to the issue already settled by the Apex Court- therefore, writ petition disposed of in terms of order passed by the Apex Court.

Title: Union of India & Ors. Vs. Lal Dass (D.B.) Page-189

Constitution of India, 1950- Article 226- One vehicle of Hon'ble Judge was stopped and was challaned – Additional Chief Secretary regretted the incident and apprised the Court that disciplinary proceedings had been initiated against the person(s), for unnecessarily stopping and challaning the vehicle of the Hon'ble Judge of the Court- direction issued that no unsavoury incident should happen with the judges/family members travelling in the vehicle in future- further direction issued to issue the permit to the Advocates for plying their vehicles liberally on restricted roads taking into consideration the arduous duties discharged by them within a period of one week- further direction issued to assure that at least 4 taxies are plied from Shilli Chowk to Majitha House- ambulance/any vehicle carrying patient permitted to ply on restricted/sealed road- further direction issued to communicate the rejection of the permit to the applicant- permission for sealed road restricted only to Hon'ble President of India, Hon'ble Vice President of India, Hon'ble Prime Minister of India, Hon'ble Governor of Himachal Pradesh, Hon'ble Chief Minister of Himachal Pradesh, Hon'ble Chief Justice of Himachal Pradesh, Hon'ble Speaker of Himachal Pradesh State Legislative Assembly, General Officer Commanding of ARTRAC and his Second-in-Command.

Title: Court on its own motion Vs. State of Himachal Pradesh and others (D.B.) Page-423

Constitution of India, 1950- Article 226- Petitioner challenged the approval granted to respondent no. 7 for starting GNM/B.Sc (N) course in private sector on the ground that proposed institute does not fall in the area notified in the advertisement- it is alleged that the institute was to be opened in the Mandi district within 30 kms but it was being opened in different sub division Chachiot- held, that applicants themselves do not fulfill the requirements and lack the basic required infrastructure- petitioner, therefore, cannot be permitted to the question of essentiality certificate granted in favour of respondent No. 7- further held, that Tehsil Chachiot is an integral part of District Mandi and the respondents have filed affidavits that place where institute was being opened was only 28 kms away from the Mandi town- no interference is required in the approval granted to respondent No. 7- hence, writ petition dismissed.

Title: Himachal Education Society Vs. State of HP & Others (D.B.) Page-458

Constitution of India, 1950- Article 226- Petitioner filed a Writ Petition in the year 2012 claiming the arrears w.e.f. 1.1.1996 till 18.3.1999- held, that arrears can only be granted for

three years prior to filing of the Writ Petition- merely, because relief was granted to some other person can be no ground to grant the relief to the petitioner.

Title: Karan Singh Pathania Vs. State of H.P. and others (D.B.) Page- 350

Constitution of India, 1950- Article 226- Petitioner had filed objection regarding some questions- he obtained some marks and again disputed answers to some other questions- respondent stated that objection can be raised within a specific time frame which he had not done- held, that a person can raise objection within the stipulated period of time and no objection can be raised thereafter- writ dismissed.

Title: Lalit Mohan Vs. H.P. Public Service Commission Page-61

Constitution of India, 1950- Article 226- Petitioner is aggrieved by reference made to the Labour Court- it is pleaded that the right of the petitioner to question the status of the respondent No. 3 as a workman would be foreclosed by reference order – held, that Labour Court is required to adjudicate the issues referred by Government for adjudication as well as incidental issues- petitioner would have a right to raise objection that respondent No. 3 is not a workman- further direction issued to the Labour Court to frame an issue regarding the status of respondent No. 3 in case of any dispute.

Title: Himachal Energy Pvt Ltd. Vs. State of HP & others Page-37

Constitution of India, 1950- Article 226- Petitioner was appointed as a teacher- a complaint was filed by the respondent No. 5 against his appointment- an inquiry was conducted and it was found that petitioner had taken admission in the Institute in the year 2000, whereas, notification provided that candidates who had taken admission w.e.f. 1.6.2001 till 31.8.2005 were eligible- notification also provided that the services of a candidate admitted in the institute between 1.6.2001 and 31.8.2005 will not be terminated- notification did not provide anyting for the candidates admitted prior to 1.6.2001- hence, order passed by the Inquiry Officer is not sustainable- however, question regarding the recognition of the diploma awarded by the institute was left open.

Title: Babita Chouhan Vs. State of Himachal Pradesh & others Page-51

Constitution of India, 1950- Article 226- Petitioner was offered appointment of Nursing Assistant for ECHS Polyclinic Kullu- she was informed that number of Nursing Assistants in the Polyclinic had been reduced- therefore, it was decided to terminate her services- respondent stated that Nursing Assistants were reduced from 2 to 1, therefore, services of the petitioner were terminated- held, that services of the petitioner came to be dispensed with on account of rationalizing /restructuring and revamping of the respondent organization - rationalizing /restructuring and revamping of services are matters pertaining to policy which should not be interfered in exercise of writ jurisdiction- decision taken by the respondents to reduce its manpower cannot be termed to be contrary to law or in violation of the provisions of the Constitution- Writ dismissed.

Title: Vijay Lakshmi Vs. Union of India and another Page-46

Constitution of India, 1950- Article 226- Petitioner was working as Milk Procurement Assistant in H.P. State Co-operative Milk Producers Limited- his appointment was made only on adhoc basis without following the due process- it was specifically stated in the office order that appointment was temporary in nature and had to lose its efficacy on the date of regular appointment- he also accepted the condition that he would not claim any seniority

or other benefits- held, that the person who was appointed on ad-hoc basis or without following due process cannot claim regularization- mere continuation in service on the basis of court orders will not create any right, title or interest in his favour- his Writ was rightly dismissed.

Title: Lal Singh Vs. H.P. State Co-operative Milk Producers (D.B.) Page-353

Constitution of India, 1950- Article 226- Petitioners are working as teachers in the school managed by the Temple Trust- 144 privately managed government aided schools including school of the petitioner had filed writ petitions in the year 1989 for the payment of salary at par with the teachers in government schools- Writ petitions were allowed - Government of H.P. and Management were asked to satisfy the same in the ratio of 95:5- State Government challenged the decision before the Supreme Court which upheld the judgment but made the same applicable w.e.f. 1.4.1993- scales of the petitioners were revised w.e.f. 1.1.2000- writ petitions were filed which were allowed- order was modified in review to the extent that arrears of salary paid by the management would be recovered from the State Government- subsequently, an order for recovery was passed on the basis of audit report that petitioners are entitled to the arrears of salary for a period of only three years- held, that the orders were passed by the Court and the petitioners are entitled to the payment of salary in accordance with the same- Department should have brought these facts to the notice of the Audit Department and should not have issued the orders- orders passed by the department set aside.

Title: Kuldeep Singh Vs. State of H.P. & others (D.B.) Page-111

Constitution of India, 1950- Article 226- Service of Anganwari Workers is a public utility service which directly deals with public- services of Anganwari workers are connected with the affairs of State or local authority which is directly under the control of the State Government- remuneration is also paid to Anganwari workers from public exchequer- Anganwari workers do not hold civil post and their service disputes fall within the definition of service matters- hence, case is ordered to be transferred to Administrative Tribunal.

Title: Sapna Kumari wife of Sh.Sonu Kumar Vs. State of H.P. and others

Page-272

Constitution of India, 1950- Article 226- Writ Court had directed the respondents/ appellants to release the due and admissible wages to the writ petitioners- Deputy Commissioner had admitted in his affidavit that writ petitioners were in position at the time when the patwaris of patwar circle had joined- this shows that writ petitioners were in position and respondents have rightly been directed to release the wages to the petitioners- petition dismissed.

Title: State of H.P. and others Vs. Roshan Lal and others (D.B.) Page-239

Constitution of India, 1950- Article 226- Writ Petitioner appeared in civil service examination and was allotted Bihar cadre in Indian Police Services- he filed a representation for seeking transfer of his cadre- his representation was rejected on which he filed an application before the Tribunal- Tribunal held that petitioner had no right to seek allotment of any particular State- held that a person having been appointed to All India Service has no right to claim allocation to State of his own choice or to home State- Tribunal had rightly dismissed his original application- writ petition dismissed.

Title: Manu Maharaaj Vs. Union of India and another(D.B.) Page-206

Constitution of India, 1950- Article 226- Writ petitioner was appointed as Constable on secondment basis- he was absorbed as clerk in H.P. Administrative Tribunal - when the Tribunal was disbanded, he was put in surplus pool - he joined the office of Lokayukta and was absorbed as clerk- Lokayukta notified Recruitment and Promotion Rules for the post of Senior Assistant Class-III, providing that post of Senior Assistant was to be filled 100% by promotion failing which on secondment basis- writ petitioner pleaded that he was eligible for promotion under the Rules- condition provided that official would be placed at the bottom in the respective cadre and seniority would be counted on the basis of his joining in the department on secondment basis- it was contended that writ petitioner was estopped from claiming seniority on the basis of this condition- Writ Court held that past service would be counted while counting the qualifying services for promotion in the feeder cadre- held, that mere acceptance of the condition by the petitioner will not estop him from claiming the benefit of past service for fulfilling the eligibility criteria- further, proviso to the rules read that minimum qualifying services of three years or that prescribed in the Rules which ever less shall be considered- writ petitioner fulfilled this criterion- Writ Court rightly held entitled for the relied- appeal dismissed.

Title: Shridhar Sharma Vs. Mukesh Thakur and others (D.B.) Page-228

Constitution of India, 1950- Article 226- Writ petitioners were working as Junior Engineers in HP PWD- they had completed more than five years of service and had passed departmental examination- they alone were entitled to be considered for promotion to the higher post of Assistant Engineers- writ Court held that any person who had been conferred with gazetted status was required to pass the departmental examination enabling him to seek promotion to the higher post and allowed the writ petition- appellants contended that mere conferment of gazetted status would not attract the applicability of H.P. Departmental Examination Rules- unless Service Rules were modified- held, that the executive instructions can fill up the gaps not covered by the Rules, but they cannot be in derogation of statutory rules- however, State cannot amend or supersede the statutory rules or add something therein by the administrative instructions- there was no provision for passing departmental examination in the statutory rules- Department Examination Rules have been framed for conducting the departmental examination and did not substitute/supplement the Service Rules- mere fact that post is declared as gazetted will not attract the provision of H.P. Departmental Examination Rules- appeal allowed and the writ petition ordered to be dismissed.

Title: State of H.P. Vs. Sanjay Gupta (D.B.) Page-128

Constitution of India, 1950- Article 227- **Code of Criminal Procedure, 1973-** Section 482**-** Judicial Magistrate returned the complaint under section 138 of N.I Act on the ground of lack of jurisdiction in view of the Judgment reported in ***J.T-2014 (9) SC 81 titled Dashrath Roop Singh Rathore vs. State of Maharashtra-*** held that, After the decision of the Hon'ble Supreme Court of India, President of India promulgated Ordinance dated June 15th, 2015 relating to The Negotiable Instruments Act 1881 and a subsequent promulgation issued by President of India dated 22.9.2015- the very court which has returned the complaint on the ground of jurisdiction was clothed with the power to try the same- the order of the Judicial Magistrate set aside.

Title: Amar Chand s/o late Shri Durga Singh & others Vs. Bhagat Ram s/o Shri Moti Ram Page-397

Constitution of India, 1950- Article 227- **Code of Criminal Procedure, 1973-** Section 482**-** Judicial Magistrate returned the complaint under section 138 of N.I Act on the ground of lack of jurisdiction in view of the Judgment reported in ***J.T-2014 (9) SC 81 titled Dashrath Roop Singh Rathore vs. State of Maharashtra***- held that, After the decision of the Hon'ble Supreme Court of India, President of India promulgated Ordinance dated June 15th, 2015 relating to The Negotiable Instruments Act 1881 and a subsequent promulgation issued by President of India dated 22.9.2015- the very court which has returned the complaint on the ground of jurisdiction was clothed with the power to try the same- the order of the Judicial Magistrate set aside.

Title: Amar Chand s/o late Shri Durga Singh & others Vs. Bhagat Ram s/o Shri Moti Ram

Page-399

'H'

H.P. Urban Rent Control Act, 1987- Section 14- Petitioner filed a petition for eviction of the tenant on the ground of arrears of rent, which was allowed by the Rent Controller- separate appeals were preferred against this order and the Appellate Court partly set aside the order passed by the trial Court- held that receipts produced by the petitioner showing that agreed rent was Rs.1,200/- per month were not reliable – no agreement was executed to show that rent was agreed to be Rs.1,200/- per month- it was mentioned in the notice that rent was Rs. 1,000/- per month-hence, findings recorded by Appellate Court that rent of premises was Rs.1,000/- per month cannot be faulted- landlord had become owner in the month of March, 1995- therefore, landlord would be entitled to statutory increase after the lapse of five years from March, 1995- appeal partly allowed.

Title: Harjinder Singh and others Vs. Maan Singh Page-299

'I'

Income Tax Act, 1961- Sections 80 HHC and 143(3)- Assessee received waiver of interest as a result of one time settlement- this amount was shown in the income tax return as income- assessee also claim deduction of this amount- Assessing Officer held that 90% of the income had to be reduced from the profit- assessee filed an appeal against the assessment which was dismissed and the assessment was conformed – further appeal filed by the assessee was allowed by ITAT- held, that any independent income which is not derived from the export activity but is otherwise assessed as business income, 90% of such receipts have to be reduced from the profit of the business - liability incurred by assessee in respect of interest had earlier been allowed as deduction- benefit would only be available on the net interest which had been included in the profit of the business of the assessee- it is clarified that while computing interest, Assessing Officer will take into account the net interest i.e. the gross interest as reduced by expenditure- appeal dismissed.

Title: Commissioner of Income Tax Vs. M/s Purewal and Associates Ltd.

Page-445

Income Tax Act, 1961- Section 153(2)- **Wealth Tax Act, 1951-** Section 17-A- Assessment order was passed on 16.3.1990- - it was contended by the assessee that proceedings were barred by limitation- contention was rejected on the ground that conflicting claims of legal representatives were pending adjudication and, therefore, there was no bar of limitation- held, that the time limit is not applicable where assessment, re-assessment or completion is to be made in consequence of, or to give effect to any finding or direction contained in the order- initially, assessment was made on the legal heirs of the assessee- further, assessment was made to give effect to the judgment of the High Court that properties owned

by the assessee were self acquired property and were not held by him as a member of Hindu Undivided Family- issue regarding the status of legal representatives is pending before the Court and, therefore, assessment could not have been completed- there is no infirmity in the order passed by the Income Tax Appellate Tribunal holding the proceedings to be within the limitation.

Title: Tikka Brijendra Singh Vs. Commissioner of Income Tax, Shimla (D.B.)

Page-141

Indian Penal Code, 1860- Sections 279, 337, 338, 304-AA- **Motor Vehicles Act, 1988-** Section 185- Accused was driving maxi cab under the influence of liquor and could not negotiate the curve due to which vehicle rolled down into gorge - some passengers died in the accident- PW-1 stated that accused might have consumed liquor- PW-4 stated that accused was under the influence of liquor – no passenger had asked the accused to stop the vehicle – no passenger had lodged any protest- Medical Officer stated that accused was smelling of alcohol and quantity of alcohol found in the blood was 279.72 mg%- doctor had not stated that he had sealed the blood sample - malkhana register was not produced to establish the deposit of blood sample in the safe custody- it was not established as to who had received the sample in the police station- link evidence is, therefore, missing- held, that in these circumstances, prosecution case was not proved- accused acquitted.

Title: Jagdev Singh Vs. State of Himachal Pradesh Page-191

Indian Penal Code, 1860- Section 302- A loud noise came out from the Dhara, where the Nepali families were residing- complainant went to the Dhara and found that accused 'N' and deceased were quarreling with each other- complainant and 'S' intervened but the accused and the deceased continued to quarrel- injuries were caused to the deceased who fell down and died on the spot- accused took a defence that deceased was drunk – he gave kick blows and opened the door- deceased caught the wife of the accused and started abusing the accused on which quarrel took place- complainant and 'S' admitted that incident had taken place inside the Dhara of the accused- accused had reasonable apprehension that the deceased was likely to hit him in order to abduct his wife- his case is covered under Section 100 of Indian Penal code- accused acquitted.

Title: Prem Tamang Vs. State of Himachal Pradesh (D.B.) Page-212

Indian Penal Code, 1860- Section 302- Accused along with his family members was living in the ground floor of the house of one 'V' and used to work in his orchard - accused was in the habit of beating his wife under the influence of liquor- accused also suspected her character- on the date of occurrence 'V' heard the cries of children of accused - when he came down, he found deceased, wife of accused, lying in the veranda with the injuries- accused was carrying a darat and he tried to give another blow on the neck of the deceased- accused was over-powered and was handed over to police- trial court convicted the accused – in appeal held, that witnesses 'V' and others; who had gathered on the spot, on being informed by 'V' had noticed that deceased was given cut injury on her neck- they had categorically stated about the facts- defence of the accused that deceased had died as she fell on the blade of the wood cutter machine installed nearby was rightly discarded by trial Court as there was no blood on the wood cutter machine- defence of the accused that he requested 'V' and others to take his wife for medical assistance also not proved on record- guilt of the accused rightly established- appeal dismissed.

Title: Tek Bahadur Vs. State of Himachal Pradesh (D.B.) Page-412

Indian Penal Code, 1860- Sections 302 and 307- Complainant party had a dispute over the land with the accused- complainant party went to bazaar and found accused digging the disputed land- accused was requested not to dig the same- accused went inside the kitchen, brought kerosene oil in a frying pan and threw the same upon the members of the complainant party- she also threw burning paper on the complainant party- complainant party suffered burn injuries- injured were taken to Hospital- 'S' succumbed to burn injuries- PW-1 admitted in her cross-examination that when accused threw kerosene oil on the complainant party they had not run away- the first reaction of the complainant party would have been to save themselves by running away from the spot- PW-3 did not narrate the incident to President of Gram Panchayat- he had also a dispute over the land with the accused- accused had also sustained 2% burn injury which was not explained- PW-3 admitted that complainant party had gone to the house of the accused to take possession of the land and kitchen from the accused- accused had a knowledge that throwing of kerosene followed by throwing of burning paper may cause death- appeal partly allowed- accused convicted for the commission of offence punishable under Section 304 Part-II of IPC instead of Section 302 of IPC- conviction and sentence under Section 307 of IPC upheld.

Title: Raksha Devi Vs. State of Himachal Pradesh (D.B.) Page-25

Indian Penal Code, 1860- Sections 302, 341 and 427- Deceased left towards village Kotighat in his car- accused was seen going towards Derthu temple armed with stick- 'L' saw the car parked on the roadside with broken windscreen and windowpane- one person was found lying downside the road- road was obstructed by putting stones- police was informed and FIR was registered- prosecution stated that deceased had illicit relation with the wife of the accused- there was land dispute between the parties- however, wife of the deceased had not stated anything in the FIR regarding the suspicion of illicit relation- she narrated this fact for the first time while making statement under Section 161 Cr.P.C- prosecution witnesses admitted that fencing had been removed 6 months prior to the incident which shows that it could not have been motive to kill the deceased- statement of PW-9 was not recorded immediately after the incident- Medical Officer found that deceased had died as a result of brain injury due to blunt trauma- alcohol concentration in the blood of deceased was found to be 301.30 mg% which shows that deceased was drunk at the time of incident- held, that in view of large concentration of alcohol, the possibility of receiving the injuries by way of fall or the vehicle having been involved in the accident cannot be ruled out- chain of circumstances is not complete- accused acquitted.

Title: Mahender Singh Vs. State of Himachal Pradesh (D.B.) Page-309

Indian Penal Code, 1860- Sections 306 and 498-A- Accused subjected his wife to cruelty in her matrimonial home as a result of which she committed suicide- held, that commission of offence punishable under Section 498-A of IPC can be inferred from the conduct, the gravity and seriousness of the acts of cruelty attributed to the accused- it is also to be established that such acts were sufficient to drive the deceased to commit suicide- further it is to be established that victim was being subjected to cruelty continuously and in close proximity of time of the occurrence- normal wear and tear of the married life and petty quarrels will not constitute the cruelty- it was asserted that accused started maltreating the deceased after 2-3 months without any rhyme and reason which shows that torture and harassment, if any, of the deceased were on account of normal wear and tear of the marriage- matter was never reported to police or pardhan- there was no allegation of demand of dowry- deceased had suffered burn injuries to the extent of 90% and her mental faculty were impaired- hence, statement made by her is not acceptable- slapping or beating in the marriage would not

amount to continuous harassment and such act would not lead a person to commit suicide- in these circumstances, prosecution version was not proved- accused acquitted.
Title: State of H.P. Vs. Desh Raj (D.B.) Page-406

Indian Penal Code, 1860- Sections 307 and 506- Accused and the prosecutrix attended a ceremony in the house of 'J'- accused sent the cousin of prosecutrix with the direction to bring 'S' and asked the prosecutrix to wait till their arrival- he took her away to forest and raped her- he also threatened to kill the prosecutrix in case of disclosure of incident to any person- prosecutrix deposed about the incident in the Court- Medical Officer found injuries on her person and opined that sexual intercourse was committed within 72 hours- testimony of the prosecutrix was also corroborated by the report of FSL and other prosecution witnesses- merely because DNA test was not conduced is not sufficient to doubt the testimony of the prosecutrix- held, that in these circumstances, prosecution case was duly proved- accused was rightly convicted.)
Title: Ravinder alias Raju son of Shri Amar Singh Vs. State of Himachal Pradesh
Page-164

Indian Penal Code, 1860- Section 376(2)(f)- **Protection of Children from Sexual Offences Act, 2012-** Section 5- Accused, God brother of uncle of the prosecutrix, asked the prosecutrix and another girl aged 9 years to accompany him to forest for collection of Guchchi- accused showed obscene clippings on the mobile to both the girls in the jungle and thereafter directed them to remove their pajama- PW-9 ran away, whereas, PW-11 (prosecutrix) was caught by the accused – the accused tried to insert his private part into private part of prosecutrix by making her to lie on the ground- accused also put finger into her private part and threatened both the girls not to disclose the incident to any one- one day when both the girls were playing in the courtyard they started quarreling and PW-9 threatened to disclose the incident to the mother of the prosecutrix- upon this prosecutrix started crying and disclosed the incident to her mother- on inquiry FIR was lodged and accused was arrested – accused was convicted by the trial court- in appeal held, that prosecutrix and PW-9 had withstood the lengthy cross-examination and their testimonies remained un-shattered- further held, that mere fact that hymen of the prosecutrix remained un-ruptured is not enough to disbelieve the witnesses in view of explanation furnished by Medical Officer- delay in FIR has been satisfactorily explained- hence, the findings of the trial Court are based upon proper appreciation of evidence- appeal dismissed.
Title: Jai Singh Vs. State of H.P. (D.B.) Page-372

Indian Penal Code, 1860- Sections 451, 323, 506 and 336- Complainant was working in his kitchen garden- accused came there under the influence of liquor and gave fist blows to the complainant- PW-7 deposed in the Court that accused was holding a rifle in his hand- he had made material improvements in his testimony- there was contradiction regarding the number of stones recovered from the spot- it was admitted by the complainant that he had long standing dispute with the accused- held, that in these circumstances, prosecution had failed to prove its case and accused was rightly acquitted.
Title: State of Himachal Pradesh Vs. Rajinder Kumar Page-35

Indian Succession Act, 1925- Section 63- Plaintiff claimed that deceased had died intestate and mutation was attested on the basis of forged and fictitious Will- defendant pleaded that deceased had executed a Will in favour of the defndant- Will was duly proved by scribe and marginal witnesses- defendant was looking after the deceased- plaintiff

admitted that deceased was residing with the defendant- Will was duly registered- held, that Will was duly proved- appeal dismissed.
Title: Ram Dei Vs. Chinta Mani and another Page-43

Indian Succession Act, 1925- Section 63- Plaintiff filed a civil suit claiming herself to be legally wedded wife of the deceased and owner in possession of the suit land - Will stated to have been executed by the deceased was pleaded to be an act of fraud, misrepresentation, deception etc.- defendant pleaded that a valid Will was executed in his favour by the deceased after being satisfied about the services being rendered by him - Will was executed 18 days prior to the death- no satisfactory evidence was led to prove that defendant had served or stayed with the deceased- scribe of the Will stated that Will was witnessed by two witnesses, whereas, one person had signed the will as an identifier and not as a witness- held, that in these circumstances Will was not proved.
Title: Shiv Chand Vs. Parwati Devi Page-94

'L'

Land Acquisition Act, 1894- Section 18- Land of respondents was acquired for setting up Army Transit Camp- the Court after appreciation of evidence assessed the compensation @ Rs.11,160/- per biswa- appellant felling aggrieved filed the present appeal- held, that there was ample evidence on record to show that acquired land was situated near National Highway No. 21- sale deeds produced in evidence pertaining to the year 1992-93 prove that the value of the land was Rs.15,000 and Rs.18,500/- per biswa respectively in the area- the Court had rightly given 10% appreciation and had assessed the value of land as Rs. 22,200/- per biswa- further held, that since proved sale transactions pertain to small pieces of land, as such, the Court had rightly deducted 40% towards development charges - order passed by the Court below is well reasoned- appeal dismissed.
Title: Union of India Vs. Jagat Ram and another Page-279

Land Acquisition Act, 1894- Section 18**-** Land of the respondents was acquired for the construction of road- the collector awarded the compensation at the rate of Rs. 500/- per bigha- The respondents filed petition under Section 18 of the Act for enhancement of compensation on various grounds-allowing the petition, learned Addl. District Judge, Shimla assessed the market value of the land at Rs. 6000/- per biswa – he further held that the land holders are entitled to a sum of Rs. 3,28,070/- being the value of fruit trees existing on the acquired land- appeal by the State- held that, The learned Addl. District Judge, has correctly relied upon copy of award passed on 16.6.2007 which was based on earlier award dated 3.3.2003, whereby the market value of the land was assessed at Rs. 6,000/- per biswa- further held that, a sum of Rs. 3,28,070/- for the value of plants was rightly awarded after relying upon the judgment in the case of ***Ramesh Chand and others vrs. Land Acquisition Collector,*** reported in ***Latest HLJ 2003 (HP) 977-*** **appeal dismissed.**
Title: State of Himachal Pradesh & ors. Vs. Beli Ram & ors. Page-403

Land Acquisition Act, 1894- Section 18- Reference Court awarded compensation @ Rs.60,000/- per bigha with all statutory benefits- PW-3 had purchased two biswas of land for Rs.6,000/- which is situated in the same mohal, where the land was acquired – sale deeds relied upon by the respondent pertaining to the land situated at a distance of 2 k.m. away and in a different mohal- acquired land abutted the State highway- it was irrigated and was situated near the school and hospital- therefore, in these circumstances compensation of Rs.60,000/- per bigha with all statutory benefits is not excessive.
Title: Collector Land Acquisition & another Vs. Karam Singh Page-421

'M'

Motor Vehicles Act, 1988- Section 149- Claim petition was dismissed on the ground that deceased was travelling in the maruti car as gratuitous passenger - policy proved on record is a package policy and not an act only policy- therefore, it not only covers the risk of 3rd party but that of the occupants of the vehicle as well- hence insurance company was liable to pay compensation - appeal allowed.

Title: Shakuntala & others Vs. Bajaj Allianz General Insurance Company Ltd. & others Page-275

Motor Vehicles Act, 1988- Section 149- Driver had a valid driving licence to drive LMV (Trans.) and HTV- held, that he was competent to drive tractor – Insurer had not led any evidence to prove the breach of the insurance policy- insurer was rightly held liable to pay compensation.

Title: Charan Dass Vs. Amar Singh and others Page-240

Motor Vehicles Act, 1988- Section 149- Driver was competent to drive light motor vehicle- he was driving Mahindra pick-up which was a light motor vehicle- held, that driver having a valid and effective driving licence to drive light motor vehicle is not required to have an endorsement of public service vehicle- Tribunal had wrongly held that insured had committed breach of the terms and conditions of the insurance policy- appeal allowed.

Title: Gurmail Singh and another Vs. Kamla Devi & others Page-247

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid and effective driving licence and insured had committed willful breach- award is excessive and the Tribunal had awarded interest on the higher side- held that driver had licence to drive light motor vehicle- offending vehicle was a jeep, the unladen weight of which was less than 7500 kilograms and would fall within the definition of 'light motor vehicle'- therefore, driver had a valid driving licence to drive the vehicle- endorsement of PSV is not required in such cases - insurer had not led any evidence to prove the breach of the policy on the part of the insured- Tribunal had awarded interest @ 9% per annum interest, which is excessive and is reduced to 7.5% per annum- Tribunal had awarded compensation in accordance with the law and was not on higher side-appeal partly allowed.

Title: National Insurance Company Ltd. Vs. Rishivansh Sharma & others Page-253

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid and effective driving licence and injured was a gratuitous passenger- no evidence was led to prove that injured was travelling in the vehicle as a gratuitous passenger and that the driver did not have a valid and effective driving licence- held, that insurer was liable to pay compensation- appeal dismissed.

Title: United India Insurance Company Ltd. Vs. Het Ram and others Page-281

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not possess a valid driving licence- however, no evidence was led to prove that insured had engaged the driver without taking due care and caution and it was known to the owner that licence of the driver was fake- held, that insurer was rightly saddled with liability.

Title: Oriental Insurance Co. Ltd. Vs. Tara and another Page-267

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not possess a valid driving licence on the date of the accident- driver was driving a maruti Van at the time of accident and he possessed a driving licence to drive a motor cycle and no other vehicle- held, that Tribunal had wrongly saddled the insurer with liability- therefore, right of recovery granted to the insurer.
Title: United India Insurance Co. Ltd. Vs. Naina Devi @ Meena Devi and others
Page-443

Motor Vehicles Act, 1988- Section 149- Insurer contended that sitting capacity of the vehicle was 42, whereas, 84 persons were travelling in the vehicle at the time of the accident- therefore, there was violation of the terms and conditions of the insurance policy- record shows that only five persons had filed claim petitions before the Tribunal- held, that insurer has to satisfy the award to the extent of risk covered- since, insurance cover was valid for 42 persons, therefore, insurance company was liable to indemnify the insured for the five awards.
Title: Oriental Insurance Company Vs. Smt. Kaushalya Devi and others
Page-437

Motor Vehicles Act, 1988- Section 149- MACT had passed an award in the year 2002, in which it was held that accident had taken place due to the negligence of the driver of maruti car- no appeal was preferred against the same- held, that in view of this award, which had attained finality, insurer was rightly held liable to pay the compensation.
Title: The New India Assurance Co. Ltd. Vs. Devki Devi and others Page-257

Motor Vehicles Act, 1988- Section 149- Tribunal held that registered owner and the person who had purchased the vehicle through an agreement were liable to pay the awarded amount – appeal by both the persons- held, that as per settled law the person who has purchased on the basis of the hire-purchase agreement is considered to be the owner – in this case the person having purchased the vehicle through agreement contended that owner had taken back the vehicle from him as he could not make the payment of the agreed amount- plea not made out from the record as this person had applied for releasing of the vehicle in the Court- thus, registered owner exonerated from the liability and the owner through agreement saddled with the liability.
Title: Vijay Kumar Vs. Pawna Devi and others Page-286

Motor Vehicles Act, 1988- Section 149- Witness deposed that driver was having a driving licence to drive light motor vehicle and, therefore, driver was authorized to drive the same- further, insurer had not led any evidence to prove that deceased was travelling in the vehicle as a gratuitous passenger- held, that Insurer was rightly held liable by MACT.
Title: Meera Balnota Vs. New India Assurance Company and others Page-38

Motor Vehicles Act, 1988- Section 166- Age of the deceased was 21 years and multiplier of '15' was applicable- held, that Tribunal had fallen in error in applying multiplier of '14'.
Title: Oriental Insurance Co. Ltd. Vs. Tara and another Page-267

Motor Vehicles Act, 1988- Section 166- Award challenged by the owner of offending vehicle – claimants have proved that deceased was hit by offending scooter- Tribunal had rightly appreciated the evidence- held, that appellant is liable and appeal dismissed.
Title: Ramesh Chand Vs. Vijay Devi & others Page-271

Motor Vehicles Act, 1988- Section 166- Claimant had pleaded and proved that he was earning Rs. 8,000/- per month- he had sustained permanent disability to the extent of 30%- he had lost source of dependency to the extent of Rs. 2,500/- per month- age of the claimant was 54 years at the time of accident- multiplier of '9' was applicable- thus, claimant is entitled to Rs.2,70,000/- (2500 x 9 x 12) towards loss of income, Rs. 10,000/- towards attendant charges, Rs. 10,000/- towards transportation charges, Rs. 50,000/- towards pain and suffering and Rs. 50,000/- under the head loss of amenities of life- thus, total compensation of Rs. 3,90,000/- along with interest @ 7.5% per annum awarded from the date of the award.

Title: Charan Dass Vs. Amar Singh and others Page-240

Motor Vehicles Act, 1988- Section 166- Deceased was 23 years of age- Tribunal on the basis of guess work held that deceased was earning Rs.10,000/- per month and deducted ½ share towards personal expenses as the deceased was bachelor- Tribunal had applied multiplier of '18' – held, that Tribunal had rightly assessed the compensation.

Title: Meera Balnota Vs. New India Assurance Company and others Page-38

Motor Vehicles Act, 1988- Section 166- Deceased was a government employee aged 24 years drawing Rs.6809/- per month as salary – he was a bachelor , therefore, half of the amount is to be deducted towards his personal expenses- claimants have lost source of dependency to the extent of Rs.3,500/- per month- claimants have given their age as 42 and 45 years and, therefore, multiplier of '13' applicable- hence, claimants are entitled to the compensation of Rs.3500 x 12 x 13= Rs.5,46,000/- + Rs.10,000/- each under the heads 'loss of funeral expenses', 'loss of estate', 'loss of consortium' and 'loss of love and affection'.

Title: Parkash Chand and another Vs. Surinder Singh and others Page-441

Motor Vehicles Act, 1988- Section 166- Insurer challenged the award on the ground that offending vehicle was being driven in breach of terms and conditions of the policy- however; no evidence was led by the insurer to prove this fact- held that insurer is bound to prove the breach of the terms of the policy- appeal dismissed.

Title: Oriental Insurance Company Vs. Sanjay Kumar Sharma & others

Page-263

Motor Vehicles Act, 1988- Section 166- Insurer challenged the award on the ground that driver of offending vehicle was not having a valid and effective driving licence, owner has committed willful breach of the terms and conditions of the policy and award amount is excessive- held, that no evidence was led by the insurer to prove that offending driver did not possess a valid and effective driving licence- deceased was bachelor of 18 years of age- his monthly income by way of guess work can be considered to be Rs.4,000/- per month- 50% of the monthly income was to be deducted towards his personal expenses and the claimants have lost source of dependency of Rs. 2,000/-- multiplier of '16' is applicable and total amount of Rs.4,24,000/- with 7.5% interest per annum awarded.

Title: United India Insurance Company Ltd. Vs. Sanyogita Devi & others

Page-283

Motor Vehicles Act, 1988- Section 166- It was contended that accident was outcome of contributory negligence of both drivers and the Tribunal had wrongly saddled the appellant with liability – it was specifically mentioned in the FIR that accident was the result of

contributory negligence of the drivers of both the vehicles- held, that prima facie proof is required in motor accident cases- report of the police can be treated as claim petition- final report also shows that accident was the result of contributory negligence- claimants have also deposed regarding this fact- in view of this, insurers of both the offending vehicles saddled with liability in equal share.

Title: National Insurance Company Ltd. Vs. Jagtamba and others Page-428

Motor Vehicles Act, 1988- Section 166- It was contended that petitions were not maintainable as petitions were filed regarding the death of the owner of the vehicle and his wife- held, that wife of the insured was a third party and not a party to the insurance contract- similarly, parents in-law and minor sons are third parties - therefore, petitions filed by others were maintainable - however, petitions filed regarding the death of the insured was not maintainable- record shows that risk of the owner was covered to the extent of Rs. 2,00,000/-, which was not disputed by the insurer- hence, amount of Rs.2,00,000/- awarded along with interest @ 7.5% per annum.

Title: Oriental Insurance Company Ltd. Vs. Jai Chand and others Page-435

Motor Vehicles Act, 1988- Section 166- Medical Officer had given the details of the injuries sustained by the claimant- held, that Tribunal is expected to pass fair, just and proper award, keeping in mind the hardship, discomfort, loss of amenities of life, pain and sufferings- Tribunal had awarded meager amount, since it was not questioned, therefore, it was reluctantly upheld.

Title: Jasbir Singh Vs. Munish Kumar Page-250

Motor Vehicles Act, 1988- Section 166- Tribunal had deducted 1/3rd amount towards personal expenses, whereas, 1/5th was to be deducted towards personal expenses- claimants had lost source of dependency to the extent of Rs.2,700/- per month- multiplier of '12' applicable- therefore, claimants are entitled to the compensation of Rs.2700 x 12 x 12= Rs.3,88,800/- and Rs.10,000/- each under the heads 'loss of funeral expenses', loss of estate', 'loss of consortium' and 'conventional charges' and Rs.26,000/- under the head 'treatment charges'- thus, total compensation of Rs.3,88,800+Rs.20,000+Rs.46,000/- = Rs.4,54800/- awarded.

Title: Naro Devi and others Vs. Jeet Singh and others Page-426

Motor Vehicles Act, 1988- Section 169- Claim petitions are to be decided summarily- provisions of Code of Civil Procedure are not applicable to them- compensation is to be granted without succumbing to the niceties and technicalities of procedure.

Title: Oriental Insurance co. Ltd. Vs. Rakesh Kumar and others Page-258

'N'

N.D.P.S. Act, 1985- Section 20- Accused turned and tried to flee on seeing the police party- he was apprehended on suspicion- bag carried by him was searched and was found to be containing 7.8 kilograms charas- his personal search was also conducted- accused was convicted by the trial Court- in appeal held, that the accused pleaded his inability to write his consent on the memo- the oral consent to be searched was given by the accused, which was written by the police and signatures of accused were obtained on the memo – prosecution had failed to adduce cogent evidence through the report of hand writing expert that the signatures of the accused on the memo were compared with his admitted

signatures- therefore, an inference can be drawn that accused had not put his signatures on Ex.PW-7/A- compliance of Section 50 of N.D.P.S. Act is not established-accused acquitted.
Title: Aam Bahadur Vs. State of Himachal Pradesh (D.B.) Page-364

N.D.P.S. Act, 1985- Section 20- Accused was apprehended on the basis of secret information- he was found carrying a blue and red coloured bag- on search of the bag 1.8 kg. of charas was recovered- accused was acquitted by the Court- in appeal, held that official witnesses had contradicted each other on material facts, such as, personal search of the witnesses by the accused- contradictions in the depositions of PW-12 & PW-14 create doubts in the genesis of the prosecution case- memo Ex.PW-1/B did not mention personal search of official and independent witnesses by the accused before his search, as deposed before the Court- guilt of the accused is not established beyond doubt - accused rightly acquitted- appeal dismissed.
Title: State of H.P. Vs. Pradeep Kumar (D.B.) Page-391

N.D.P.S. Act, 1985- Section 20- Accused was found carrying a bag on his left shoulder- he tried to run away on seeing the police- he was apprehended on the basis of suspicion, search of his bag was conducted, and 850 grams of charas was recovered- one independent witnesses did not support the prosecution version and the other independent person was not examined- PW-3 had not signed the seizure memo- it was not mentioned in the report of FSL, Junga that seals were intact and were tallied with the specimen seal- PW-6 stated that samples were not taken homogeneously – official witnesses had given contradictory versions- original seal was not produced before the Court- held, that in these circumstances, prosecution version was not proved beyond reasonable doubt – accused acquitted.
Title: Roshan Lal son of Ratti Ram Vs. State of H.P. Page-177

N.D.P.S. Act, 1985- Section 20- Accused was found carrying yellow coloured bag in his lap- bag was checked and was found to be containing 1 kg 865 grams of charas- independent witnesses did not support the prosecution version and turned hostile- they stated that contraband was recovered from an unclaimed bag lying on the shelf near front window of the bus- there were contradictions in the testimonies of official witnesses regarding the place from where the police party entered in the bus and the seat where the accused was sitting- police had detained the driver and conductor, therefore, the possibility of their involvement cannot be ruled out- passengers of the bus were not cited as witnesses- police had left the place for routine traffic checking and it was not explained as to why police had carried the weighing scale with it- held, that all these circumstances make prosecution case doubtful- accused acquitted.
Title: Sajjan Kumar Vs. State of Himachal Pradesh (D.B.) Page-63

N.D.P.S. Act, 1985- Section 20- Accused was sitting on the side of the road- he became perplexed on seeing the police and tried to escape- he was apprehended and during search 1.8 kg. charas was found in his possession- testimonies of police officials were not in accordance with the FIR- their testimonies were contradictory to each other- independent witnesses were not associated despite availability- there was contradiction between the testimony of PW-2 and PW-9 regarding the time at which the investigation started, which shows that PW-2 is a planted witness- PW-9 deposed that he had not counted the vehicles which crossed the site of the occurrence, which shows that vehicles were crossing but no efforts were made to stop any vehicle and to associate any independent witness- held, that in these circumstances, prosecution case was not proved- accused acquitted.
Title: Gulshan Kumar Vs. State of H.P. (D.B.) Page-4

N.D.P.S. Act, 1985- Section 21- Accused was convicted of possession of 7600 capsules of Parvon Spas and 1142 capsules of Spasmo Proxyvon- in appeal held, that official witnesses have spoken categorically about the facts - independent witnesses had resiled from their previous statements, however their testimonies cannot be believed as they had admitted their signatures on the memo and Sections 91 and 92 of Indian Evidence Act excluded their oral testimonies - Section 42(2) of Act was also complied and the case property is proved to have remained intact in the malkhana- trial Court has rightly appreciated the evidence and the guilt of the accused is fully established- appeal dismissed.

Title: Sanjeev Kumar Vs. State of Himachal Pradesh (D.B.) Page-385

'P'

Prevention of Food Adulteration Act, 1954- Section 16 (1) (a) (i)- Food Inspector took sample of Arhar Dal for analysis from the shop of the accused- sample was found to be adulterated on analysis – sample was taken in a carry bag- held that samples are to be taken in clean bottles, jars or any other suitable containers, which are to be closed sufficiently tight to prevent leakage, evaporation and entrance of moisture- polythene bag does not fall within the definition of a container as per description in Rule 14- Further, as per Food Inspector, 600 grams of Arhar Dal was divided into three parts of 200 grams each, whereas, 150 grams Dal was received for analysis which does not confirm to the quantity of Dal prescribed in rules- prosecution case was not proved in these circumstances and accused was rightly acquitted.

Title: State of H.P. Vs. Deepak Sood Page-233

'S'

Specific Relief Act, 1963- Section 5- Plaintiff filed a suit for possession on the ground that father of the defendant got himself recorded as kabiz during settlement and took possession of the suit land- defendants were requested to hand over the possession but the possession was not delivered- said entry was made for the first time showing the name of the father of the defendant in the column possession- there is no basis for recording the same- no entry was made regarding the payment of the rent- no evidence was produced by the defendants to show that land was handed over to the defendant for cultivation- appellate court had rightly dismissed the suit.

Title: Ram Kumar (since deceased) through his LRs. Rohit Sharad and ors. Vs. Hukmi Devi (deceased) & Lekh Raj and ors. Page-415

Specific Relief Act, 1963- Section 34- Plaintiff executed a Power of Attorney in favour of defendant on 29.05.1979 as he intended to go abroad- but plaintiff could not go abroad and requested the defendant not to act upon Power of Attorney – however, defendant executed a sale deed on 17.11.1989 on the basis of Power of Attorney for consideration of Rs. 1,50,000/-, whereas, actual value of the property was more than Rs. 4 lacs – Power of Attorney was cancelled subsequently- hence, a civil suit was filed for setting aside the sale deed- defendant pleaded that sale deed was cancelled as per the instructions and under the authority of the plaintiff- defendants No. 2 and 3 claimed to be bona-fide purchasers for consideration- defendant No. 2 filed another civil suit pleading that she was owner in possession on the basis of the sale deed and was being dispossessed forcibly without any right- it was admitted by the plaintiff that he had appointed defendant as Power of Attorney and had given him power to dispose of the property by way of sale, mortgage or exchange- plaintiff had not got the Power of Attorney revoked- held, that in these circumstances suit of plaintiff was rightly dismissed and the suit of the defendant was rightly decreed.

Title: Maya Devi Vs. Des Raj and others Page-9

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit pleading that he is owner in possession of the suit land- land was allotted to him on 13.6.1981, nazarana was deposited by him, his allotment was subsequently cancelled but defendant was estopped from cancelling the allotment- revenue record shows that State was owner of the land and the land was in possession of the Forest Department- held that land could not have been allotted for non-forest purposes- allotment was cancelled within three years of the discovery of the fraud- Additional District Magistrate had the necessary jurisdiction to go into the question.

Title: Budhi Singh vs. State of H.P. Page-106

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit seeking declaration to the effect that judgment and decree rendered by Senior Sub Judge, Mandi in Execution Petition No. 66/94 is hit by Section 44 of Evidence Act and is nullity in the eyes of law having been obtained by fraud- defendants pleaded that judgment/order had been upheld up to the Hon'ble Supreme Court- previous suit was decreed for possession by way of pre-emption subject to the deposit of the Rs. 8,000/- on or before 9.2.1981- time was extended by 30.10.1981- amount was deposited on or before 30.10.1981- objections were considered by the Executing Court- order had attained finality- petition was filed within the period of limitation- notification issued subsequently will not apply retrospectively- appeal dismissed.

Title: Gokal Chand Vs. Reeta and others Page-400

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit pleading that defendant was recorded in possession as Chakotadar- he was never inducted as Chakotadar- defendant pleaded that tenancy was created in his favour- he was paying Rs. 50/- as rent - however, no documentary evidence was produced to prove the induction- no rent receipt regarding the payment of the rent was produced- entry appeared for the first time in the jamabandi for the year 1951-52, it was not explained as to how the entry was changed - no rapat roznamcha or order passed by the Competent Authority was placed on record- order of conferment of proprietary rights was passed without following the fundamental procedure and in violation of the mandatory provision of H.P. Tenancy and Land Reforms Act.

Title: Rattani Devi (dead through LRs) & ors. Vs. Rasila Ram (dead through LRs) & ors. Page-160

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit claiming that they are owners in possession of the suit land- defendant No. 1 had got himself recorded as owner over the suit land and this entry was void- held that plaintiffs had not approached the Patwari regarding the acquisition of title by way of exchange- Patwari had not noted the date of making entry nor had he got the entries attested from the Lambardar, Pradhan or Up-Pradhan- cuttings were not attested by Patwari or Kanungo- plaintiffs were not present at the time of passing of the order- held that mutations are not in conformity with law and do not confer any title.

Title: Ujjagar Singh Vs. Mohinder Singh & ors. Page-152

Specific Relief Act, 1963- Section 34- Plaintiffs pleaded that they and defendant No. 2 constituted joint Hindu Mitakshra Coparcenary Family- defendant No. 2 had alienated the property without any legal necessity- hence, a declaration for setting aside the ex-parte decree was sought – record shows that 'G' , predecessor-in-interest of the parties was Adna Malik who had acquired proprietary rights after notification- therefore, land possessed by 'G' was his self acquired property- land was inherited by defendant no. 2 under Section 8 of

Hindu Succession Act and would retain the character of self acquired property- Courts below had rightly dismissed the suit.

Title: Dhanwant Singh & ors. Vs. Prem Kaur & ors. Page- 326

Specific Relief Act, 1963- Section 34- Plaintiffs pleaded that they and defendant No. 4 constituted joint Hindu Mitakshra Coparcenary Family- defendant No.4 had alienated the property without any legal necessity- hence, a declaration for setting aside the ex-parte decree was sought – record shows that 'G' , predecessor-in-interest of the parties was Adna Malik who had acquired proprietary rights after notification- therefore, land possessed by 'G' was his self acquired property- land was inherited by defendant no. 4 under Section 8 of Hindu Succession Act and would retain the character of self acquired property- Courts below had rightly dismissed the suit.

Title: Dhanwant Singh & ors. Vs. Punni & ors. (RSA No.184 of 2008) Page- 337

Specific Relief Act, 1963- Section 34- Plaintiffs pleaded that they and defendant No. 4 constituted joint Hindu Mitakshra Coparcenary Family- defendant No.4 had alienated the property without any legal necessity- hence, a declaration for setting aside the ex-parte decree was sought – record shows that 'G' , predecessor-in-interest of the parties was Adna Malik who had acquired proprietary rights after notification- therefore, land possessed by 'G' was his self acquired property- land was inherited by defendant no. 4 under Section 8 of Hindu Succession Act and would retain the character of self acquired property- Courts had rightly dismissed the suit.

Title:Dhanwant Singh & ors. Vs. Kharak Singh & ors. Page- 321

Specific Relief Act, 1963- Section 34- Plaintiffs pleaded that they and defendants No. 2 and 3 constituted joint Hindu Mitakshra Coparcenary Family- defendants No. 2 and 3 had alienated the property without any legal necessity- hence, a declaration for setting aside the ex-parte decree was sought – record shows that 'G' , predecessor-in-interest of the parties was Adna Malik who had acquired proprietary rights after notification- therefore, land possessed by 'G' was his self acquired property- land was inherited by defendants no. 2 and 3 under Section 8 of Hindu Succession Act and would retain the character of self acquired property- Courts below had rightly dismissed the suit.

Title: Dhanwant Singh & ors. Vs. Punni & ors. (RSA No. 132 of 2005) Page-332

Specific Relief Act, 1963- Section 34- Plaintiffs pleaded that they and defendants No. 3 and 4 constituted joint Hindu Mitakshra Coparcenary Family- defendants No. 3 and 4 had alienated the property without any legal necessity- hence, a declaration for setting aside the ex-parte decree was sought – record shows that 'G' , predecessor-in-interest of the parties was Adna Malik who had acquired proprietary rights after notification- therefore, land possessed by 'G' was his self acquired property- land was inherited by defendants no. 3 and 4 under Section 8 of Hindu Succession Act and would retain the character of self acquired property- Courts had rightly dismissed the suit.

Title: Dhanwant Singh & ors. Vs. Ram Nath & ors. Page-342

Specific Relief Act, 1963- Section 34- Plaintiffs sought declaration and injunction pleading that they are in possession of the suit land- defendant has no right over the suit land and the revenue entries showing the defendant as owner are wrong- defendant pleaded that

entries were correctly recorded- suit land was earlier in possession of the grand-father of the plaintiffs and father of the defendant- held that father of the plaintiffs and defendant inherited the tenancy to the extent of ½ share - suit property was earlier in possession of the grand-father and thereafter it was to be succeeded equally- mutation was attested in the presence of the plaintiffs without any objection from them- it cannot be believed that after the death of the grand-father only one son would have acquired the entire suit land as tenant- case of the plaintiffs was not proved and suit was rightly dismissed.

Title: Kuber Raj and another Vs. Hari Singh (died) through his LRs Page-203

Specific Relief Act, 1963- Section 38- Plaintiff claimed that being mother of the deceased she was having share in death-cum- retirement gratuity, family pension and G.P.F. amount which was paid to defendant No. 2 despite representation made by the plaintiff- defendants pleaded that amount is payable to nominee in accordance with the rule and same was rightly paid to them- plaintiff is mother of the deceased whereas defendants No.3 to 5 were nominees of the deceased- held, that nominee is entitled to receive money but he holds it on behalf of other legal heirs- plaintiff being class-I legal heir is entitled to 1/4th share and defendants No. 3 to 5 would be entitled to 3/4th share- Appellate Court had rightly granted the amount to the plaintiff- appeal dismissed.

Title: Neena and others Vs. Sunehru Devi and others Page-20

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit pleading that defendants were interfering with his possession and claimed permanent prohibitory injunction- defendants claimed to be in possession and further claimed that they had become owners by way of adverse possession – plaintiff was proved to have been dispossessed on the date of the filing of the suit- defendants had failed to prove their plea of adverse possession- held, that Court could have moulded the relief and granted relief of the possession, even though, such relief was not specifically pleaded by the plaintiff.

Title: Anil Kumar & others Vs. Gokal Chand Page-100

Specific Relief Act, 1963- Section 38- Plaintiff purchased the suit land- he filed a suit seeking permanent prohibitory injunction against the defendant who has no right, title or interest in the suit – defendant pleaded that suit land bearing Khasra No.153/57 was part and parcel of Khasra No.47- record shows that Khasra Nos.56 and 47 are separately owned and possessed by the parties- no evidence was placed on record to show that any part of Khasra No.153/57 formed part of Khasra No.47- demarcation report also does not show that Khasra No.153/57 was part of Khasra No.47- held, that Court had properly appreciated the evidence- appeal dismissed.

Title: Khem Singh Vs. Y.R. Sharma Page-377

'T'

Torts- Plaintiff filed a civil suit for damages pleading that defendant had made false and frivolous complaint to the Forest Department, consequently her premises were searched- he had also made a complaint to the Branch Manager leveling imputations against the character of plaintiff - suit was decreed by the trial Court- however, decree was set aside in appeal- plaintiff had relied upon the photocopy of the official report- no application for leading secondary evidence was filed- held that documents are not admissible in evidence, unless the grounds are laid down for leading secondary evidence – appeal dismissed.

Title: Piaro Devi Vs. Anant Ram Page-13

'W'

Workmen Compensation Act, 1923- Section 22- Claimants claimed that their brother had died in the road accident while driving the vehicle- Commissioner awarded a compensation of Rs. 7,21,160/-- it was contended that claimants were dependent upon the deceased- held, that claimants had lost their father and brother- claimant No. 2 was minor and was dependent upon the deceased - other claimants are minor sisters who fall within the definition of the 'dependent' under Section 2(d) – appeal dismissed.

Title: Oriental Insurance Co. Ltd. Vs. Ramesh kumar and others Page-261

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State of Tripura and others versus K.K. Roy (2004) 9 SCC 65

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State of U.P. v. Chhotey Lal, (2011) 2 SCC 550)

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State of U.P. vs. Nahar Singh (dead) and others, (1998)3 SCC 561

State of Uttar Pradesh vs. Om Prakash Gupta, 1969 (3) SCC 775 (Two Judges)

State of Uttar Pradesh vs. Santosh Kumar and others, (2009)9 SCC 626

State of Uttaranchal versus Balwant Singh Chaufal and others (2010) 3 SCC 402

State vs. Lekh Raj and another, (2000)1 SCC 247

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Subash v. Smt. Ganga Devi, 1996(2) RLR 519(HP)

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Subramaniya Gounder and others Vs. Easwara Gounder and others, 2011 (2) MadLJ 467

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Sunder Lal @a Sunder Dass Vs. Sita Devi@a Sheela Devi, 1994 (2) RCR 633 (P13)

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Suraj Singh vs. State of U.P., 2010(1) RCR (Criminal) 88

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Suryanarayana vs. State of Karnataka, (2001)9 SCC 129

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The New Prakash Transport Co. Ltd. vs. The New Suwarna Transport Co. Ltd., AIR 1957 SC 232 (Five Judges)

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

The State of Bombay vs. Atma Ram Shridhar Vaidya, AIR (38) 1951 SC 157 (Six Judges)

The State of Jammu & Kashmir & others, vs. Bakshi Gulam Mohammad & another, AIR 1967 SC 122 (Five Judges)

The State of Orissa and another Versus Murlidhar Jena, AIR 1963 SC 404 (Five Judges)

Thimma vrs. The State of Mysore, AIR 1971 SC 1871

Thimmaiah versus Shabira and others, (2008) 4 Supreme Court Cases 182

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Union of India & another vs. P. K. Roy & others, AIR 1968 SC 850 (Five Judges)

Union of India & Anr. vs. B. Kishore, 2011 AIR SCW 2293

Union of India & others vs. Mohd. Ramzan Khan, (1991) 1 SCC 588 (Three Judges)

Union of India & others vs. Sanjay Jethi & another, (2013) 16 SCC 116 (Two Judges)

Union of India and others v. Flight Cadet Ashish Rai, (2006) 2 SCC 364

Union of India and others vs. Jagdish Pandey and others (2010) 7 SCC 689

Union of India and others vs. K.P. Tiwari, (2003) 9 Supreme Court Cases 129

Union of India Versus T.R. Varma, AIR 1957 SC 882 (Five Judges)

Union of India vs. H.C. Goel, AIR 1964 SC 364 (Five Judges)

Union of India vs. R.Gandhi, President, Madras Bar Association, (2010) 11 SCC 1 (Five Judges)

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United India Insurance Company Ltd. vs. Savita Devi and others, I L R 2015 (IV) HP 1285

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Uttar Pradesh State Textile Corporation Limited versus Suresh Kumar, (2011) 15 Supreme Court Cases 180

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Vaijanath and others Vs. Guramma and another (1999) 1 SCC 292

Vellakutty versus Karthyayani and another, AIR 1968 Kerala 179

Venkatalakshmamma Vs. Lingamma 1984 (2) KarLJ 296

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Vipin Kumar v. Roshan Lal Anand and others, (1993) 2 SCC 614

Virindar Kumar Satyawadi vs. State of Punjab, AIR 1956 SC 153

Vishnu alias Undrya v. State of Maharashtra, (2006) 1 SCC 283

'Y'

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

BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Sh. Madan Lal. ..... Petitioner.

Versus

Smt. Soma Devi & ors. ..... Respondents.

CMPMO No. 402 of 2015.
Date of decision: October 8, 2015.

Code of Civil Procedure, 1908- Order 22 Rule 4- Defendant 'G' died during the pendency of suit and his legal representatives were brought on record- defendant had also filed a counter-claim but his legal representatives were not substituted in counter-claim - later on, an application was filed by his legal representatives to bring themselves on record as counter-claimants- application was dismissed by the trial Court but Lower Appellate Court allowed the same- held, that once Legal Representatives of deceased 'G' were substituted in the main suit, there was no necessity of their impleadment in the Counter-Claim- order of Lower Appellate Court upheld and petition dismissed. (Para- 4 and 5)

Cases referred:

N. Jayaram Reddi and another V. the Revenue Divisional Officer and land Acquisition Officer, Kurnool, AIR 1979 Supreme Court, 1393

Organic Insulations Vs. Indian Reyon Corporation Limited, (2003) 9 SCC 187

For the Petitioner : Ms. Chetna Thakur, Advocate, vice Mr. Dushyant Dadwal, Advocate.

For the respondents: Nemo.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. ***(Oral)***

Heard.

2. A short but interesting question of law involved in this petition for adjudication is as to whether in cross cases non-substitution of legal representatives of a deceased party in one of the appeal or Cross Objections has any adverse effect in the proceedings therein when the LRs of the said party have been substituted in another appeal(s)/Cross-Objections or not. The law on this point is no more *res integra* as the Apex Court in ***N. Jayaram Reddi and another*** V. ***the Revenue Divisional Officer and land Acquisition Officer, Kurnool, AIR 1979 Supreme Court, 1393*** has held as follows:-

> *"42. Now, if the discernible principle underlying Rules 3 and 4 of Order 22 is that the legal representatives of the deceased likely to be affected one way or the other by the decision in appeal must be before the Court and must be heard before a decision affecting their interests is recorded, it would stand fully vindicated when in cross-appeals a party occupying the position of an appellant in one appeal and respondent in the other dies and his legal representatives are brought on record in the appeal in which he is the appellant and not in the other appeal wherein he is a respondent because the subject-matter of both the appeals being the decree under attack, they have an*

opportunity to support the decree in their favour and question the correctness of the decree adverse to them. Even if they were brought on record as legal representatives of the deceased in his capacity as respondent in the cross-appeal, they could not have further advanced their case nor could they have done anything more than what they would do in their capacity as legal representatives of the deceased appellant unless they were precluded from contending that they being not on record cannot support or controvert the decree. They have thus the fullest opportunity of putting forth their grievance against and in support of the decree. Their position was not the least likely to be affected one way or the other even if they were not formally impleaded as legal representatives of the deceased in his capacity as respondent. To say that cross-appeals are independent of each other is to overlook the obvious position which parties adopt in cross-appeals is the same as interdependence of appeal and cross-objections a decision with regard to appeal would directly impinge upon the decision in cross-objections and vice versa. Indubitably the decision in one of the cross-appeals would directly impinge upon the decision in the other because both ultimately arise from the same decree. This is really the interdependence of cross-appeals and it is impossible to distinguish cross-appeals from appeal and cross-objections. Unfortunately this interdependence was overlooked by the Madras High Court when the scope of cross-appeals arising from the same decree and appeal and cross-objections in respect of the same decree were not examined in depth in Shankaranaina Saralaya's case (AIR 1931 Mad 277). This approach is merely an extension of the principle well recognized by Courts that if legal representatives are before the Court in the given proceeding in one capacity it is immaterial and irrelevant if they are not formally impleaded as legal representatives of the deceased party in another capacity. Shorn of embellishment, when legal representatives of a deceased appellant are substituted and those very legal representatives as legal representatives of the same person occupying the position of respondent in cross-appeal are not substituted, the indisputable outcome would be that they were on record in the connected proceeding before the same Court hearing both the matters, in one capacity though they were not described as such in their other capacity, namely, as legal representatives of the deceased respondent. To ignore this obvious position would be giving undue importance to form rather then substance. The anxiety of the Court should be whether those likely to be affected by the decision in the proceeding were before the Court having full opportunity to canvass their case. Once that is satisfied it can be safely said that the provisions contained in rules 3 and 4 of Order 22 are satisfied in a given case. To take another view would be to give an opportunity to the legal representatives of a deceased party in an appeal having had the fullest opportunity to canvass their case through the advocate of their choice appearing in cross-appeals for them and having canvassed their case and lost, to turn round and contend that they were not before the Court as legal representatives of the same person in his other capacity, namely, respondent in the cross-appeal. In other words, those legal representatives were before the Court all throughout

the hearing of the appeal as parties to the appeal and canvassed their case and were heard by their advance and they had the full opportunity to put forth whatever contentions were open to them in the appeals and to contest the contentions advanced against them by the opposite side and yet if the other view is taken that as they were not formally impleaded as legal representatives of the deceased respondent in the cross-appeal that appeal has abated, it would be wholly unjust. It is very difficult to distinguish on principle the approach of the Court in appeals and cross-objections and in cross-appeals in this behalf. No principle of law can distinguish this deviational approach. The cases which have taken the view that in cross-appeals the position is different than the one is appeal and cross-objections do not proceed on any discernible legal principle. Nor can they be explained by any demonstrable legal principle but in fact they run counter to the established legal principle."

3. Similar is the ratio of the judgment again that of Apex Court in ***Organic Insulations Vs. Indian Reyon Corporation Limited, (2003) 9 SCC 187*** in which the judgment of the Apex Court in *N. Jayaram Reddi's* case has also been followed. Therefore, the position as emerges from the law laid down in the judgments supra is that the legal representatives who were before the Court throughout during the course of hearing of the appeal as party to the appeal and canvassed their case and had full opportunity to put forth whatever contentions were opened to them in the appeals and also to contest the contentions advance against them by the opposite party, their non-impleadment as legal representatives in the cross appeal is of no consequences nor the cross appeal abates.

4. Now if coming to the present case, defendant No. 1 Shri Gorkh Nath had died during the pendency of the suit in the trial Court. On an application filed under order 22 Rule 4 of the Code of Civil Procedure his legal representatives were ordered to be brought on record in the main suit. Deceased defendant Shri Gorkh Nath had filed counter claims also. His legal representative respondent No. 1 herein filed an application for her substitution as his legal representative in the counter claim. The application, however, was dismissed by the trial Court vide order dated 16.5.2014. That order was taken in appeal to learned Lower Appellate Court which has been decided vide order dated 27.7.2015, (Annexure P-7) under challenge in this petition. Learned Lower Appellate Court has reversed the order passed by the trial Court while placing reliance on the judgments of Apex Court cited supra and has rightly held that in view of substitution of legal representative of deceased Gorkh Nath in the main suit, there was no necessity of impleadment of his legal representative in the counter claim.

5. In view of the legal position discussed hereinabove the petitioner-plaintiff cannot be said to be aggrieved by the order under challenge in this petition in any manner whatsoever. Otherwise also, nothing to the contrary has been brought to the notice of this Court by learned counsel representing the petitioner during the course of arguments. Therefore, the impugned order being legal and valid calls for no interference by this Court. The petition is accordingly dismissed.

6. Pending application(s), if any, stands dismissed.

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

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

Cr. Appeal No.: 180 of 2015
Reserved on: 09.10.2015
Date of Decision: 14.10.2015

N.D.P.S. Act, 1985- Section 20- Accused was sitting on the side of the road- he became perplexed on seeing the police and tried to escape- he was apprehended and during search 1.8 kg. charas was found in his possession- testimonies of police officials were not in accordance with the FIR- their testimonies were contradictory to each other- independent witnesses were not associated despite availability- there was contradiction between the testimony of PW-2 and PW-9 regarding the time at which the investigation started, which shows that PW-2 is a planted witness- PW-9 deposed that he had not counted the vehicles which crossed the site of the occurrence, which shows that vehicles were crossing but no efforts were made to stop any vehicle and to associate any independent witness- held, that in these circumstances, prosecution case was not proved- accused acquitted. (Para-9 to 15)

For the Appellant: Mr.Anuj Nag, Advocate.
For the respondent: Mr.Ramesh Thakur, Assistant Advocate General.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge

This appeal is directed against the judgment rendered on 18.03.2015 by the learned Special Judge, Mandi, in Sessions trial No. 25/2010 whereby the latter convicted and sentenced the accused for his having committed an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act.

2. The accused/convict is aggrieved by the renditions of the learned Special Judge, Mandi. Being aggrieved, he has by instituting the instant appeal before this Court assailed the findings recorded therein. A prayer has been made therein that his appeal be accepted and the findings of conviction recorded against him by the learned trial Court qua his having committed an offence punishable under Section 20 of the NDPS Act be reversed and set-aside in the exercise of appellate jurisdiction by this Court.

3. The prosecution story, in brief, is that ASI Amar Nath, Constable Ajit Singh, ASI Ramesh Prashar, Constable Ganesh Dass, HHG Parshotam Dass and HHG Mitter Dev had gone for patrolling in an official vehicle after lodging rapat. The police party started search of the vehicles on 1.1.2010 and at about 3.15 p.m on national highway 21 accused was found sitting on the parapet of the road. On seeing the police party he became perplexed and tried to escape. He was apprehended. On search of the bag carried by the accused charas was found in a polythene packet. On weighment, the charas was found to be 1 kilogram 800 grams. The charas and polythene packet were kept in a cloth parcel and were sealed with 8 seals of impression 'Y' in presence of independent witness Bholu Ram. Sample seal was drawn and facsimile of seal was obtained on NCB form filled in triplicate on the spot. Thereafter the Investigating Officer prepared rukka and sent the same to police

station through constable Ajit Singh on which basis F.I.R was registered by SHO Shreshta Thakur. The Investigating Officer prepared spot map and recorded the statements of the witnesses. The case property was resealed by SHO Shreshta Thakur with seals of impression 'A' and thereafter the case property alongwith relevant documents were deposited with Kashmir Singh the then MHC. On 3.1.2010 the parcel containing contraband alongwith sample seals, NCB forms and seizure memo etc. were sent to Forensic Science Laboratory, Junga through constable Narender Kumar who deposited the same at FSL, Junga. Thereafter, FSL's report was obtained which proved that the parcel containing extract of cannabis and sample of charas.

4. After completion of the investigation, challan, under Section 173 of the Cr.P.C. was prepared and filed in the Court. The trial Court charged the accused for his having committed an offence punishable under Section 20 of the NDPS Act to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined as many as 10 witnesses. On closure of the prosecution evidence, the statement of the accused under Section 313 Cr.P.C. was recorded, in which he pleaded innocence. On closure of proceedings under Section 313 Cr.P.C the accused person was given an opportunity to adduce evidence, in defence, and he chose to adduce evidence in defence.

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

7. On the other hand, the learned Assistant Advocate General appearing for the State, has, with considerable force and vigour, contended that the findings of conviction, recorded by the Court below, are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication.

8. This Court with the able assistance of the learned counsel on either side, has with studied care and incision, evaluated the entire evidence on record.

9. Recovery of charas weighing 1 kilogram & 800 grams was effected from a carry bag held by the accused. The carry bag wherefrom charas weighing 1.800 kilograms was recovered was taken into possession under memo Ext.PW-1/A. Even though the prosecution witnesses have deposed in tandem and in harmony qua each of the links in the chain of circumstances commencing from the proceedings relating to search, seizure and recovery till the consummate link comprised in the rendition of an opinion by the FSL on the specimen parcels sent to it for analysis, portraying proof of unbroken and unsevered links, in the entire chain of the circumstances, hence it is argued that when the prosecution case stand established, it would be legally unwise for this Court to acquit the accused.

10. Besides when the testimonies of the official witnesses, unravel the fact of theirs being bereft of any inter-se or intra-se contradictions hence, they too enjoy credibility for sustaining thereupon the findings of conviction recorded against the accused by the learned trial Court. Apparently, proof of the prosecution case is endeavoured to be sustained on the strength of the unblemished testimonies of the police witnesses. A close and studied perusal of the depositions of the police witnesses underscores the factum that they have therein neither given a version qua the factum of recovery of contraband from the

exclusive and conscious possession of the accused inconsistent with the manner thereof as recited in the F.I.R. Ext.PW-9/C, for begetting a conclusion that hence their testimonies in their respective examinations in chief are ridden with the vice of embellishments and improvements vis-à-vis their previous statements recorded in writing nor also when the versions qua the alleged occurrence deposed by the prosecution witnesses in their respective examinations in chief stand not contradicted by the versions thereof comprised in their respective cross examinations, necessarily when their testimonies are not ridden with any vice of inter se contradictions so as to render them to be blemished and unworthy of credence besides when their respective depositions are not afflicted with any vice of intra se contradictions rather when they have respectively deposed qua the manner of recovery of charas from the alleged conscious and exclusive possession of the accused bereft of any disharmony or inconsistency, gives leverage to the inference that hence the prosecution has been able to sustain the charge against the accused of charas weighing 1.800 Kgs. having been recovered from his conscious and exclusive possession while his carrying it in a carry bag held by him and which was seized under memo Ext.PW-1/A.

11. Be that as it may, given the manner of recovery of charas from the conscious and exclusive possession of the accused inasmuch as it having come to be recovered from a bag held by him in his right hand necessarily hence, when it was not recovered from either his pocket or its being inextricably strapped with any part of his body in event whereof compliance by the Investigating Officer with the mandatory provisions of Section 50 of the NDPS Act was imperative, inasmuch as his being then enjoined to under an apposite consent memo elicit from the accused his consent of search of his person being carried out either by the Executive Magistrate or a Gazetted Officer or by the police official eliciting his consent. Contrarily when it was recovered from a bag held by him necessarily the said manner of the accused carrying it when did not constitute its being strapped inextricably with any portion of his body necessarily then compliance by the Investigating Officer with the provisions of Section 50 of the NDPS Act was not enjoined to be meted out by him. Nor also when it was not a case of prior information rather was a chance recovery concomitantly also then compliance with the mandate of Section 42 of the NDPS Act was not enjoined to be meted out by the Investigating Officer.

12. However, even though the official witnesses through their recorded depositions on oath have proven the factum of recovery of charas under memo Ext.PW-1/A from the alleged conscious and exclusive possession of the accused while his carrying it in a bag held by him besides when their testimonies comprised in their respective examinations in chief are bereft of any taint of inter se contradictions vis-à-vis their depositions comprised in their respective cross-examinations nor also when their testimonies are not ingrained with the vice of intra se contradictions necessarily then when their testimonies inspire confidence and are credible obviously reliance is to be imputed to them while concluding qua the guilt of the accused. Nonetheless before proceeding to place implicit reliance upon their testimonies, it is also imperative for this Court to gauge or discern from the available evidence on record whether independent witnesses were available in the immediate vicinity of the locality where the proceedings relating to search, seizure and recovery of contraband from the alleged conscious and exclusive possession of the accused in the manner as deposed by the official witnesses, were launched and concluded. The Investigating Officer, is not obliged to associate independent witnesses while initiating proceedings qua search and recovery of contraband from the alleged conscious and exclusive possession of the accused nor also the non association of independent witnesses by the investigating officer in the proceedings relating to search and recovery of contraband from the alleged conscious and exclusive possession of the accused would oust or discount the probative worth of the testimonies of the official witnesses. However, when independent witnesses despite proven

evidence of theirs being available in close proximity to the location where the proceedings relating to search and recovery of contraband from the conscious and exclusive possession of the accused were launched or carried out, are not associated, such non association of independent witnesses by the Investigating Officer despite their availability would nurse an inference that their non association was deliberate or intentional. Concomitantly also it would give succor to an inference that the Investigating Officer, despite availability of the independent witnesses in the vicinity of the location where the proceedings relating to search and recovery of contraband from the conscious and exclusive possession of the accused were launched or concluded, omitted to join them, as he intended to smother the truth qua the genesis of the prosecution version. The genesis of the prosecution version would gain credence with this Court only when it is free from the taint of it having been reared by a partisan or a slanted investigation having been carried out by the investigating officer. The investigation carried out by the Investigating Officer would garner an element of slantedness or distortion when the investigating officer despite availability of independent witnesses deliberately omits to join them in the proceedings relating to search and recovery of contraband from the purported exclusive and conscious possession of the accused. Consequently, a slanted or distorted investigation by the Investigating Officer would erode the genesis of the prosecution story.

13. Furthermore, when the depositions of the official witnesses stand corroborated by the deposition of an independent witness comprised in the testimony of PW-2 necessarily then the genesis of the prosecution case acquires reinforced vigour and sustenance. However, the acceptance of the genesis of the prosecution case anvilled upon the testimonies of the prosecution witnesses besides its standing succor from the deposition of PW-2, would only be with trepidation or extreme wariness on the part of this Court, as the factum of whether PW-2 was an invented witness, is to be discerned from the testimonies rendered on oath both by PW-2 and PW-9 the Investigating Officer. In the event of this Court fathoming therefrom the fact that PW-2 is an invented witness necessarily then the introduction of an invented witness by the Investigating Officer in the apposite proceedings would cast a blur upon the fairness as also the transparency of investigation. Obviously then the investigation carried out by the investigating Officer would be rendered flawed besides skewed facilitating an inference of it being amenable to a concomitant deduction hence being drawable by this Court of its not inspiring its trust and confidence. Apart therefrom the evidence as existing on record has to be closely gauged for disinterring therefrom whether independent witnesses other than PW-2 were available for theirs being associated in the apposite proceedings carried out by the Investigating Officer, who yet were omitted to be associated despite theirs availability, spurring a concomitant inference from this Court that such an omission on the part of the Investigating Officer was both deliberate as well as intentional merely to smother the truth qua the genesis of the prosecution case. Sequelly then a smothered and tainted investigation would not gain credence from this Court. Initially for gauging whether PW-2 is an invented witness, the occurrence of the fact in his testimony of the apt proceedings having stood commenced/launched at the site of occurrence at about 2.15 p.m. is material, in as much as it is in blatant contradiction to the testimony of the investigating officer who while deposing as PW-9 has therein recorded on oath the fact that the apposite proceedings at the site of occurrence stood commenced at about 3.15 p.m. The open rife contradiction intra se PW-2 and PW-9 qua the aforesaid material fact about the timing of the commencement of the apposite proceedings at the site of occurrence on the relevant date obviously constrains a deduction from this Court that, PW-2 is an invented witness. In other words, if the testimony of the Investigating Officer of the apt proceedings having stood commenced at 3.15 p.m on the relevant date is to be believed, then the testimony of PW-2 of the apt proceedings at the relevant date having commenced at about 2.15 p.m is rendered oustable besides unworthy of credit. The ensuing

inference which is garnerable therefrom is that PW-2 is an invented witness. The conclusion as drawn by this Court of PW-2 being an invented witness renders any reliance upon his testimony by the prosecution to lend corroborative strength to the genesis of its case, to be both misconceived as well as legally ill-founded. With the Investigating Officer having invented an independent witness to the apposite proceedings besides fillips the sequel of his intending to smother the truth qua the genesis of the prosecution version, naturally a smothered version qua the genesis of the prosecution case cannot be foisted with any veracity. Moreover, the inference of PW-2 being unavailable at the site of occurrence at the time contemporaneous to the initiation of the apposite proceedings thereto is garnered by (a) the existence of an admission in his deposition comprised in his cross-examination of his photo figuring in photograph Ext. D-4 having been clicked on the day subsequent to the initiation of the apposite proceedings (b) his having in his deposition comprised in his cross-examination conceded qua his having not signed the recovery memo contemporaneously with the official witnesses.

14. Be that as it may, it is now to be ferreted from the evidence on record whether on the relevant date at the time contemporaneous to the commencement of the apposite proceedings by the Investigating Officer independent witnesses were available in proximity to the site of occurrence for theirs being associated in the apposite proceedings by the Investigating Officer. In case the evidence on record on its rummaging unravels the fact that independent witnesses were available at the site of occurrence the omission on the part of the Investigating Officer to associate them in the apposite proceedings would be construable to be an intentional and deliberate omission on his part, casting aspersions upon the transparency of the investigation carried out by him, rendering amenable to disbelief the genesis of the prosecution version. The apt evidence which underscores the factum of independent witness being available in proximity to the site of occurrence at the time contemporaneous to the launching of the apposite proceedings by the Investigating Officer, is encompassed in the testimony comprised in the cross-examination of PW-9 wherein he has deposed that he did not count the vehicles which crossed the site of occurrence. The aforesaid deposition of the Investigating Officer existing in his cross-examination underscores the factum of vehicles having at a stage contemporaneous to the initiation of apposite proceedings by him at the site of occurrence, crossed therefrom. The Investigating Officer was peremptorily enjoined to hence facilitate an aura of transparency besides impartisanship gather around the investigation carried out by him, stop the vehicles which crossed the site of occurrence at the time contemporaneous to the commencement of the apposite proceedings therein at his instance for hence soliciting the participation of theirs drivers, conductors besides their occupants as witnesses in the apposite proceedings. However, the Investigating Officer neither stopped the vehicles which crossed the site of occurrence at the time contemporaneous to the commencement of the apposite proceedings at his instance at the site of occurrence nor obviously he solicited their association as witnesses in the apposite proceedings, necessarily then when independent witnesses were available to be joined in the apposite proceedings, the non joining of independent witnesses by the Investigating Officer despite their availability, is to be construed to be both deliberate as well as intentional. Consequently, the deliberate as well as an intentional omission on the part of the Investigating Officer to solicit the association of independent witnesses in the apposite proceedings at the time contemporaneous to their initiation at the site of occurrence at his instance, cannot but foster a conclusion from this Court, that such omission was begotten by his intending to carry out a slanted and skewed investigation into the offence allegedly attributed by him to have been committed by the accused. In aftermath a slanted investigation cannot garner any credence from this Court. Conjunctively, the factum of the Investigating Officer having introduced an invented witness in the apposite proceedings besides his having not joined any independent witness in the apposite

proceedings at the time contemporaneous to their commencement at the purported site of occurrence renders the factum of non joining of independent witnesses by the Investigating Officer in the apposite proceedings despite their availability, to in its entirety engulf the entire prosecution case with a shroud of doubt. Therefore, this Court is constrained to disbelieve the prosecution version as propounded by the prosecution.

15. The summum bonum of the above discussion is that the prosecution has not been able to adduce cogent and emphatic evidence in proving the guilt of the accused. The appreciation of the evidence as done by the learned trial Court suffers from an infirmity as well as perversity. Consequently, reinforcingly, it can be formidably concluded, that, the findings of the learned trial Court merit interference.

16. In view of above discussion, the instant appeal is allowed and the impugned judgment of 18.03.2015 rendered by the learned Special Judge, Mandi, is set-aside. The appellant/accused is acquitted of the offence charged. The fine amount, if any, deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

17. The Registry is directed to prepare the release warrants of the accused and send the same to the Superintendent of the jail concerned, in conformity with the judgment forthwith. Records be sent back forthwith.

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

Smt. Maya Devi ……Appellant.

Vs.

Des Raj and others …..Respondents.

RSA No. 307 of 2005-C a/w
Cross Objections No. 163 of 2008.
Reserved on: 27.10.2015
Date of decision: 28.10.2015

Specific Relief Act, 1963- Section 34- Plaintiff executed a Power of Attorney in favour of defendant on 29.05.1979 as he intended to go abroad- but plaintiff could not go abroad and requested the defendant not to act upon Power of Attorney – however, defendant executed a sale deed on 17.11.1989 on the basis of Power of Attorney for consideration of Rs. 1,50,000/-, whereas, actual value of the property was more than Rs. 4 lacs – Power of Attorney was cancelled subsequently- hence, a civil suit was filed for setting aside the sale deed- defendant pleaded that sale deed was cancelled as per the instructions and under the authority of the plaintiff- defendants No. 2 and 3 claimed to be bona-fide purchasers for consideration- defendant No. 2 filed another civil suit pleading that she was owner in possession on the basis of the sale deed and was being dispossessed forcibly without any right- it was admitted by the plaintiff that he had appointed defendant as Power of Attorney and had given him power to dispose of the property by way of sale, mortgage or exchange- plaintiff had not got the Power of Attorney revoked- held, that in these circumstances suit of plaintiff was rightly dismissed and the suit of the defendant was rightly decreed.

(Para-14 to 21)

For the appellant : Mr. Rajneesh K. Lall, Advocate, vice Mr. Sanjeev Sood, Advocate.
For the respondents: Mr. Amit Jamwal, Advocate, vice Mr. Ajay Sharma, Advocate, for respondent No. 1.
Respondent No. 2 already deleted.
None for respondent No. 3.
Mr. Neeraj Gupta, Advocate, for respondents No. 4 and 5.

The following judgment of the Court was delivered:

Rajiv Sharma, J.:

This Regular Second Appeal is directed against the judgment and decree, dated 01.04.2005, passed by the learned District Judge, Una, H.P. in Civil Appeal No. 44 of 2003, titled as Des Raj Vs. Smt. Shakuntla Devi.

2. Key facts necessary for the adjudication of this Regular Second Appeal are that the plaintiff/respondent No. 1 (hereinafter referred to as "the plaintiff" for the sake of convenience) had instituted a suit bearing Civil Suit No. 145 of 1991 against Sh. Madan Lal Vashisht, predecessor-in-interest of the defendants/appellants (hereinafter referred to as "the defendants" for the sake of convenience) as well as against Smt. Ram Piari and Sh. Tirath Ram for declaration. The case of the plaintiff was that he was resident of village Ajouli and was owner in possession of suit land measuring 0-14-42 Hcts., as detailed in head-note of the plaint. Defendant Madan Lal (since deceased) was also resident of village Ajouli. He was a Medical Practitioner. The plaintiff was an agriculturist and in order to supplement his income by earning and doing work abroad, intended to go abroad during the year 1979 and came in contact with defendant No. 1. He pursuaded the plaintiff to execute a General Power of Attorney in his favour to manage the property of the plaintiff in his absence. The plaintiff executed General Power of Attorney on 29.05.1979 in favour of defendant No. 1 Madan Lal Vashisht. Plaintiff could not go abroad due to lack of money and also informed the defendant No. 1 and asked him not to do any act on the basis of general power of attorney. Defendant No. 1 did not do any act on the basis of power of attorney and the power of attorney remained only a paper transaction. The plaintiff came to know that the defendant No. 1 Madan Lal had sold the land on the basis of General Power of Attorney for consideration of Rs.1,50,000/- in favour of defendant No. 2 vide sale deed, dated 17.11.1989 and mutation has also been sanctioned on 26.03.1990. The suit land was abutting the Ajauli-Nangal road and was highly valuable from the business point of view and the rate of the land was Rs.15,000/- per marla. The actual price of the land was more than Rs.4 lac at that time. Thereafter, the plaintiff revoked the General Power of Attorney vide registered deed, dated 13.06.1991 and defendant No. 1 was duly notified through registered notice. According to the plaintiff, the sale deed was without his consent and authority.

3. The suit was contested by the defendants. According to the averments made in the written statement filed by the defendant No. 1, the sale was made under plaintiff's authority, Power of Attorney and under his instructions.

4. The defendants No. 2 and 3 also contested the suit. According to them, the suit land was sold by the defendant No. 1 as General Power of Attorney of the plaintiff to the defendant No. 2 vide sale deed, dated 17.11.1989 for a consideration of Rs.1,50,000/-.

5. The replication was filed by the plaintiff.

6. Smt. Ram Piari (defendant No. 2 in Civil Suit No. 145 of 1991), as mentioned hereinabove, also filed a Civil Suit against Des Raj, Shakuntla Devi, Babita, Chander

Shekhar and Maya Devi bearing Civil Suit No. 739/95/92. According to the averments made in the plaint, she was owner in possession of the suit land on the basis of a registered sale deed, dated 17.11.1989 executed by Sh. Des Raj through his General Power of Attorney Madan Lal, predecessor-in-interest of defendants No. 2 to 5. Sh. Des Raj was threatening to take forcible possession of the land without any right.

7. The suit was contested by Des Raj, defendant No. 1. According to him, the sale deed in favour of Smt. Ram Piari by Madan Lal, predecessor-in-interest of defendants No. 2 to 5 as his General Power of Attorney, was not genuine. The market value of the suit land was Rs.15,000/- per marla.

8. The suit was also contested by defendants No. 2 to 5. According to them, the amount received by Madan Lal has been adjusted against the amount of pronotes executed by defendant No. 1 in favour of Madan Lal.

9. The replication was filed.

10. Learned Senior Sub Judge, Una, District Una, H.P. framed the issues on 10.08.1992 and 04.12.2002. He decreed Civil Suit No. 739/95/92 and dismissed Civil Suit No. 141/91.

11. Sh. Des Raj, feeling aggrieved by the judgment and decree, dated 21.03.2003, filed a Civil Appeal No. 44 of 2003 before the learned District Judge, Una, H.P. Des Raj also filed a Civil Appeal No. 43 of 2003 against the judgment and decree, dated 21.03.2003.

12. These appeals were heard together and were decided on 01.04.2005. The learned District Judge, Una, H.P. partly allowed Civil Appeal No. 44 of 2003 and decreed Civil Suit No. 145/91 against defendant No. 1 Madan Lal through his L.Rs., i.e., defendants 1-A to 1-C for recovery of Rs.1,50,000/- with 6% interest from the date of filing the suit till its realisation with costs. Civil Appeal No. 43 of 2003 was dismissed. The appellant-defendant has now assailed the judgment and decree, dated 01.04.2005, rendered in Civil Appeal No. 44 of 2003.

13. The Regular Second Appeal was admitted on the following substantial questions of law on 13.03.2008:

> 1. *Whether the judgment of the learned District Judge is vitiated being not in accordance with Order 20 Rule 5 C.P.C. and the judgment of this Hon'ble Court in case reported in AIR 2001, H.P. 18 Om Parkash versus State of Himachal Pradesh in as much as it has neither independently considered the evidence nor has given findings and conclusions on each of the issues?*
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> *2. Whether the findings of the Court below are perverse, based on misreading of oral and documentary evidence and the pleadings of the parties particularly the basic documents of title of Ext.PW-4/A and Ext. DX?*
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> *3. Whether the findings of the courts below in decreeing the suit for Rs. 1.50 lakh with interest is sustainable when it was proved on record that the amount of sale consideration stood adjusted on account of the money borrowed by the plaintiff on account of pronotes executed by the plaintiff?*
>
> *4. Whether the suit of the plaintiff was maintainable in the present form and particularly when the plaintiff had not asked for the cancellation of the sale deed and the findings are based on wrong assumption not proved from facts on record?*

14. Mr. Rajnish K. Lall, learned vice counsel for the appellant, on the basis of the substantial questions of law framed, has vehemently argued that the learned first appellate Court has not correctly appreciated the oral as well as documentary evidence, more particularly, Ex. PW4/A and Ex.-DX. According to him, the sale consideration stood adjusted on account of the money borrowed by the plaintiff on account of pronotes executed by the plaintiff. He lastly contended that the suit was not maintainable.

15. The learned Advocates appearing on behalf of the respondents have supported the judgment and decree, dated 01.04.2005.

16. I have heard the learned counsel for the parties and gone through the pleadings, judgments and the records, carefully.

17. Since all the substantial questions of law are interconnected and interlinked, the same are taken up together for determination to avoid the repetition of discussion of evidence.

18. Plaintiff Des Raj (PW-4) in his cross-examination has admitted that he has executed a General Power of Attorney in favour of defendant No. 1 and document writer read over the same to him and he put his signatures on the said General Power of Attorney in token of its correctness. Copy of the General Power of Attorney is Ex. PW4/A. He also admitted that there was no stipulation in the General Power of Attorney Ex. PW4/A that a notice was required to be given to him before effecting any sale on the basis of the said General Power of Attorney. He further admitted that Madan Lal has sold the suit land on the basis of General Power of Attorney in favour of defendants No. 2 and 3. In fact, the defendant No. 3 has accepted the sale deed on behalf of his wife defendant No. 2 Ram Piari. Des Raj has cancelled the General Power of Attorney vide revocation deed Ex. PW1/A, dated 13.06.1991. The impugned sale deed was executed by defendant No. 1 Madan Lal on 17.11.1989 vide Ex. DX, thus, the General Power of Attorney on the date of sale deed was in existence.

19. It is evident from the examination of Ex. PW4/A, General Power of Attorney, that Des Raj Plaintiff appointed Sh. Madan Lal as lawful attorney. It is specifically mentioned in Ex. PW4/A that he has power to even dispose of his property by way of sale, mortgage or exchange. Since the plaintiff has not gone abroad, he could get the General Power of Attorney revoked before the land was sold by Sh. Madan Lal. The Attorney have the legal power to effect the sale deed by using the General Power of Attorney. Tirath Ram (DW-13) as well as Chaman Lal (DW-15) were marginal witnesses of the sale deed Ex. DX. Both these witnesses have categorically deposed that the suit land was sold for consideration of Rs.1,50,000/- by defendant No. 1 Madan Lal on the basis of the General Power of Attorney in favour of defendant No. 2. The defendants have also examined Vipin Kumar (DW-5), who was scribe of General Power of Attorney Ex.PW4/A.

20. Mr. Rajnish K. Lall, learned counsel for the appellant has vehemently argued that the amount of Rs.1,50,000/- was set off as per pronotes. However, the fact of the matter is that defendant Madan Lal Vashisht has not taken specific plea of set off nor there was any mention of the pronotes which have been proved by defendant No. 1 during the course of evidence so as to claim set off qua the amount of the sale consideration mentioned in sale deed Ex.-DX. Rather, in paras 7 and 10 of the written statement filed by defendant No. 1, it has been admitted that the suit land has been sold by the defendant on behalf of the plaintiff under his authority and consent on 17.11.1989 for a sum of Rs.1,50,000/- and the mutation was also sanctioned. There is no mention in any para that the amount mentioned in the pronotes was liable to be set off against the sale consideration of

Rs.1,50,000/- mentioned in the sale deed, dated 17.11.1989, Ex. DX. The amount of set off was not mentioned either in the written statement filed by defendant No. 1 Madan Lal or in other Civil Suit titled as Smt. Ram Piari Vs. Des Raj and others by the successors-in-interest of Madan Lal. The defendants have not disputed the fact of execution of sale deed Ex. DX, dated 17.11.1989 and passing of sale consideration in both the Civil Suits, i.e., Civil Suit No. 739/95/92 and Civil Suit No. 145 of 1991. The first appellate Court has correctly appreciated the oral as well as documentary evidence, including Ex. PW4/A and Ex. DX. All the issues raised by the parties have been properly adjudicated on the basis of the evidence adduced by the parties. The defendants have failed to prove that the amount of sale consideration stood adjusted on account of the money borrowed by the plaintiff on account of pronotes executed by the plaintiff. The suit was maintainable. All the substantial questions of law are answered accordingly.

21. Accordingly, there is no merit in this Regular Second Appeal and the same is dismissed, so also the pending application(s), if any. No costs.

Cross-objections No. 163 of 2008

22. In view of the observations made hereinabove in Regular Second Appeal No. 307 of 2005, there is no merit in Cross-objections. It is reiterated that the sale deed, dated 17.11.1989, Ex. DX was valid. It was made during the subsistence of General Power of Attorney executed by Des Raj in favour of defendant Madan Lal. Consequently, the Cross-objections are also dismissed with no order as to costs.

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

Piaro Devi .....Appellant.
Versus
Anant Ram .....Respondent.

RSA No. 304 of 2005.
Reserved on: 27.10.2015.
Decided on: 28.10.2015.

Torts- Plaintiff filed a civil suit for damages pleading that defendant had made false and frivolous complaint to the Forest Department, consequently her premises were searched- he had also made a complaint to the Branch Manager leveling imputations against the character of plaintiff - suit was decreed by the trial Court- however, decree was set aside in appeal- plaintiff had relied upon the photocopy of the official report- no application for leading secondary evidence was filed- held that documents are not admissible in evidence, unless the grounds are laid down for leading secondary evidence – appeal dismissed.

(Para- 15 to 19)

Case referred:
Sait Tarajee Khimchand and others, vrs. Yelamarti Satyam and others, AIR 1971 SC 1865

For the appellant(s): Mr. Jagan Nath, Advocate, vice Mr. Anand Sharma, Advocate.
For the respondent: None.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Hamirpur, H.P. dated 18.3.2005, passed in Civil Appeal No. 100 of 2002.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the appellant-plaintiff (hereinafter referred to as the plaintiff), has instituted suit for recovery against the respondent-defendant (hereinafter referred to as the defendant). According to the plaintiff, the defendant had good relations with her husband Sh. Gurmit Singh. The defendant had borrowed certain money from her husband. The money was advanced to the defendant in the presence of respectable persons of the area. He promised to repay the loan money in a short time. As he did not refund the money, her husband demanded it from him. The demand so made offended the defendant who adopted indifferent and callous attitude towards her and her husband. In order to defame them, the defendant made a false and frivolous complaint to the Forest Department. The forest officials raided and searched their premises in the presence of the villagers and relatives etc. But, nothing incriminating was recovered. The defendant has also filed complaint on 15.6.1998 against one Sh. Makhan Singh, Branch Manager, Punjab National Bank, Garli to the Regional Manager, Punjab National Bank, Hamirpur. In the complaint, false and defamatory imputations were made against the plaintiff that she is not having good character and Makhan Singh regularly visits her house.

3. The suit was contested by the defendant. The defendant denied borrowing the money from her husband with promise to repay it after some time. He denied any grudge against the plaintiff and her husband. He also denied having leveled false allegations that plaintiff was not having good character and Makhan Singh visits her house regularly.

4. The replication was filed by the plaintiff. The learned Sub Judge, Ist Class, Barsar, framed the issues on 30.5.2000. The suit was decreed with costs vide judgment dated 17.6.2002 for recovery of Rs. 2,00,000/- with interest @ 9% per annum from the date of institution of suit till its realization. The defendant, feeling aggrieved, preferred an appeal against the judgment and decree dated 17.6.2002. The learned District Judge, Hamirpur, allowed the same on 18.3.2005. Hence, this regular second appeal.

5. The regular second appeal was admitted on the following substantial questions of law on 28.9.2005:

> "1. Whether the learned Lower Appellate Court erred in drawing adverse inference against the defendant-respondent when he neither appeared in the witness box nor examined any other witness in his behalf?
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> 2. Whether the learned lower Appellate Court could have held the documents Ext. PW-2/A to Ext. PW-2/D to be not legally proved when the defendant-respondent had itself not challenged the exhibition of such documents in his grounds of appeal preferred before the Lower Appellate Court?
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> 3. Whether the learned Lower Appellate Court could have held the documents Ext. PW-2/A to PW-2/C to be not duly exhibited and proved, especially when the defendant-respondent himself did not challenge the execution of such documents?

4. Whether the learned Lower Appellate Court below has wrongly applied the provisions of Section 65 of the Indian Evidence Act?"

6. Mr. Jagan Nath, Advocate appearing vice Mr. Anand Sharma, Advocate, on the basis of the substantial questions of law framed, has vehemently argued that adverse inference should have been drawn against the defendant for not appearing in the witness box. He then contended that documents Ext. PW-2/A to PW-2/D were duly proved by the appellant. He lastly contended that provisions of Section 65 of the Indian Evidence Act have been wrongly complied with by the learned first Appellate Court.

7. Since all the substantial questions of law are inter-connected, hence are taken up together for discussion to avoid repetition of evidence.

8. I have heard learned counsel for the appellant and have also gone through the judgments and records of the case carefully.

9. PW-1 Sagar Singh Rana testified that he was posted as Range Forest Officer, Flying Squad, Hamirpur. He has not brought the original record since the same was not available in the office.

10. PW-2 Ashok Kumar Setia has brought the record and proved Ext. PW-2/A to PW-2/C i.e. copies of complaint dated 15.6.1998, 21.3.1998 and 16.11.1998. He also brought the original enquiry report, the copy of which is Ext. PW-2/D.

11. PW-3 Makhan Singh testified that he remained posted at Garli from October, 1996 to May, 1999. He knows the parties. The plaintiff had a loan account in the bank where the defendant was the landlord of the building from which the bank operated. The defendant lodged complaints Ext. PW-2/A and PW-2/B with his superiors. On enquiry, those complaints were found to be false and frivolous.

12. PW-4 Dhundha Singh Forest Guard has proved enquiry report Ext. PW-4/A.

13. The plaintiff has appeared as PW-5. She testified that she and Gurmit Singh were married 18 years ago. She had two children. Her husband is employed at Nalagarh. The defendant had cordial relations with her husband. About 3 years ago, the defendant borrowed Rs. 65,000/- from her husband. No writing in this regard was executed. When she asked the defendant to return the loan amount, the latter started defaming them. Firstly, the defendant lodged a complaint against them with the forest department that they have stolen timber. The forest officials raided and searched their premises. Nothing incriminating was recovered. After that defendant filed a complaint before the bank authorities wherein he averred that the Bank Manager visits her house and she is a lady of loose character. The bank people too conducted the enquiry and asked her as to whether Makhan Singh comes to her house. She denied the said fact. She did not have illicit relations with Makhan Singh. In her cross-examination, she admitted that defendant has filed case against her and Makhan Singh. She was house wife. None except her and her husband were present at that time when money was advanced on 13.4.1998 to the defendant. She has admitted that he had filed a suit for recovery against them.

14. PW-6 Gurmit Singh is the husband of the plaintiff. He has corroborated the statement of PW-5 Piaro Devi. He could not produce any record proving that he had withdrawn Rs. 60,000/- from the funds of the Company.

15. The plaintiff has failed to prove that a sum of Rs. 65,000/- was advanced to the defendant. No receipt to this effect was produced before the Court. Mr. Jagan Nath, Advocate, appearing for the appellant has placed reliance upon Ext. PW-2/A to PW-2/C.

The plaintiff has relied upon three complaints Ext. PW-2/A dated 15.6.1998, Ext. PW-2/B dated 21.3.1998 and Ext. PW-2/C dated 16.11.1998. These are merely photo copies from the official record produced by PW-2 Ashok Kumar, Manager, Punjab National Bank, Regional Office, Hamirpur. PW-2 Ashok Kumar has admitted that the original complaints dated 15.6.1998 and 16.11.1998 were not available in their record as those were addressed to Zonal Office, Chandigarh. There were only photo copies of the complaints in their records. The receiving of Ext. PW-2/A to PW-2/C tendered by Ashok Kumar PW-2 was objected to. The objection was allowed and the documents were ordered to be taken on record with costs of Rs. 100/- and it was accepted by defendant. However, the statement dated 16.9.2000 of PW-2 Ashok Kumar does not specify clearly what precisely was objection of the defendant. Whether it was on account of mode of proof or late production of documents or admissibility of the documents. The plaintiff has not taken any steps to prove the complaints by way of preliminary evidence. Merely marking of documents as Exhibits would not absolve the parties to prove execution of the same.

16. The plaintiff has not invoked Section 65 of the Indian Evidence Act for summoning the original from the authority possessing it or by showing that the original was destroyed or lost, was not easily movable or that original was a public document or certified copy of the document was admissible or that original consisted of numerous accounts which was convenient to be transported to the Court.

17. The learned District Judge, has rightly come to the conclusion that these documents i.e. PW-2/A to PW-2/C were neither primary, nor in the form of secondary evidence. These documents were not admissible in evidence unless and until the case was governed under Section 65 of the Indian Evidence Act. There was no evidence to conclude that complaints Ext. PW-2/A to Ext. PW-2/C were actually written by defendant and they scandalized the plaintiff.

18. Their lordships of the Hon'ble Supreme Court in the case of ***Sait Tarajee Khimchand and others, vrs. Yelamarti Satyam and others,*** reported in ***AIR 1971 SC 1865,*** have held as follows:

> "15. The plaintiffs wanted to rely on Exhibits A-12 and A-13, the day book and the ledger respectively. The plaintiffs did not prove these books. There is no reference to these books in the judgments. The mere marking of an exhibit does not dispense with the proof of documents. It is common place to say that the negative cannot be proved. The proof of the plaintiffs' books of account became important because the plaintiffs' accounts were impeached and falsified by the defendants' case of larger payments than those admitted by the plaintiffs. The irresistible inference arises that the plaintiffs' books would not have supported the plaintiffs."

19. The plaintiff was required to prove his case and merely the absence of defendant appearing as witness had no bearing on the outcome of the civil suit and no adverse inference can be drawn against him. The substantial questions of law are answered accordingly.

CMP No. 539 of 2005.

20. The plaintiff has preferred an application under Order 41 Rule 27 CPC read with Section 151 CPC for permission to lead additional evidence. The statement relied upon by the plaintiff Annexure A-1 is dated 7.8.2000. The purpose of application under Order 41 Rule 27 CPC read with Section 151 CPC is not to fill up the lacunae. It is not believable that the plaintiff did not know about the statement recorded wayback on 7.8.2000 in case No. 25/1999 titled as Anant Ram vrs. Makhan Singh. The plaintiff ought to have been vigilant

while leading his evidence. Moreover, the plaintiff has not given the date and the year when he came to know about this statement. The plaintiff has failed to prove that despite exercise of due diligence Ext. PW-2/B could not be produced before the appellate Court. Moreover, PW-3 Makhan Singh has appeared on behalf of the plaintiff in the present matter. Accordingly, there is no merit in this application and the same is dismissed.

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

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Chet Ram (since deceased through LRs) .....Appellant(s)
Versus
Ami Chand & Others .....Respondents

RSA No. 461 of 2014 &
CMP No. 9882 of 2015.
Decided on: 29th October, 2015.

Code of Civil Procedure, 1908- Order 22 Rule 4(4)- It was noticed in Regular Second Appeal, that defendant No. 7 had died when the matter was pending before the First Appellate Court- although, defendant No. 7 has neither filed written statement nor had he contested the suit before the trial Court- since the death had taken place during the pendency of appeal before First Appellate Court; therefore, the application under Order 22 Rule 4(4) read with Section 151 C.P.C. shall only lie before the Court of first appeal- matter remanded to the First Appellate Court for the decision afresh as per the Law after deciding the question of abatement of appeal, if any. (Para- 1 to 6)

Case referred:
T Gnanavel versus T.S. Kanagaraj and Another, (2009)14, SCC, 294

For the appellant : Mr. K.R. Thakur, Advocate
For the respondents : Mr. B.C. Verma, Advocate for respondents No.1 to 4.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

This appeal is directed against the judgment and decree dated 9.6.2014, passed by learned District Judge, Shimla, in Civil Appeal No. 84-S/13 of 2008. The same after its admission is at the stage of final hearing. When the process was issued to respondent-proforma defendant No.7 Om Prakash, it transpired that he has expired on 2.7.2013 i.e. during the pendency of the appeal in the lower appellate Court.

2. This has led in filing the application under Order 22 Rule 4 (4) read with Section 151 of the Code of Civil Procedure, CMP No. 9882 of 2015, aforesaid for deletion of his name on the ground *inter alia* that deceased respondent No.7 Om Prakash was only proforma defendant in the suit and that no relief was claimed against him. Learned counsel submits that respondent-proforma defendant No.7 Om Prakash was exparte in the trial

Court and even in the lower appellate Court also. He has neither filed the written statement nor contested the suit.

3. True it is that in a case where the defendant has failed to file written statement and if written statement is filed to contest the suit or allowed himself to be proceeded against exparte, the plaintiff can be exempted from substitution of the legal heirs and legal representatives of such deceased defendant. However, the application for the purpose should have been filed during the pendency of the appeal in the lower appellate Court for the reason that the death of respondent-defendant No.7 Om Prakash has occurred on 2.7.2013, when the appeal was pending disposal in the lower appellate Court.

4. The law on the point is no more *res integra* as the Hon'ble Apex Court in ***T Gnanavel*** versus ***T.S. Kanagaraj and Another, (2009)14, SCC, 294,*** after discussing the scope of the provisions contained under Order 22 Rule 4(4) of the Code of Civil Procedure, has held as follows:-

> "25. We are unable to accede to this submission of Mr. Ranjit Kumar, the learned senior counsel appearing on behalf of the appellant for the simple reasons viz. (1) on the abatement caused on the death of defendant, the suit automatically abated in view of the provisions under Order XXII Rule 4(3) CPC and (2) from the decision in the case of Zahirul Islam vs. Mohd. Usman and Others, (supra), it would be evident that no exemption was sought or granted under Order XXII Rule 4(4) CPC in the aforesaid decision. In any view of the matter, Order XXII Rule 4(4) CPC clearly says that such exemption to bring on record the heirs and legal representatives of the deceased could be taken or granted by the court only before the judgment is pronounced and not after it.
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> 26. In view of our discussions made hereinabove and after going through the provisions under Order XXII Rule 4(4) CPC, as discussed herein earlier, and in view of the principles laid down by the aforesaid decision, it is, therefore, clear that if exemption, which is provided under Order XXII Rule 4(4) CPC is obtained from the Court before the delivery of the judgment, in that case, it would be open to the Court to exempt the plaintiff from bringing on record the heirs and legal representatives of the defendant even if, the defendant had died during the pendency of the suit as if the judgment was pronounced by treating that the defendant was alive notwithstanding the death of such defendant and shall have the same force and effect as if it was pronounced before the death had taken place. That being the position, we are, therefore, of the view that since in this case, admittedly, exemption was obtained after the judgment was pronounced, the provision of Order XXII Rule 4(4) CPC would not be attracted.
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> 27. In our view, the aforesaid decision in the case of Zahirul Islam can also be distinguished on facts. As noted herein earlier, in that decision, the plaintiff did not seek permission of the Court under Order XXII Rule 4(4) CPC and

in that view of the matter, this Court held that the legal representatives of the deceased defendant was entitled to be brought on record in the suit. Admittedly, in our case, after the judgment was pronounced, the permission was sought to exempt the plaintiff from the necessity of substituting the heirs and legal representatives of the defendant and not before it. That being the position, we do not find any ground to rely on this judgment of this Court as sought by Mr. Ranjit Kumar, learned senior counsel appearing for the appellant.

28. This view has also been expressed by Madras High Court in a decision reported in Elisa and others vs. A. Doss, in which the Madras High Court in paragraph 3 had observed as follows :-

> "It is seen from the rules that an application to bring the legal representatives on record shall be made within the time limited by law and if no application is made within the said period, the suit shall abate as against the deceased defendant. That is the effect of sub rule (3). Sub-rule (4) provides an exception to sub-rule (3). Under Sub-Rule (4), it is open to the court to pass an order exempting the plaintiff from the necessity of bringing on record the legal representatives of any defendant, who had failed to file a written statement or if having filed the written statement, failed to appear and contest the suit at the hearing. But, the language of sub rule (4) is clear enough to show that the court must pass an order exempting the plaintiff from the necessity of substituting the legal representatives. Of course, it is not necessary for the plaintiff to file a written application seeking such exemption, as the rule does not require one. Under the said rule, the court must apply its mind and think it fit, in the facts and circumstances of the case, to grant the exemption. For granting such exemption, the defendant who died should have remained exparte, either without filing the written statement or after filing the written statement. It is clear from the language of the said rule that the order of exemption shall be passed before a judgment in the case is pronounced. The relevant portion of the said rule reads that the court `may exempt the plaintiff' and `judgment may, in such case pronounced.' That part of the sub rule says that the order of exemption should precede the judgment to be pronounced in the suit."
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> (emphasis supplied)

29. For the reasons aforesaid, we are of the opinion that the High Court had rightly interpreted the provision of Order XXII Rule 4 (4) CPC and accordingly held that the decree passed by the trial court on 20th of December, 2002, in O.S.

No. 3946 of 1999 was a nullity in the eye of the law as the defendant had died during the pendency of the suit for specific performance of the contract for sale and no exemption was sought at the instance of the plaintiff/appellant to bring on record the heirs and legal representatives of the defendant before the judgment was pronounced."

5. In view of the ratio of the judgment supra, the judgment and decree under challenge in the present appeal, being against a dead person, is nullity. This Court, therefore, is not left with any alternative except to quash the impugned judgment and decree and to remand the case to the lower appellate Court for fresh disposal after dealing with the issue of substitution of legal representatives of deceased respondent-proforma defendant No.7 Shri Om Prakash or grant exemption to the plaintiff from substitution of his legal representatives, in accordance with law.

6. In view of what has been said hereinabove, the judgment and decree under challenge in this appeal is ordered to be quashed and set aside. The trial Court to decide the appeal afresh, after deciding the question of abatement of the appeal, if any, on the death of respondent-defendant No.7 Om Prakash or substitution of his legal representatives/grant of exemption to appellant-plaintiff from substitution of his legal representatives as the case may be. The parties through learned counsel representing them are directed to appear in the lower appellate Court on ***7th December, 2015***. Records be sent back to the lower appellate Court forthwith so as to reach there well before the date fixed. The appeal stands disposed of accordingly. Pending application(s), if any, shall also stand disposed of.

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BEFORE THE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Smt. Neena and others ...Appellants/Defendants.

Versus

Smt. Sunehru Devi and others ...Respondent/Plaintiff/Proforma respondents.

R.S.A. No. 489 of 2004
Date of decision: 29.10.2015.

Specific Relief Act, 1963- Section 38- Plaintiff claimed that being mother of the deceased she was having share in death-cum- retirement gratuity, family pension and G.P.F. amount which was paid to defendant No. 2 despite representation made by the plaintiff- defendants pleaded that amount is payable to nominee in accordance with the rule and same was rightly paid to them- plaintiff is mother of the deceased whereas defendants No.3 to 5 were nominees of the deceased- held, that nominee is entitled to receive money but he holds it on behalf of other legal heirs- plaintiff being class-I legal heir is entitled to 1/4th share and defendants No. 3 to 5 would be entitled to 3/4th share- Appellate Court had rightly granted the amount to the plaintiff- appeal dismissed. (Para-10 to 14)

Cases referred:
Sarbati Devi and another vs. Smt. Usha Devi, (1984) 1 SCC 424

Vishin N. Khanchandani and another vs. Vidya Lachmandas Khanchandani and another (2000) 6 SCC 724
Ram Chander Talwar and another vs. Devender Kumar Talwar and others (2010) 10 SCC 671

For the Appellants: Mr. N.K. Sood, Senior Advocate, with Mr. Aman Sood, Advocate.
For the Respondents: Mr. Harsh Khanna, Advocate, for respondent No.1.
Mr. V.K. Verma, Addl. Advocate General, with Ms. Parul Negi, Dy. Advocate General, for proforma respondents.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

The present appeal has been preferred by the appellants/Defendants against judgment and decree dated 10.08.2004 passed in Civil Appeal No. 99-S/13 of 2002 by learned District Judge, Shimla, whereby he partly allowed the appeal and decreed the suit of the plaintiff for recovery of a sum of Rs.63,337/- against the appellants.

2. The facts, in brief, are that the respondent No.1/plaintiff (hereinafter referred to as the 'plaintiff') filed a suit for recovery of share of the plaintiff and for relief of mandatory and prohibitory injunction against the defendants/appellants. It was claimed that the plaintiff being the mother of deceased Santosh Kumar was having a share in the amount of death-cum-retirement gratuity, family pension and G.P.F. amount which was payable to the heirs of Santosh Kumar, after his death. This amount is said to have not been paid to the plaintiff by the defendants-State of Himachal and Secretary (SAD) to the Govt. of H.P.(defendant No.2) despite representation having been made by the plaintiff to them in this behalf. In the suit, the plaintiff prayed for recovery of her share in the amount of benefits paid to defendants No. 3 to 5 by defendants No. 1 and 2. The plaintiff also prayed for relief of mandatory injunction for seeking a direction to defendants No. 1 and 2 to recover the amount of share of the plaintiff from defendants No. 3 to 5 and release the same in favour of the plaintiff. The plaintiff also prayed for relief of prohibitory injunction against the defendants No. 3 to 5 for directing them to not appropriate or usurp the amount of the share of the plaintiff which is said to have been wrongly released to their favour.

3. The suit was contested by the defendants. The defendants- State of Himachal Pradesh and Secretary (SAD) in their reply claimed that as per CCS (Pension) Rules, 1972, the amount of gratuity and family pension was payable to the nominee of the deceased Government employee. It was also stated that deceased Santosh Kumar had made nominations in favour of his legally widowed wife, daughter and son (defendants No. 3 to 5) and all such dues have rightly been paid to the nominees, defendants No. 3 to 5 and, therefore, the suit was not maintainable against defendants No. 1 and 2. It was also averred that the plaintiff, who was the mother of deceased Santosh Kumar, had remarried on 23.10.1983 to one Kanthu Ram and, therefore, she was not entitled to seek any share from the amount of pension, GPF and gratuity etc. payable to the legal heirs of Santosh Kumar, after his death. The suit was also stated to be bad for non-joinder of necessary parties insofar as Senior Deputy Accountant General, who is said to have authorized the payment of retirement benefit, was not impleaded as a party in the suit. The defendants admitted that a sum of Rs. 44,658/- was paid to defendants No. 3 to 5 as the legal heirs of Santosh Kumar.

4. In separate written statement, the defendants No.3 to 5 also claimed that the plaintiff had no locus standi or right, title to maintain the suit insofar as the grant of

gratuity and pension was payable to the nominee of the deceased Santosh Kumar, who had nominated defendants No. 3 to 5 as the persons entitled to receive this amount after his death. It was also averred that the court has no jurisdiction to entertain the suit because the dispute related to the service benefits and was cognizable only by H.P.State Administrative Tribunal. The suit was also stated to be bad for non-joinder of necessary particulars.

5. On the pleadings of the parties, the learned trial Court framed the following issues:

1. Whether the plaintiff being mother of deceased Santosh Kumar is entitled for the benefit alongwith defendants No. 3 to 5 as alleged? OPP.
2. Whether the plaintiff is entitled for decree of mandatory injunction, as prayed? OPP
3. Whether the plaintiff is entitled for permanent prohibitory injunction as prayed? OPP
4. Whether suit is not maintainable, as alleged in objection No. 3 and 4? OPD
5. Whether suit is bad for non-joinder of necessary parties? OPD
6. Whether this court has no jurisdiction? OPD
7. Relief.

6. After recording the evidence, the learned trial Court dismissed the suit of the plaintiff vide judgment and decree dated 1.6.2002. Aggrieved against the said judgment and decree, the plaintiff preferred an appeal before the learned lower Appellate Court, who vide his judgment and decree dated 10.8.2004 has allowed the appeal and the suit of the plaintiff has been ordered to be decreed for recovery of a sum of `.63,337/- in her favour and against defendants No. 3 to 5. It is against this judgment and decree, which has been challenged by the appellants/defendants No. 3 to 5 before this Court.

7. On 16.11.2004, this Court admitted the appeal on the following substantial questions of law:

1. Whether the findings of the learned appellate Court are vitiated by mis-interpretation of the pleadings and law?
2. Whether the Civil Court has no jurisdiction to try the suit?
3. Whether in view of the nomination of the widow and other minor children, the plaintiff is not entitled to the service benefits of deceased Santosh Kumar?

Substantial Question of law No.2:

8. At the outset, I proceed to determine question No.2, which relates to the jurisdiction of the Civil Court to try the instant suit. It is not in dispute that a specific issue i.e. issue No.6 was framed by the learned trial Court (supra) to this effect and the same was answered against the defendants/appellants. This finding has attained finality since the appellants did not question the same before the learned lower Appellate Court.

Substantial Questions of Law No. 1 and 3:

These substantial questions of law are inter-connected and inter-related and, therefore, are being disposed of by a common reasoning.

9. It is not in dispute that the plaintiff/respondent No.1 is the mother of deceased Santosh Kumar, and was therefore, a class-1 heir in respect of the estate left behind by him on his death. It is also not in dispute that Santosh Kumar was employed as a

Peon in Government Secretariat and had died on 14.2.1998 and had left behind the defendants No. 3 to 5 as his other legal heirs being his widow, daughter and son.

10. PW-3 Manohar Lal Sharma, who was a Senior Assistant in Government Secretariat, had deposed that a total sum of `2,53,348/- had been paid by defendants No. 1 and 2 to defendants No. 3 to 5 as terminal benefits in the shape of death-cum-retirement gratuity, family pension and balance amount of GPF and insurance compensation. It has further been established on record that the defendants No. 3 to 5 were the nominees with regard to the pension and gratuity etc. Once it is not in dispute that the plaintiff was the mother and class-1 legal heir in respect of the estate of Santosh Kumar, then her entitlement to 1/4th share in his estate cannot be disputed as the remaining 3/4th share would go to defendants No. 3 to 5, who are the other class-1 legal heirs of the deceased being his widow, daughter and son.

11. Insofar as the legal status of nominee is concerned, the same is no longer *res integra*. The Hon'ble Supreme Court for the first time clarified the issue in case ***Smt. Sarbati Devi and another vs. Smt. Usha Devi, (1984) 1 SCC 424*** and held that in context of Section 39 of the Life Insurance Act, 1938 (in short LIC Act), a mere nomination under Section 39 of the Act did not confer "beneficial interest" in the nominee qua the amount payable under the policy on the death of the assured. The nomination was indicative only of the authority or the person who was to receive the amount, pursuant to which the insurer would get a valid discharge of its liability under the policy. This however, would not belie the claim of the heirs of the asssured made in accordance with law of succession. It is apt to reproduce para 4 of the judgment which reads thus:

> *"4. At the out set it should be mentioned that except the decision of the Allahabad High Court in Kesari Devi v. Dharma Devi, AIR 1962 All 355, on which reliance was placed by the High Court in dismissing the appeal before it and the two decisions of the Delhi High Court in S. Fauza Singh v. Kuldip Singh & Ors., AIR 1978 Del 276 and Mrs. Uma Sehgal & Anr. v. Dwarka Dass Sehgal & Ors AIR 1982 Del 36 in all other decisions cited before us the view taken is that the nominee under section 39 of the Act is nothing more than an agent to receive the money due under a life insurance policy in the circumstances similar to those in the present case and that the money remains the property of the assured during his lifetime and on his death forms part of his estate subject to the law of succession applicable to him. The cases which have taken the above view are Ramballav DhanJhania v. Gangadhar Nathmall AIR 1956 Cal 275, Life Insurance Corporation of India v. United Bank of India Ltd. & Anr., AIR 1970 Cal 513, D. Mohanavelu Muldaliar & Anr. v. Indian Insurance and Banking Corporation Ltd. Salem & Anr.,AIR 1957 Mad 115, Sarojini Amma v. Neelakanta Pillai AIR 1961 Ker 126, Atmaram Mohanlal Panchal v. Gunavantiben & Ors.,AIR 1977 Guj 134, Malli Dei vs. Kanchan Prava Dei, AIR 1973 Ori 83 and Lakshmi Amma v. Sagnna Bhagath & Ors.,ILR 1973 Kant 827 Since there is a conflict of judicial opinion on the question involved in this case it is necessary to examine the above cases at some length. The law in force in England on the above question is summarised in Halsbury's Laws of England (Fourth Edition), Vol. 25, Para 579 thus :*
>
> > *"579. Position of third party. - The policy money payable on the death of the assured may be expressed to be payable to a third party and the third party is then prima facie merely the agent for the time being of the legal owner and has his authority to receive the policy money and to give a good discharge; but he generally has no right to sue the*

insurers in his own name. The question has been raised whether the third party's authority to receive the policy money is terminated by the death of the assured; it seems, however, that unless and until they are otherwise directed by the assured's personal representatives the insurers may pay the money to the third party and get a good discharge from him."

12. In ***Vishin N. Khanchandani and another vs. Vidya Lachmandas Khanchandani and another (2000) 6 SCC 724,*** the legal position was reiterated and it was held:

"10.....The nomination only indicated the hand which was authorized to receive the amount on the payment of which the insurer got a valid discharge of its liability under the policy. The policy holder continued to have interest in the policy during his lifetime and the nominee acquired no sort of interest in the policy during the lifetime of the policy holder. On the death of the policy holder, the amount payable under the policy became part of his estate which was governed by the law of succession applicable to him. Such succession may be testamentary or intestate. Section 39 did not operate as a third kind of succession which could be styled as a statutory testament. A nominee could not be treated as being equivalent to an heir or legatee. The amount of interest under the policy could, therefore, be claimed by the heirs of the assured in accordance with law of succession governing them."

13. In ***Ram Chander Talwar and another vs. Devender Kumar Talwar and others (2010) 10 SCC 671,*** it was held that nomination merely gives right of depositor to receive money lying in the account, but it does not make nominee owner of money lying in the account and it was held as under:

"3. *Mr. Swetank Shantanu, counsel appearing for the appellants, strenuously argued that by virtue of sub-section 2 of section 45 ZA, the nominee of the depositor, after the death of the depositor acquires all his/her rights to the express exclusion of all other persons and, therefore, the respondent can not lay any claim to the money in the account or in regard to the articles that might be lying in the bank locker held by their deceased mother. The submission is quite fallacious and is based on a complete misconception of the provision of the Act.*

4. Sub-section 2 of the 45-ZA, reads as follows:-

"45-ZA xxx xxx xxx xxx

(2) Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of such deposit, where a nomination made in the prescribed manner purports to confer on any person the right to receive the amount to deposit from the banking company, the nominee shall, on the death of the sole depositor or, as the case may be, on the death of all the depositors, become entitled to all the rights of the sole depositor or, as the case may be, of the depositors, in relation to such deposit to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner."

(emphasis added)

5. Section 45-ZA(2) merely puts the nominee in the shoes of the depositor after his death and clothes him with the exclusive right to receive the money

lying in the account. It gives him all the rights of the depositor so far as the depositor's account is concerned. But it by no stretch of imagination makes the nominee the owner of the money lying in the account. It needs to be remembered that the Banking Regulation Act is enacted to consolidate and amend the law relating to banking. It is in no way concerned with the question of succession. All the monies receivable by the nominee by virtue of section 45-ZA(2) would, therefore, form part of the estate of the deceased depositor and devolve according to the rule of succession to which the depositor may be governed.

6. We find that the High Court has rightly rejected the appellant's claim relying upon the decision of this Court in V.N. Khanchandani & Anr. v. V.L. Khanchandani & Anr., (2000) 6 SCC 724. The provision under Section 6(1) of the Government Saving Certificate Act, 1959 is materially and substantially the same as the provision of Section 45-ZA(2) of the Banking Regulation Act, 1949, and the decision in V.N. Khanchandani applies with full force to the facts of this case."

14. In view of the aforesaid exposition of law, it is absolutely clear that a mere nomination in itself does not confer any 'beneficial interest' in the nominee and the retiral benefits of the deceased would become part of his estate and would be governed by the law of succession. Since the plaintiff is admittedly class-I heir, her entitlement would be 1/4th share, whereas the defendants No. 3 to 5 who alone otherwise were the nominees would be entitled to the remaining 3/4th share, that too, not on account of their being the nominees, but because of their being the class-I heirs of the deceased. This is exactly what has been held by the learned lower Appellate Court while reversing the judgment and decree passed by the learned trial Court.

15. In view of the aforesaid discussion, the findings recorded by the learned lower Appellate Court are legally and factually correct and it does not suffer from any illegality, perversity much less impropriety. The learned lower Appellate Court has correctly interpreted the pleadings and has considered the law in its correct perspective and has also considered the effect of the nomination.

Accordingly, both the substantial questions of law are answered against the appellants.

16. In view of the aforesaid discussion, there is no merit in this appeal and the same 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.

Raksha Devi .....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 223 of 2015
Reserved on: October 28, 2015.
Decided on: October 29, 2015.

Indian Penal Code, 1860- Sections 302 and 307- Complainant party had a dispute over the land with the accused- complainant party went to bazaar and found accused digging the disputed land- accused was requested not to dig the same- accused went inside the kitchen, brought kerosene oil in a frying pan and threw the same upon the members of the complainant party- she also threw burning paper on the complainant party- complainant party suffered burn injuries- injured were taken to Hospital- 'S' succumbed to burn injuries- PW-1 admitted in her cross-examination that when accused threw kerosene oil on the complainant party they had not run away- the first reaction of the complainant party would have been to save themselves by running away from the spot- PW-3 did not narrate the incident to President of Gram Panchayat- he had also a dispute over the land with the accused- accused had also sustained 2% burn injury which was not explained- PW-3 admitted that complainant party had gone to the house of the accused to take possession of the land and kitchen from the accused- accused had a knowledge that throwing of kerosene followed by throwing of burning paper may cause death- appeal partly allowed- accused convicted for the commission of offence punishable under Section 304 Part-II of IPC instead of Section 302 of IPC- conviction and sentence under Section 307 of IPC upheld.

(Para-24 to 32)

For the appellant: Mr. N.K.Thakur, Sr. Advocate, with Mr. Rohit Bharol, Advocate.
For the respondent: Mr. M.A.Khan, Addl. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment and order dated 2.5.2015 and 7.5.2015, respectively, rendered by the learned Addl. Sessions Judge, Hamirpur, H.P. in Sessions Trial No. 02 of 2014, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offences punishable under Sections 302 and 307 IPC, was convicted and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.50,000/- and in default of payment of fine to further undergo simple imprisonment for one year under Section 302 IPC. She was further sentenced to undergo rigorous imprisonment for 7 years and to pay a fine of Rs.10,000/- and in case of default to further undergo simple imprisonment for 6 months for offence punishable under Section 307 IPC. Both the sentences were ordered to run concurrently.

2. The case of the prosecution, in a nut shell, is that on 3.10.2013 at about 12:50 PM, a telephonic message was received from MO CHC Bhoranj at PS Bhoranj that three ladies, namely, Sharda, Anju and Nisha, residents of village Patta have been brought for treatment as a burn case. PW-20 ASI Rajinder Singh alongwith other police officials visited the hospital. On reaching there the ladies were found admitted in burnt condition upon which an application Ext. PW-20/A was presented to M.O. CHC Bhoranj for their medical examination. Statement of Anju Devi wife of Shyam Dev was recorded vide Ext. PW-1/A. It was reported by her that her husband is Shyam Kumar and works in Ukhli Transport. Sh. Shyam Kumar has two brothers who are her Jeth and Debar. They all live separately in village Patta. Her mother-in-law was living separately in their old house in Patta Bazar. They are having a family dispute with respect to landed property with Jugal Kishore. On 3.10.2013 at about 12:00 noon, she alongwith her Jethani Sharda Devi and Devrani Nisha had gone to bazaar to see their mother-in-law. On reaching there, accused Raksha wife of Jugal Kishore was found digging the disputed land. She was requested not to dig the same. The accused went inside her kitchen and brought kerosene oil in a frying

pan and threw the same upon them. She also threw burning paper upon them. Their clothes caught fire. On their making hue and cry, their mother-in-law reached there and poured water on them. In the meantime, other persons from neighbourhood gathered there. Jasraj also appeared at the spot and removed them to CHC Bhoranj for treatment. She alongwith her Jethani Sharda and Devrani Nisha had received burn injuries. On her statement, FIR Ext. PW-16/A under Sections 307 and 506 IPC was registered against the accused. The injured Anju, Sharda and Nisha were referred to RH Hamirpur from where Nisha and Sharda were further referred to IGMC, Shimla. During treatment at IGMC, Shimla, Sharda Devi succumbed to injuries on 3.1.2014. The post mortem report is Ext. PW-15/B. The spot map was prepared. Frying Pan Ext. P-1 and plastic can Ext. P-4 were taken into possession vide memo Ext. PW-5/B. The clothes were also taken into possession. On completion of the investigation, challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 21 witnesses. The accused was also examined under Section 313 Cr.P.C. She pleaded innocence and examined 4 witnesses in defence. The learned trial Court convicted and sentenced the accused, as noticed hereinabove, for commission of offence under Sections 302 and 307 IPC for causing death of Sharda Devi and attempting to kill Anju Devi and Nisha. Hence, this appeal.

4. Mr. N.K.Thakur, Sr. Advocate, for the accused has vehemently argued that the prosecution has failed to prove the case against the accused. On the other hand, Mr. M.A.Khan, Addl. Advocate General, appearing on behalf of the State, has supported the judgment/order of the learned trial Court dated 2/7.5.2015.

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

6. PW-1 Anju Devi deposed that Sh. Shyam Kumar is her husband and they were residing at Village Patta. Her other brothers-in-law are also residing in village Patta. They are living separately and her mother-in-law is residing at Patta bazaar in ancestral house. Accused is daughter-in-law of Dina Nath. They are having a family dispute with the family of accused. On 3.10.2013, she alongwith Sharda Devi and Nisha Kumari had gone to Patta bazaar to see her mother-in-law. When they reached there, they saw accused digging the disputed land. They asked her not to dig the same. On this, accused went inside her kitchen and came out with a frying pan filled with kerosene and threw it on them. Thereafter, she also threw a burning paper on them. Their clothes caught fire, resulting in burn injuries to Sharda Devi, herself and Nisha Kumari. They raised hue and cry on which, her mother-in-law came there and poured water on them. In the meantime, people from the vicinity also gathered there. They were taken to CHC Bhoranj. The police visited CHC Bhoranj. Her statement Ext. PW-1/A was recorded by the police. She was also subjected to medical examination. She sustained injuries on her left shoulder, arm, chest, back as well as left leg. Thereafter, she and Sharda Devi for further treatment were referred to RH Hamirpur and then to IGMC, Shimla. Sharda Devi succumbed to injuries on 3.1.2014. In her cross-examination, she admitted that the dispute was with regard to land and kitchen. On 3.10.2013, the accused had engaged a mason but she did not know his name. The accused was doing work on the land adjoining to kitchen which is their land. The accused was digging for construction of a latrine pit. The disputed kitchen abuts their old house on backside. The accused had dug the pit only to some extent. They were standing outside the kitchen near to door of the kitchen. They enquired from accused as to why she was doing the same in their land. The accused while threatening them went inside the kitchen and

came out with the frying pan within half a minute. The accused threw kerosene on them from the door of the kitchen. She threw kerosene only once. The gas stove was burning near to the door of the kitchen. She on lighting paper with the help of the same threw on them. They all together caught the fire as they were standing together. When accused threw kerosene oil on them, they did not run away.

7. PW-2 Nisha Kumari has corroborated the statement of PW-1 Anju Devi on all material aspects, the manner in which they received burn injuries. In her cross-examination, she admitted that the mason was not doing plastering work of the floor of the house of the accused. The accused was doing work near the door of the kitchen and they were standing there. She was standing in front of them and therefrom she went inside the kitchen. The accused threw kerosene oil from inside the kitchen. The paper was burning when kerosene was thrown on them. Kerosene was thrown only once. The burning paper was also thrown from inside the kitchen. She could not state as to upon whom the burning paper firstly fell but all of them together caught the fire. She denied the suggestion that Jasraj visited the spot about half an hour prior to their visiting the spot and had a quarrel with the accused, during which he threatened the accused to leave the possession of the kitchen.

8. PW-3 Jasraj Singh deposed that their mother lives in old ancestral house at Patta bazaar. Accused is daughter-in-law of his paternal Uncle Amar Nath. They are having a family dispute with the accused. On 3.10.2013, he was at his home and his wife Sharda Devi alongwith Anju and Nisha had gone to see his mother at Patta bazaar from where his wife conveyed to him that accused had started digging their land. She asked him to report the matter to Panchayat and to bring the representatives of the Panchayat to the spot. After some time, his mother called him up and told him that accused has burnt his wife, Anju and Nisha by pouring kerosene oil and asked him to reach on the spot immediately. He rushed to the spot and found them burnt. Thereafter, he took them to CHC Bhoranj. His wife was further referred for treatment to RH Hamirpur and she succumbed to burn injuries at IGMC, Shimla on 3.1.2014. In his cross-examination, he deposed that he received telephonic message from his wife regarding digging about 10-15 minutes prior to the message received from his mother regarding burning. On receiving the message, he visited the house of village President. He received telephonic message about burning when he was present at the house of village President. He did not inform the village President about the incident at the relevant time. They are having dispute about kitchen and the land adjoining the same. The accused had also occupied their land beneath her house. He admitted categorically that they want to take possession of kitchen and land from the accused. Though, volunteered that they have applied for partition. The accused was digging pit.

9. PW-4 Saraswati Devi deposed that she alongwith her husband were residing in Patta bazaar. There was a dispute qua construction of kitchen by the accused. On 3rd October, all her daughters-in-law had visited her. The accused by engaging a labourer was doing digging work and at that time she was sleeping on a bench in her house. When her daughters-in-law objected to the work of digging being done by the accused, she threatened them and further set them on fire by throwing kerosene oil. They raised hue and cry. She rushed to the spot. She found her daughters-in-law in fire and then she poured water on them. Thereafter, she telephonically informed Jasraj about the incident and then he visited the house of village President. Jasraj then came to the spot and took her daughters-in-law to the hospital.

10. PW-5 Savita Minhas is the President of Gram Panchayat Patta. She deposed that on 3.10.2013, Jasraj came to her and told that quarrel has taken place between accused, his wife and wives of his brothers with regard to digging of land by accused. He

requested her to visit the spot. She told him that she would visit later on. Jasraj thereafter left her house. After some time, she visited the spot but there was no one present on the spot. From the persons present there, she came to know that accused persons had set Sharda, Anju and Nisha on fire and they have been removed to CHC Bhoranj for treatment. In her cross-examination, she deposed that when she visited the spot, she came to know from the persons of vicinity that quarrel has taken place between accused and complainant party. Some burnt clothes were also lying there. No one told her that the accused has set the complainant party on fire.

11. PW-6 LC Rekha Devi deposed that accused produced a plastic Can and a frying pan to the I.O, which were taken into possession vide seizure memo Ext. PW-5/B.

12. PW-7 Const. Kuljesh Kumar has brought rukka to the Police Station vide Ext. PW-1/A. Thereafter, FIR was registered.

13. PW-9 Dr. Abhilaksh Kango deposed that Smt. Anju Devi was brought to the hospital with alleged history of burn injuries. Her clothes were partially burnt. Smell of kerosene was present in the clothes. Burn injuries were present on face, parietal region of skull, left side of chest and left arm. It also included left upper thigh and left side of the upper back. 30-40% of superficial to deep burns were present. After examination, first aid treatment was given and patient was referred to RH Hamirpur for further examination. The injuries were found grievous in nature. The injuries were dangerous to life. He issued MLC Ext. PW-9/A. He also examined Sharda Devi. As per the Surgeon's opinion, the injuries were grievous in nature and dangerous to life. He issued MLC Ext. PW-9/B. He opined that the death was caused due to septicemia shock due to approximately 68% of dermal and epidermal burns. He also examined Nisha Devi. He noticed burn injuries on right arm to the extent of 4% superficial burns. The patient was referred for surgical opinion and final opinion was reserved. As per the Surgeon's opinion, the injuries were simple in nature. He issued MLC Ext. PW-9/C.

14. PW-12 Dr. Yash Pal deposed that Anju Devi remained under his treatment at IGMC Shimla from 4.10.2013 to 25.10.2013 and was treated for 20% superficial and deep burns.

15. PW-13 Dr. Parikshit Malhotra, deposed that wife of Jasraj was referred from RH Hamirpur. She was admitted in Female Surgery Unit IV of IGMC, Shimla on 3.10.2013 at 10.24 PM, with approximately 55-60% total body surface area of superficial to deep burn. The patient succumbed to injuries on 3.1.2014 at 5:45 AM.

16. PW-15 Dr. Dharuv Gupta deposed that he conducted the post mortem examination on Sharda Devi and issued report Ext. PW-15/B. The probable time that elapsed between injury and death delayed and between death and postmortem was within 6-12 hours. In his opinion, the deceased died as a result of septicemia shock secondary to Epidermal/Dermo-Epidermal burns equivalent to 68% (approx.) ante mortem in nature.

17. PW-17 Dr. Nikhil Ahluwalia, deposed that he gave surgical opinion over MLC Ext. PW-9/C in respect of burn injuries to Nisha Devi. As per his opinion, she had 4% first degree burns over the forearm. Nature of injury was simple.

18. PW-20 ASI Rajinder Singh was the I.O. in the case. He received information from M.O. CHC Bhoranj. The statement of Anju Devi was recorded under Section 154 Cr.P.C. The statements of the witnesses were also recorded under Section 161 Cr.P.C. The recoveries were made from the spot including burnt clothes. The spot map was also prepared.

19. PW-21 SI Sandeep Kumar has prepared the inquest papers.

20. The accused has also examined DW-1 MHC Subhash Chand to prove FIR Ext. DW-1/A registered by her against the complainant party dated 3.10.2013.

21. DW-2 Sanjeev Kumar deposed that he was standing outside the godown and saw that three ladies were abusing accused Raksha Devi and went to her kitchen. Accused had engaged a mason for the purpose of flooring of her house. In the meantime, he heard loud noise from the kitchen of accused raising a voice for saving. On hearing noise, many persons gathered there. He saw that all persons present in the kitchen had caught fire.

22. DW-3 Shamneesh Kumar has proved MLC Ext. DW-3/A.

23. DW-4 Dr. Abhilaksh Kango has also examined the three ladies alongwith the accused. He has noticed one mild superficial burn on upper part of left side of back and left elbow and left hand middle finger which constituted 2% burn injuries collectively. The injuries were simple in nature. He issued MLC Ext. DW-3/A in respect of accused.

24. What emerges from the evidence discussed hereinabove, is that the complainant party had dispute with the accused over a portion of the land. According to the prosecution case, the accused was digging pit. PW-1 Anju Devi, PW-2 Nisha Kumari and Sharda Devi (deceased) had gone to Patta bazaar to see their mother-in-law. When they reached there, they saw accused digging the disputed land. They asked her not to dig the land. The accused went inside the kitchen and brought frying pan filled with kerosene. She threw the same on them and then she had thrown burning paper on them resulting in burn injuries to Sharda Devi, herself, Nisha Kumari and Anju Devi. Sharda Devi succumbed to injuries on 3.1.2014 at IGMC, Shimla. The injuries received by Anju Devi were also opined to be grievous by PW-9 Dr. Abhilaksh Kango.

25. PW-1 Anju Devi has admitted in her cross-examination that they had a family dispute with the family of accused. The dispute between them was with regard to land and kitchen. She categorically deposed in her cross-examination that when accused person threw kerosene oil on them, they did not run away. The first reaction of these women would have been to save themselves by running away from the spot before they were put on fire instead of standing on the spot.

26. PW-3 Jasraj deposed that he went to the President of Gram Panchayat but surprisingly, he has not narrated the incident to her. He has admitted in his cross-examination that they were having dispute about kitchen and land adjoining the same. He has also admitted that they went to take possession of kitchen and land from the accused. The immediate reaction of Jasraj would have been to reach the spot to save injured persons instead of going to PW-5 President of the Gram Panchayat, Patta.

27. According to PW-9 Dr. Abhilaksh Kango, PW-1 Anju Devi had received superficial to deep burns to the extent of 30-40%. The injuries were found grievous in nature. The injuries were also dangerous to life. He issued MLC Ext. PW-9/A. He also examined Sharda Devi. She had suffered 60-70% superficial deep burn injuries. As per the Surgeon's opinion, the injuries were grievous in nature and dangerous to life. He issued MLC Ext. PW-9/B. He opined that the death was caused by septicemia shock due to approximately 68% of dermal and epidermal burns. He noticed burn injuries on right arm to the extent of 4% superficial burns on PW-2 Nisha Kumari. He issued MLC Ext. PW-9/C. Sharda Devi succumbed to injuries on 3.1.2014 at 5:45 AM. The post mortem was conducted by PW-15 Dr. Dhruv Gupta. According to him, the deceased died as a result of

septicemia shock secondary to epidermal/dermo-epidermal burns equivalent to 68% and ante mortem in nature.

28. The accused has also lodged FIR Ext. DW-3/A and she was also medically examined by PW-9 Dr. Abhilaksh Kango. According to him, she received only 2% burn injuries.

29. It has come on record that there was dispute with regard to kitchen and adjoining land. PW-3 Jasraj, as noticed hereinabove, has categorically admitted that the complainant party had gone to the house of accused to take possession of kitchen and land from the accused. PW-1 Anju Devi has also admitted about the dispute with the family of the accused. PW-1 Anju Devi, PW-2 Nisha Kumari and PW-3 Jasraj and Sharda Devi had gone to the house of the accused. It is apparent that quarrel has taken place on the spot when the digging of the land was objected to by the witnesses. PW-4 Saraswati Devi has also deposed that there was dispute qua construction of kitchen by accused.

30. PW-1 Anju Devi, PW-2 Nisha Kumari and Sharda Devi have objected to the digging of land by the accused. The accused was all alone. According to these witnesses, the accused went inside the house and threw kerosene oil on them from frying pan. Thereafter, she threw burning paper on them. They caught fire. The defence taken by the accused before the trial Court was that she was all alone. PW-1 Anju Devi, PW-2 Nisha Kumari and Sharda Devi came on the spot. They had brought oil can with them. All of them tried to put her on fire. She pushed them and in the process all of them caught fire including her. She also received injuries. She filed FIR Ext. DW-1/A, under Section 452, 323, 504 and 34 IPC. Even if it is assumed as argued by Mr. Naresh Thakur, Sr. Advocate for the accused that the complainant party was aggressor and his client has exercised the right of private defence, the fact of the matter is that as per the evidence, the accused has thrown kerosene oil on PW-1 Anju Devi, PW-2 Nisha Kumari and Sharda Devi (deceased) and thereafter put them on fire by throwing burning paper. She may not have the intention at the time she threw kerosene oil on them but, definitely she had the knowledge that her act of throwing kerosene followed by throwing burning paper may cause death. Though the incident is dated 2.10.2013 but Sharda Devi has died in IGMC, Shimla on 3.1.2014 at 5:45 Am. The accused though has received burn injuries but these are only 2%.

31. The report of the chemical examiner is Ext. PA, which also shows that kerosene was detected in the contents of burnt clothes of Anju Devi and Sharda Devi. The injuries received by PW-2 Nisha Kumari were simple in nature. The grievous and life threatening injuries were received by PW-1 Anju Devi and Sharda Devi. PW-1 Anju Devi has received grievous injuries as per the opinion of PW-9 Dr. Abhilaksh Kango. PW-2 Nisha Kumari has received only 4% superficial burns and the injuries were simple in nature. In order to prove the case under Section 307 IPC, what has to be seen is the intention and not the nature of injuries, though in the present case, PW-1 Anju Devi has received serious and grievous injuries and injuries received by PW-2 Nisha Kumari were simple in nature.

32. In view of the observations and analysis made hereinabove, the appeal is partly allowed. The accused is convicted under Section 304 (part II) IPC instead of Section 302 IPC. The conviction and sentence under Section 307 IPC is upheld. The accused be heard on the quantum of sentence on 6.11.2015. The Registry is directed to prepare the production warrant and send the same to the concerned Superintendent of Jail for production of the accused on 6.11.2015.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Saroj .....Appellant

Versus

Brikam Jeet & Others .....Respondents

RSA No. 86 of 2013 &
CMP NO. 7479 of 2015.
Decided on: 29th October, 2015.

Code of Civil Procedure, 1908- Order 22 Rule 4(4)- It was noticed in Regular Second Appeal, that defendant No. 3 had died when the matter was pending before the First Appellate Court- defendant No. 3 has neither filed written statement nor had she contested the suit before the trial Court- since the death had taken place during the pendency of appeal before First Appellate Court; therefore, the application under Order 22 Rule 4(4) read with Section 151 C.P.C. shall only lie before the Court of first appeal- matter remanded to the First Appellate Court for the decision afresh as per the Law after deciding the question of abatement of appeal, if any. (Para- 1 to 6)

Case referred:
T Gnanavel versus T.S. Kanagaraj and Another, (2009)14, SCC, 294,

For the appellant : Mr. B.C. Verma, Advocate
For the respondents : Mr. Vaibhav Tanwar, Advocate vice counsel for respondent No.1.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

This appeal is directed against the judgment and decree dated 9.10.2012, passed by learned Additional District Judge, Fast Track Court, Shimla, Camp at Rohru in Civil Appeal RBT No. 69-R/13 of 2008/05. The same after its admission is at the stage of final hearing. When the process was issued to respondent-proforma defendant No.3 Dwarka Devi, it transpired that she has expired.

2. This has led in filing the application under Order 22 Rule 4 (4) read with Section 151 of the Code of Civil Procedure, CMP No. 7479 of 2015, aforesaid for deletion of her name on the ground *inter alia* that deceased respondent No.3 allowed herself to be proceeded against exparte not only in the trial Court but also in the lower appellate Court. She has neither filed the written statement nor contested the suit. Deceased respondent No.3 has died on 7.9.2006. Though death certificate has not been placed on record, however, the submissions to this effect in para 3 of the application CMP No. 7479 of 2015 are supported by the affidavit of the applicant, Saroj.

3. True it is that in a case where the defendant has failed to file the written statement and if written statement is filed to contest the suit or allowed himself to be proceeded against exparte, the plaintiff can be exempted from substitution of the legal heirs and legal representatives of such deceased defendant. However, the application for the purpose should have been filed during the pendency of the appeal in the lower appellate

Court for the reason that the death of respondent-defendant No.3 Dwarka Devi has occurred on 7.9.2006, when the appeal was pending disposal in the lower appellate Court.

4. The law on the point is no more *res integra* as the Hon'ble Apex Court in ***T Gnanavel*** versus ***T.S. Kanagaraj and Another, (2009)14, SCC, 294,*** after discussing the scope of the provisions contained under Order 22 Rule 4(4) of the Code of Civil Procedure, has held as follows:-

> "25. We are unable to accede to this submission of Mr. Ranjit Kumar, the learned senior counsel appearing on behalf of the appellant for the simple reasons viz. (1) on the abatement caused on the death of defendant, the suit automatically abated in view of the provisions under Order XXII Rule 4(3) CPC and (2) from the decision in the case of Zahirul Islam vs. Mohd. Usman and Others, (supra), it would be evident that no exemption was sought or granted under Order XXII Rule 4(4) CPC in the aforesaid decision. In any view of the matter, Order XXII Rule 4(4) CPC clearly says that such exemption to bring on record the heirs and legal representatives of the deceased could be taken or granted by the court only before the judgment is pronounced and not after it.
>
> 26. In view of our discussions made hereinabove and after going through the provisions under Order XXII Rule 4(4) CPC, as discussed herein earlier, and in view of the principles laid down by the aforesaid decision, it is, therefore, clear that if exemption, which is provided under Order XXII Rule 4(4) CPC is obtained from the Court before the delivery of the judgment, in that case, it would be open to the Court to exempt the plaintiff from bringing on record the heirs and legal representatives of the defendant even if, the defendant had died during the pendency of the suit as if the judgment was pronounced by treating that the defendant was alive notwithstanding the death of such defendant and shall have the same force and effect as if it was pronounced before the death had taken place. That being the position, we are, therefore, of the view that since in this case, admittedly, exemption was obtained after the judgment was pronounced, the provision of Order XXII Rule 4(4) CPC would not be attracted.
>
> 29. In our view, the aforesaid decision in the case of Zahirul Islam can also be distinguished on facts. As noted herein earlier, in that decision, the plaintiff did not seek permission of the Court under Order XXII Rule 4(4) CPC and in that view of the matter, this Court held that the legal representatives of the deceased defendant was entitled to be brought on record in the suit. Admittedly, in our case, after the judgment was pronounced, the permission was sought to exempt the plaintiff from the necessity of substituting the heirs and legal representatives of the defendant and not before it. That being the position, we do not find any ground to rely on this judgment of this Court as sought by Mr. Ranjit Kumar, learned senior counsel appearing for the appellant.
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> 30. This view has also been expressed by Madras High Court in a decision reported in Elisa and others vs. A. Doss, in which the Madras High Court in paragraph 3 had observed as follows :-
>
> > "It is seen from the rules that an application to bring the legal representatives on record shall be made within the time limited by law and if no application is made within the said period, the suit shall abate as against the deceased defendant. That is the effect of

> sub rule (3). Sub-rule (4) provides an exception to sub-rule (3). Under Sub-Rule (4), it is open to the court to pass an order exempting the plaintiff from the necessity of bringing on record the legal representatives of any defendant, who had failed to file a written statement or if having filed the written statement, failed to appear and contest the suit at the hearing. But, the language of sub rule (4) is clear enough to show that the court must pass an order exempting the plaintiff from the necessity of substituting the legal representatives. Of course, it is not necessary for the plaintiff to file a written application seeking such exemption, as the rule does not require one. Under the said rule, the court must apply its mind and think it fit, in the facts and circumstances of the case, to grant the exemption. For granting such exemption, the defendant who died should have remained exparte, either without filing the written statement or after filing the written statement. It is clear from the language of the said rule that the order of exemption shall be passed before a judgment in the case is pronounced. The relevant portion of the said rule reads that the court `may exempt the plaintiff' and `judgment may, in such case pronounced.' That part of the sub rule says that the order of exemption should precede the judgment to be pronounced in the suit." (emphasis supplied)
>
> 29. For the reasons aforesaid, we are of the opinion that the High Court had rightly interpreted the provision of Order XXII Rule 4 (4) CPC and accordingly held that the decree passed by the trial court on 20th of December, 2002, in O.S. No. 3946 of 1999 was a nullity in the eye of the law as the defendant had died during the pendency of the suit for specific performance of the contract for sale and no exemption was sought at the instance of the plaintiff/appellant to bring on record the heirs and legal representatives of the defendant before the judgment was pronounced."

5. In view of the ratio of the judgment supra, the judgment and decree under challenge in the present appeal, being against a dead person, is nullity. This Court, therefore, is not left with any alternative except to quash the impugned judgment and decree and to remand the case to the lower appellate Court for fresh disposal after dealing with the issue of substitution of legal representatives of deceased respondent-proforma defendant No.3 Smt. Dwarka Devi or grant exemption to the plaintiff from substitution of her legal representatives, in accordance with law.

6. In view of what has been said hereinabove, the judgment and decree under challenge in this appeal is ordered to be quashed and set aside. The trial Court to decide the appeal afresh, after deciding the question of abatement of the appeal, if any, on the death of respondent-defendant No.3 Dwarka Devi or substitution of her legal representatives/grant of exemption to appellant-plaintiff from substitution of her legal representatives as the case may be. The parties through learned counsel representing them are directed to appear in the lower appellate Court on ***7th December, 2015***. Records be sent back to the lower appellate Court forthwith so as to reach there well before the date fixed. 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.

State of Himachal Pradesh ....Appellant
Versus
Rajinder Kumar ....Respondent

Cr.A. No. 163/2006
Reserved on: 27.10.2015
Decided on: 29.10.2015

Indian Penal Code, 1860- Sections 451, 323, 506 and 336- Complainant was working in his kitchen garden- accused came there under the influence of liquor and gave fist blows to the complainant- PW-7 deposed in the Court that accused was holding a rifle in his hand- he had made material improvements in his testimony- there was contradiction regarding the number of stones recovered from the spot- it was admitted by the complainant that he had long standing dispute with the accused- held, that in these circumstances, prosecution had failed to prove its case and accused was rightly acquitted. (Para-13 and 14)

For the appellant: Mr. Parmod Thakur, Addl. A.G.
For the Respondent: Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 29.12.2005 rendered by the Judicial Magistrate 1st Class, Court No.II, Palampur in Crl. Case No.RBT No. 191-II/04/2000, whereby the respondent-accused (hereinafter referred to as the "accused" for convenience sake), who was charged with and tried for offences punishable under sections 451, 323, 506 and 336 IPC has been acquitted.

2. Case of the prosecution, in a nutshell, is that on 6.4.1998 PW-5 Anil Kumar was working in his kitchen garden at 8.30 P.M. Accused came to the spot under the influence of liquor. He started abusing him. His mother and younger brother were in the kitchen. Accused held Anil Kumar and brought him in the courtyard and gave fist blows. On alarm being raised, his mother and younger brother came to the spot. Thereafter, accused fled away from the spot. Statement of Anil Kumar was recorded vide Ex.PW-6/A. FIR Ex.PW-6/B was lodged by the Police of Police Station, Palampur. Investigating Officer visited the spot and prepared site plan Ex.PW-8/A. Medical examination of Anil Kumar was got conducted. MLC Ex.PW-4/A was obtained. Four stones Ex.P-1 to Ex.P-4 were seized by the police on being presented from the spot vide seizure memo Ex.PW-3/A. Statements of witnesses were recorded under section 161 of the Code of Criminal Procedure.

3. Charge was framed against the accused. Accused claimed trial. Prosecution examined as many as eight witnesses to prove the case against the accused. Statement of accused under Section 313 Cr.P.C. was recorded. He denied the incident and claimed innocence. The accused was acquitted by the trial court as noticed hereinabove. Hence, this appeal.

4. Mr. Parmod Thakur, learned Addl. A.G. has vehemently argued that the prosecution has proved its case against the accused.

5. Mr. Ajay Sharma has supported the judgment passed by the trial Court.

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

7. PW-1 Kamlesh Kumari is the mother of Anil Kumar. She has testified that on 6.4.1998 at about 8.30 P.M. when Anil Kumar was working in the kitchen garden, she and her younger son were in the kitchen. They heard noise outside. They went out and saw accused giving fist blows to her son. She, her younger son and other people rescued Anil Kumar. Vikram Singh was present at the spot. Accused threatened them to do away with their lives and also pelted stones on their house. In her cross-examination, she has admitted that Prithu was the father of accused. She has denied that they have illegally encroached upon the land of accused. She has admitted litigation with the family of accused, which was dismissed and expressed ignorance regarding any criminal proceedings. She has admitted that they were not on talking terms with the accused and his family. She has admitted that Vikram Singh resided at about 150 meters away from their house, but at that time lived with them. She has also admitted that Ram Parshad also resided at about 150 meters away from their house.

8. PW-2 Vikram Singh has deposed that he used to live in the house of Anil Kumar and when he heard the calls of Anil Kumar for help, he went out and saw accused holding Anil Kumar by his neck and beating him. He, PW-1 and her son intervened and rescued Anil Kumar. Accused threatened Anil Kumar. In his cross-examination, he has admitted that Bakshi Ram was his father and they have on going land dispute with the accused.

9. PW-3 Ram Parkash has deposed that on 6.4.1998 at about 8.30 P.M. he heard noise. On reaching the spot he saw accused quarreling with Anil Kumar. Accused gave beatings to Anil Kumar with fist blows. Anil Kumar sustained injuries. Stones Ex.P-1 to Ex.P-4 were seized by the police vide memo Ex.PW-3/A. He has admitted that he has on going boundary dispute with the accused.

10. PW-4 Dr. S.K. Bhatia has proved MLC Ex.PW-4/A. PW-5 Anil Kumar has deposed on 6.4.1998 at about 8.30 P.M. he was working in his kitchen garden. Accused under the influence of liquor came on the spot. He gave him beatings. He raised alarm. His mother and brother came to the spot and rescued him.

11. PW-7 Dilwar Chand has deposed that on 6.4.1998 at about 8.45 A.M., when he was at his house, he heard the noise. He saw that accused was pelting stones on the house of Kamlesh Kumari. Accused was holding a rifle in his hand and was threatening to kill them. He was associated in the investigation. In his cross-examination, he has admitted that they had land dispute and criminal cases against the accused.

12. PW-8 Sukh Ram was the Investigating Officer.

13. PW-7 Dilwar Chand has testified that accused was holding rifle in his hand. He has made improvements in his statement. According to Ex.PW-3/A, three stones were seized at the spot though it is also mentioned therein that four stones were recovered. PW-7 Dilwar Chand has also testified that only three stones were recovered from the spot. PW-1 Kamlesh Kumari has deposed that she and her younger son alongwith one Vikram Singh had gone to rescue Anil Kumar and the same version is given by PW-2 Vikram Singh. However, PW-5 Anil Kumar did not mention anywhere that Vikram Singh had come to his rescue. It is also not stated in Ex.PW-6/A. His version in Ex.PW-6/A is that his mother and younger brother had rescued him. The distance between the house of Ram Parshad and

Kamlesh Kumari is only 150 meters. In the site plan also details of the houses in the neighbourhood have not been given. It has come in the statements of PW-1 Kamlesh Kumari, PW-2 Vikram Singh, PW-3 Ram Parkash and PW-5 Anil Kumar that they have longstanding disputes with the accused.

14. In view of this, the prosecution has failed to prove the charges for offences punishable under sections 451, 323, 506 and 336 IPC against the accused

15. Accordingly, in view of the analysis and discussion made herein above, there is no merit in the appeal and the same is dismissed.

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

Himachal Energy Pvt Ltd ...Petitioner

Vs.

State of HP & others ...Respondents.

CWP No. 3164 of 2014
Decided on: 30.10.2015

Constitution of India, 1950- Article 226- Petitioner is aggrieved by reference made to the Labour Court- it is pleaded that the right of the petitioner to question the status of the respondent No. 3 as a workman would be foreclosed by reference order – held, that Labour Court is required to adjudicate the issues referred by Government for adjudication as well as incidental issues- petitioner would have a right to raise objection that respondent No. 3 is not a workman- further direction issued to the Labour Court to frame an issue regarding the status of respondent No. 3 in case of any dispute. (Para-3 to 7)

Case referred:
Workmen Vs. Hindustan Lever Ltd (1984) 1 SCC 728

For the Petitioner : Mr. Rahul Mahajan, Advocate.
For the Respondents : Mr.V.K. Verma, Mr. Rupinder Singh, Addl. AGs with Ms. Parul Negi, Dy AG for respondents.
Ms. Archana Dutt, Advocate for respondent No.3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge:

The petitioner has sought writ in the nature of certiorari for quashing and setting aside reference made to the Labour-cum-Industrial Court by the appropriate authority on 1.1.2014.

2. The petition has been filed on the apprehension that looking into the contents of the reference order as framed by the appropriate authority and the manner in which the words are couched therein, the right of the petitioner to question the status of the respondent No.3 as a workman within the meaning of Section 2(S) of the Industrial Disputes Act, 1947 would be foreclosed.

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

3. It is more than settled that whether the person is a workman or not depends upon factual matrix, the ingredients and the incidence of the definition as contained in Section 2 (S) of the Act when satisfied, the person satisfying same would be a workman. Negatively, if someone fails to satisfy one or the other ingredient or incident of the definition, he may not be held to be a workman within the meaning of expression in the Act.

4. To my mind, once the employer disputes the status of its employee to be that of the workman, then essentially the Tribunal would be obliged to decide the status of the person whether he is a workman or not.

5. No doubt, the Tribunal(hereinafter referred to as 'Tribunal') derives its jurisdiction by the order of reference and not on the determination of the jurisdictional fact which it must of necessity decide to acquire jurisdiction. In industrial adjudication, the issues are of two types: (i) those referred by the government for adjudication and set out in the order of reference and (ii) incidental issues which are sometimes the issues of law or issues of mixed law and fact. This is so held by the Hon'ble Supreme Court in **Workmen** Vs. **Hindustan Lever Ltd (1984) 1 SCC 728.** It is apt to reproduce the following observation:

> *"Ordinarily, the Tribunal after ascertaining on what issue the parties are at variance raises issues to focus attention on points in dispute. In industrial adjudication , issues are of two types: (i) those referred by the Government for adjudication and set out in the order for reference and (ii) incidental issues which are sometimes the issues of law or issues of mixed law and fact. The Tribunal may as well frame preliminary issues if the point on which the parties are at variance, as reflected in the preliminary issue, would go to the root of the matter.*

6. It is evident from the aforesaid exposition of law that not only the issues are required to be framed on the basis of reference made, but issues arising out of the pleadings of the parties are also required to be framed by the Labour Court.

7. Having said so, the apprehension of the petitioner appears to be ill-founded. However, in order to safeguard and protect the interest of petitioner as also to ensure that no prejudice is caused to it, it is hereby clarified that in the event of petitioner's raising a plea that respondent No.3 is not a workman under Section 2(S) of the Industrial Disputes Act, it shall be obligatory upon the Tribunal to frame an issue to this effect.

8. The petition is disposed of in the aforesaid terms, leaving the parties to bear the costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAO (MVA) No. 47 of 2015 a/w
FAOs No. 50 and 407 of 2015.
Date of decision: 30.10. 2015.

FAO No. 47/2015.

Meera Balnota .....Appellant.

Versus

New India Assurance Company and others ...Respondents

FAO No. 50/2015.

Meera Balnota .....Appellant.

Versus

New India Assurance Company and others ...Respondents

FAO No. 407/2015.

Ramla Devi and another .....Appellants.

Versus

Smt. Meera Balnota and others ...Respondents

Motor Vehicles Act, 1988- Section 149- Witness deposed that driver was having a driving licence to drive light motor vehicle and, therefore, driver was authorized to drive the same- further, insurer had not led any evidence to prove that deceased was travelling in the vehicle as a gratuitous passenger- held, that Insurer was rightly held liable by MACT. (Para- 14 to 18)

Motor Vehicles Act, 1988- Section 166- Deceased was 23 years of age- Tribunal on the basis of guess work held that deceased was earning Rs.10,000/- per month and deducted ½ share towards personal expenses as the deceased was bachelor- Tribunal had applied multiplier of '18' – held, that Tribunal had rightly assessed the compensation. (Para-22)

Cases referred:

Oriental Insurance Co. Ltd. Versus Smt. Amara Devi and others, I L R 2015 (II) HP 874

Kulwant Singh and others versus Oriental Insurance Company Ltd. (2015) 2 SCC 186

Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120

For the appellant(s):	Mr.Y.P. Sood, Advocate, for the appellants in FAOs No. 47 and 50 of 2015 and Ms. Aruna Chauhan, Advocate, for the appellants in FAO No. 407 of 2015.
For the respondent(s):	Mr. Ashwani K. Sharma, Sr. Advocate with Ms. Monika Shukla, Advocate, for respondent No.1 in FAOs No. 47 and 50 of 2015. Ms. Aruna Chauhan, Advocate, for respondents No. 2 and 3 in FAOs No. 47 and 50 of 2015. Mr. Y.P. Sood, Advocate, for respondent No.1 in FAO No. 407 of 2015. Mr. Ashwani K. Sharma, Sr. Advocate with Ms. Monika Shukla, Advocate, for respondent No.3 in FAO No. 407 of 2015. Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

All these appeals are directed against a common award dated 27.8.2014, made by the Motor Accident Claims Tribunal, Shimla (HP) Circuit Court Theog in two separate claim petitions, i.e., MAC Petition No. 87-T-2 of 2013/09 titled *Bishan Singh and another versus Smt. Meera Balnota and others* and *MAC Petition No. 86-T-2 of 2013/09 titled Sita Ram and another versus Smt. Meera Balnota and others,* for short "the Tribunal", whereby compensation to the tune of Rs.11,30,000/- with 5000/- costs and interest @7.5%

per annum came to be awarded in favour of the claimants in each of the claim petitions and insurer was directed to satisfy the award with right of recovery from the insured, hereinafter referred to as "the impugned award", for short.

2. Insurer, driver Rakesh Kumar and claimant Bishan Singh in MAC Petition No. 87-T-of 2013-09 have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

3. The insured/owner Meera Balnota has questioned the impugned award by the medium of FAO No. 47 of 2015 and FAO No. 50 of 2015, on the ground that the Tribunal has fallen in an error in granting the right of recovery to the insurer.

4. One of the claimants Ramla Devi in MAC Petition No. 86-T-2 of 2013-09 titled *Sita Ram and another versus Smt. Meera Balnota and others* has questioned the impugned award on the ground of adequacy of compensation.

5. In order to determine these appeals, it is necessary to give brief resume of the relevant facts herein.

6. In both the claim petitions, parents of the deceased namely, Satish Kumar and Neeraj Parkash had invoked the jurisdiction of the Motor Accidents Tribunal for the grant of compensation to the tune of Rs.20 lacs, as per the break-ups given in the claim petition on the grounds taken in the memo of claim petitions.

7. Precisely, the case putforth by the claimants was that driver Rakesh Kumar had driven the vehicle bearing registration No. HP63-1417 Mahindra Bolero Camper, rashly and negligently on 26.7.2006 at about 10 30. p.m. at Kailash "Dhank P.O. Kuthar, Tehsil Theog District Shimla, H.P. The deceased were on their way from Deha to Kathori alongwith grocery articles loaded in the said vehicle, went off the road and rolled down into deep gorge. The deceased suffered multiple injuries and succumbed to the same.

8. The respondents resisted and contested the claim petitions and the Tribunal framed the issues in both the claim petitions. It is apt to reproduce issues framed by the Tribunal in one of the claim petitions herein.

(i) *Whether deceased Sh. Satish Kumar died because of rash and negligent driving of vehicle in question by respondent No. 2 as alleged? OPP.*

(ii) *If issue No. 1 is proved ion the affirmative, whether the petitioners are entitled to compensation, if so, how much and from whom? OPP.*

(iii) *Whether the petition is not maintainable as alleged? OPR.*

(iv) *Whether the petitioners are estopped from filing of present petition due to their act and conduct OPR-1.*

(v) *Whether the petition is bad for mis-joinder and non-joinder of necessary parties as alleged? OPR-1.*

(vi) *Whether the vehicle in question was being driven at the relevant time against the terms and conditions of insurance policy as alleged, if so, its effect? OPR-3.*

(vii) *Whether the vehicle in question was being driven by its driver at the relevant time without any valid and effective driving licence, if so, its effect? OPR-3.*

(viii) Whether the deceased was traveling in the vehicle in question at the relevant time as a gratuitous passenger? OPR-3.

(ix) Relief.

9. Parties have led evidence.

10. The claimants have examined HC Dev Raj as PW1, Asha Kimta as PW3, Dhayan Singh as PW5 Dr. Iqbal Singh as PW6 and claimants Ramla Devi and Prabha Devi themselves appeared in the witnesses-box as PW2 and PW4 respectively.

11. The insurer has examined one witness, namely, Shyam Singh.

12. The Tribunal, after scanning the evidence held that the claimants have proved that the driver, namely, Rakesh Kumar has driven the vehicle rashly and negligently and caused the accident in which Satish Kumar and Neeraj Prakash sustained injuries and succumbed to the injuries. The said findings are not in dispute, accordingly, upheld.

13. Before I deal with issue No. 2, I deem it proper to deal with issues No. 3 to 5 at the first instance. It was for the insurer to lead evidence and prove the same, has not led any evidence. Accordingly, the findings returned by the Tribunal on these issues are upheld.

14. **Issues No. 6 and 7**. The insurer had to discharge the onus, has examined Shyam Lal, who has deposed that the driver was having licence to drive the LMV (NT), has proved the certificate Ext. RW1/A. The vehicle in question is a "light motor vehicle" and the driver was competent to drive the said vehicle.

15. This Court in ***FAO No. 125 of 2008*** titled ***Oriental Insurance Co. Ltd. Versus Smt. Amara Devi and others*** decided on 17.4.2015 and ***FAO No. 219 of 2008*** titled ***United India Insurance Co. Ltd. Versus Smt. Juma Devi and others*** decided on 14th August, 2015, has already held that the said vehicle falls within the definition of "light motor Vehicle" and the driver who is having driving licence to drive light motor vehicle, requires no endorsement to drive passenger vehicle. So the driver was having a valid driving licence.

16. The learned counsel for the claimants has also relied upon a recent judgment of the Supreme Court in case titled ***Kulwant Singh and others versus Oriental Insurance Company Ltd***. reported in ***(2015) 2 SCC 186,*** wherein same principles of law have been laid down. It is apt to reproduce para 9 of the said judgment herein.

> *"9.In S. Iyyapan , the question was whether the driver who had a licence to drive 'light motor vehicle' could drive 'light motor vehicle' used as a commercial vehicle, without obtaining endorsement to drive a commercial vehicle. It was held that in such a case, the Insurance Company could not disown its liability. It was observed:*
>
> > *"18. In the instant case, admittedly the driver was holding a valid driving licence to drive light motor vehicle. There is no dispute that the motor vehicle in question, by which accident took place, was Mahindra Maxi Cab. Merely because the driver did not get any endorsement in the driving licence to drive Mahindra Maxi Cab, which is a light motor vehicle, the High Court has committed grave error of law in holding that the insurer is not liable to pay compensation because the driver was not holding the licence to drive the commercial vehicle. The impugned judgment (Civil Misc. Appeal No.1016 of 2002, order dated 31.10.2008 (Mad) is, therefore, liable to be set aside."*

17. Having said so, the findings returned on issues No. 6 and 7 are set aside and it is held that the driver was competent to drive the offending vehicle and insured has not committed any willful breach. Accordingly, issues No. 6 and 7 are decided against the insurer.

18. **Issue No.8.** It was for the insurer to prove that the deceased were traveling in the offending vehicle as gratuitous passengers, has not led evidence and issues have been decided in favour of the claimants and against the insurer in both the claim petitions. The insurer has not questioned the said findings thus, the findings returned on issue No. 8 have attained finality and are accordingly upheld.

19. **Issue No.2.** The Tribunal has discussed all aspects of the case in paras 35 to 40 of the impugned award and came to the conclusion that the claimants are entitled to compensation to the tune of Rs.11,30,000/- in each claim petitions.

20. The adequacy of compensation is not in dispute in claim petition No. 87-T-2 of 2013/09 for the reasons that claimants have not questioned the same. Thus, it is held that the Tribunal has rightly awarded the compensation to the tune of Rs.11,30,000/- with costs, as stated supra.

21. In Claim Petition No. 86-T-2 of 2013/09, the claimants have questioned the impugned award on the ground of adequacy of compensation. The claimants in both the claim petitions have claimed Rs.20 lacs each, as per the break-ups given in the claim petitions and pleaded how they are entitled to the same, but has not been able to prove before the Tribunal.

22. The Tribunal in para 38 of the impugned award specifically held that Satish Kumar was 21 years of age and Neeraj Parkash was 23 years of age. Claim Petition No. 86-T-2 of 2013/09 relates to Neeraj Parkash. The Tribunal, after making guess work, held that deceased was earning Rs.10,000/- per month and after making one half deduction, in view the fact that the deceased was a bachelor read with the 2nd Schedule of the Motor Vehicles Act, for short "the Act, and ***Sarla Verma and others versus Delhi Transport Corporation and another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120*** and held that the parents have lost source of dependency to the tune of Rs.5000/- per month. The Tribunal has also applied the multiplier of "18", which came to be rightly awarded in terms of the ***Sarla Verma's*** and ***Reshma Kumar's*** cases supra. Having said so, the compensation awarded is adequate and cannot be said to be meager in any way.

23. Having glance of the above discussion, the Tribunal has fallen in an error in granting right of recovery to the insurer.

24. Viewed thus, the appeals being FAOs No. 47 and 50 of 2015 filed by the insured are allowed and insurer is held liable to pay the amount and FAO No. 407 of 2015 flied by the claimants for enhancement is dismissed.

25. The Registry/ Tribunal is directed to release the amount in favour of the claimants within one week from today, strictly, in terms of the conditions contained in the impugned award, through payee's cheque account and report compliance.

26. Send down the record, forthwith, after placing a copy of this judgment.

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

Ram Dei .....Appellant.
Versus
Smt. Chinta Mani and another .....Respondents.

RSA No. 571 of 2011.
Reserved on: 29.10.2015.
Decided on: 30.10.2015.

Indian Succession Act, 1925- Section 63- Plaintiff claimed that deceased had died intestate and mutation was attested on the basis of forged and fictitious Will- defendant pleaded that deceased had executed a Will in favour of the defndant- Will was duly proved by scribe and marginal witnesses- defendant was looking after the deceased- plaintiff admitted that deceased was residing with the defendant- Will was duly registered- held, that Will was duly proved- appeal dismissed. (Para-14)

For the appellant(s): Mr. Yogesh Chandel, Advocate.
For the respondents: Mr. Naveen K. Bhardwaj, 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 Addl. District Judge (FTC), Kullu, H.P. dated 9.8.2011, passed in Civil Appeal No. 05 of 2011.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the appellant-plaintiff Ram Dei and respondent Prema Dei, filed a suit for declaration to the effect that Lal Singh, predecessor-in-interest of the plaintiffs had died intestate leaving behind the parties to the lis as his legal heirs and after the death of Lal Singh, the plaintiffs are joint owners-in-in possession of the suit land to the extent of 2/3 share, i.e. 1/3 share each and the revenue entries showing the respondent-defendant (hereinafter referred to as the defendant) as owner-in-possession of the suit land vide mutation No. 6838 of Phati Shamshi, Kothi Khokhan, on the basis of the forged and fictitious registered Will No. 194 dated 17.5.1996 are wrong, illegal and contrary to the factual position. The consequential relief of permanent perpetual injunction to restrain the defendant from interfering in the peaceful and joint ownership of the plaintiffs to the extent of 2/3 share over the suit land and from encumbering or changing the nature of the suit land in any manner, whatsoever and from forcibly dispossessing the plaintiffs from the suit land was also prayed for. Lal Singh died intestate on 15.1.2007 leaving behind the plaintiffs and defendant as his daughters. Twelve years prior to his death Lal Singh was suffering from Blood Pressure and Paralysis. Lal Singh had firstly suffered a mild attack of paralysis in the year 1994 and thus he was not in a sound disposing state of mind. There was no question of executing the Will as Lal Singh loved his all the daughters equally and they were looking after his agricultural land. After the death of Lal Singh, the defendant started threatening the plaintiffs to oust and dispossess them from the suit land. When the plaintiffs were busy in performance of the last rites of deceased Lal Singh, defendant in connivance with the revenue officials got mutation No. 6838 attested on the basis of some procured, false and fabricated Will dated 17.5.1996.

3. The suit was contested by the defendant. According to the defendant Lal Singh, father of plaintiffs and defendant died on 14.1.2007. He denied that he died intestate. Lal Singh before his death was sick and defendant rendered services to him and had also borne the expenses of his treatment. Lal Singh had executed his last and final Will dated 17.5.1996 DW-2/A, whereby he bequeathed his property situated in Phati Shamshi, Kothi Khokhan, Tehsil and Distt. Kullu in the manner that 1-10-00 bighas in favour of plaintiff No. 2 Prema Dei and 1-00-00 bighas in favour of plaintiff No. 1 Ram Dei and rest of the land was bequeathed by him in favour of Chinta Mani, defendant.

4. The replication was filed. The learned Civil Judge, (Sr. Divn.), Lahaul and Spiti at Kullu, framed the issues on 11.6.2007. The suit was dismissed vide judgment dated 15.1.2011. The plaintiff Ram Dei, feeling aggrieved, preferred an appeal against the judgment and decree dated 15.1.2011. The learned Addl. District Judge (FTC, Kullu, dismissed the same on 9.8.2011. Hence, this regular second appeal.

5. The regular second appeal was admitted on the following substantial questions of law on 22.3.2012:

> "1. Whether the learned Court below can reach to a finding regarding the validity of the will merely on the basis of the oral evidences of given by the DW-1?
>
> 2. Whether the learned Court below is right in holding the alleged will as valid, by ignoring the evidence on record which shows that the defendant is involved in the execution of the will and other suspicious circumstances as is pointed out by the appellant/plaintiff in the execution of alleged will?
>
> 3. Whether the learned court below can reach to the finding regarding the state of the mind of the testator and dismisses the appeal of the appellant/plaintiff, by ignoring the specific evidence regarding the mental state of the testator given by PW-2?"

6. Mr. Yogesh Chandel, Advocate, on the basis of the substantial questions of law framed, has vehemently argued that both the Courts below have not correctly appreciated the documentary as well as the oral evidence. According to him, Will dated 17.5.1996 was not valid Will. He then contended that the defendant has failed to remove the suspicious circumstances surrounding the Will. He lastly contended that the testator was not in sound disposing state of mind. On the other hand, Mr. Naveen K. Bhardwaj, Advocate, has supported the judgments and decrees passed by both the Courts below.

7. Since all the substantial questions of law are inter-connected, hence are taken up together for discussion to avoid repetition of evidence.

8. I have heard learned counsel for the appellant and have also gone through the judgments and records of the case carefully.

9. PW-1 Ram Dei has testified that her father had three daughters i.e. She, Prema Dei and Chinta Mani. He had equal love and affection for all the three daughters. Her father was suffering from High Blood Pressure and he also suffered a paralytic attack in the year 1994. He was unable to walk. All the sisters were looking after their father. They all had cultivated his land. In the year 1999, their father had again suffered a paralytic attack as a result of which he was unable to speak and walk. Her father during his life time had never executed any Will. The alleged Will dated 17.5.1996 was forged and fictitious document. She has admitted that she has no animosity with the scribe. She was having no animosity with Sudhir Bhatnagar and Pradeep Sharma, the marginal witnesses of the Will.

She also admitted during the course of cross-examination that Lal Singh used to reside with defendant.

10. PW-2 Keshav Ram deposed that he was in visiting terms with Lal Singh. Lal Singh never disclosed with him that he had executed any Will. In the year 1994, Lal Singh had a paralytic attack as a result of which he was unable to walk. In the year 1999 again he had suffered an attack of paralysis due to which he was unable to walk and sleep. Lal Singh and his wife were looked after and maintained by all the three sisters.

11. The defendant has appeared as DW-1. She stated that Lal Singh due to old age used to remain ill. On 17.5.1996 Lal Singh had executed a Will (Ext. DW-2/A) in her favour and in favour of Ram Dei and Prema Dei. On 17.5.1996, he was in a perfect state of mind. The Will was executed by Lal Singh in a sound disposing state of mind without any influence or pressure from anyone. The Will was got registered by Lal Singh before Sub Registrar, Kullu. On that day, her father had handed over the Will to her in presence of both her sisters. She had rendered all sorts of services to Lal Singh as he was residing with her. Lal Singh expired on 15.1.2007. The Will bears the signatures of Lal Singh. She has denied the suggestion that her father has suffered a paralytic attack in the year 1994. The Will was scribed by Niranjan Dass Mahant DW-2. Pardeep Sharma DW-3 is one of the marginal witnesses.

12. DW-2 Niranjan Dass Mahant has led his evidence by filing affidavit. He deposed that he was working as petition writer. Sh. Lal Singh alongwith Pardeep Sharma Advocate and Sudhir Bhatnagar had come for scribing the Will. He scribed the Will. The Will was scribed at the instance of Lal Singh without any undue influence. Sh. Pardeep Sharma and Sudhir Bhatnagar Advocates were the marginal witnesses of the Will dated 17.5.1996. The Will was scribed in Court premises at Kullu. The Will was read over to the testator as well as the marginal witnesses. Sh. Lal Singh after admitting the contents of the same to be true and correct put his signatures on both the papers of the Will. The marginal witnesses thereafter put their signatures in his presence. He has entered the Will at Sr. No. 469 of his Register.

13. DW-3 Sh. Pardeep Sharma, has also led his evidence by way of affidavit. He testified that Lal Singh came to the Court on 17.5.1996. He got the Will scribed out of his free volition. The Will was written by Niranjan Dass, Petition Writer without any undue influence. He and Sudhir Bhatnagar were the marginal witnesses of the Will. The contents of the Will were read over and explained to Lal Singh. Lal Singh after admitting the contents of the same to be true and correct put his signatures on the Will in their presence on both the pages. He also signed the same as a marginal witness alongwith Sh. Sudhir Bhatnagar. Thereafter, the Will was got registered in the office of Sub Registrar, Kullu. The Sub Registrar Kullu, has read over the contents of the Will to Lal Singh and he after admitting the contents to be true and correct put his signatures on the endorsement. They also put their signatures on the endorsement in the presence of Sub Registrar.

14. The Will Ext. DW-2/A is dated 17.5.1996. The defendant has duly proved the execution of the Will Ext. DW-2/A. The Will was scribed by DW-2 Niranjan Dass Mahant in the Court premises. DW-3 Pardeep Sharma was the marginal witness along with Sudhir Bhatnagar. The Will was scribed by Lal Singh without any undue influence. The Will was also registered before the Sub Registrar, Kullu. It has come in the evidence that the defendant was looking after Lal Singh. PW-1 Ram Dei has admitted that Lal Singh used to reside with defendant. A specific suggestion put to DW-1 Chinta Mani that Lal Singh has suffered paralytic attack in the year 1994 was denied by the defendant. According to her, he was in sound state of disposing mind. The contents of the Will were read over and explained to Lal Singh. He thereafter signed the same and after that marginal

witnesses signed the Will. The same procedure was followed before the Sub Registrar, Kullu. It is also proved from Ext. DA, copy of Parivar Register that Lal Singh, Ram Dei and Chinta Mani were residing together at Village Tegu Behar, Shamshi. Merely that the marginal witnesses were from the same locality or same village where Lal Singh used to reside would not cast doubt on the execution of the Will. The Courts below have correctly appreciated the oral as well as documentary evidence on record. The Will dated 17.5.1996 is validly executed by Lal Singh. The Will was executed by Lal Singh in sound disposing state of mind. The substantial questions of law are answered accordingly.

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

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

Vijay Lakshmi ...Petitioner
Versus
Union of India and another ...Respondents

CWP No. 3018 of 2015
Date of decision: 30th October, 2015

Constitution of India, 1950- Article 226- Petitioner was offered appointment of Nursing Assistant for ECHS Polyclinic Kullu- she was informed that number of Nursing Assistants in the Polyclinic had been reduced- therefore, it was decided to terminate her services- respondent stated that Nursing Assistants were reduced from 2 to 1, therefore, services of the petitioner were terminated- held, that services of the petitioner came to be dispensed with on account of rationalizing /restructuring and revamping of the respondent organization - rationalizing /restructuring and revamping of services are matters pertaining to policy which should not be interfered in exercise of writ jurisdiction- decision taken by the respondents to reduce its manpower cannot be termed to be contrary to law or in violation of the provisions of the Constitution- Writ dismissed. (Para-5 to 9)

Cases referred:
Nand Lal and another vs. State of H.P. and others, 2014 (2) HLR (DB) 982
Census Commissioner and others vs. R. Krishnamurthy (2015) 2 SCC 796

For the Petitioner : Mr. Manish Sharma, Advocate.
For the Respondents : Mr. Ashok Sharma, Assistant Solicitor General of India, with Mr. Angrez Kapoor, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (*Oral*)

By medium of this petition, the petitioner has prayed for quashing of the impugned notice dated 27.5.2015 (Annexure P-4) whereby her services came to be dispensed with.

2. The petitioner vide letter dated 14.3.2013 was offered appointment of Nursing Assistant (X-ray Assistant/Radiographer) for ECHS Polyclinic Kullu where she after

executing the requisite agreement joined as such on 1.4.2013. The contract of the petitioner was thereafter renewed for another 12 months vide agreement dated 1.4.2014 and thereafter subsequently renewed for another 12 months on 4.4.2015. However, vide notice dated 27.5.2015 the petitioner was informed that since the scales of Nursing Assistants in the Polyclinic had been reduced, therefore, it had been decided to conclude her services. This action of the respondents has been assailed on the ground that once the contract of the petitioner had been renewed, there was no occasion for the respondents to have issued the impugned notice. Moreover, the petitioner was otherwise ready and willing to work under the reduced scale and should have therefore been offered the appointment on the reduced scales.

3. The respondents have filed their reply wherein the facts narrated in the petition have not been disputed/ However, it has been submitted that during the period when the petitioner had been working on contractual basis, the scales of man-power authorization of ECHS Polyclinic Type-D had been reduced from two Nursing Assistants to one Nursing Assistant only. It was due to reduction of the scale of manpower, the services of the petitioner were terminated. In support of such submission, the respondents have also placed on record the extract of the reduction of the scales of manpower authorization as Annexure R-1.

I have heard learned counsel for the parties and have gone through the records of the case carefully and meticulously.

4. It is not in dispute that the services of the petitioner came to be dispensed with only on account of the rationalizing /restructuring and revamping of the respondent-organization whereby the scales of the authorized manpower was ordered to be reduced. Rationalizing /restructuring and revamping of services are essentially matters pertaining to 'policy' which ordinarily should not be interfered with by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

5. Under Article 226 of the Constitution of India, it is trite law that the power of judicial review under Article 226 of the Constitution of India is not directed against the decision but is confined to the decision making process. The judicial review is not an appeal from a decision, but a review of the manner in which the decision is made and the Court sits in judgment only on the correctness of the decision making process and not on the correctness of the decision itself. The Court confines itself to the question of legality and is concerned only with, whether the decision making authority exceeded its power, committed an error of law, or committed a breach of the rules of natural justice, reached an unreasonable decision or abused its powers.

6. On matters affecting policy, this Court does not interfere unless the policy is unconstitutional or contrary to the statutory provisions or arbitrary or irrational or in abuse of power. It is more than settled that the Government is entitled to make pragmatic adjustments and policy decisions, which may be necessary or called for under the prevalent peculiar circumstances. The Court may not strike down a policy decision taken by the Government merely because it feels that another decision would have been more fair or wise, scientific or logic. The principle of reasonableness and non-arbitrariness in governmental action is the core of our constitutional scheme and structure. Its interpretation will always depend upon the facts and circumstances of a given case. This has been the view of this Court in ***Nand Lal and another*** vs***. State of H.P. and others, 2014 (2) HLR (DB) 982*** and was followed in ***CWP No. 4625 of 2012*** titled ***Gurbachan*** vs. ***State of H.P. and others***, decided on 15.7.2014.

7. That apart, the scope of judicial review and its exclusion was a subject matter of a recent decision by three Judges of the Hon'ble Supreme Court in ***Census Commissioner and others*** vs**. *R. Krishnamurthy (2015) 2 SCC 796*** and it was held that it is not within the domain of Courts to embark upon enquiry as to whether particular public policy is wise and acceptable or whether better policy could be evolved, Court can only interfere if policy framed is absolutely capricious or not informed by reasons or totally arbitrary and founded on ipse dixit offending Article 14. It was held as under:

> *"23. The centripodal question that emanates for consideration is whether the High Court could have issued such a mandamus commanding the appellant to carry out a census in a particular manner.*
>
> *24. The High Court has tried to inject the concept of social justice to fructify its direction. It is evincible that the said direction has been issued without any deliberation and being oblivious of the principle that the courts on very rare occasion, in exercise of powers of judicial review, would interfere with a policy decision.*
>
> *25. Interference with the policy decision and issue of a mandamus to frame a policy in a particular manner are absolutely different. The Act has conferred power on the Central Government to issue Notification regarding the manner in which the census has to be carried out and the Central Government has issued Notifications, and the competent authority has issued directions. It is not within the domain of the Court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance. But, the courts are not to plunge into policy making by adding something to the policy by way of issuing a writ of mandamus. There the judicial restraint is called for remembering what we have stated in the beginning. The courts are required to understand the policy decisions framed by the Executive. If a policy decision or a Notification is arbitrary, it may invite the frown of Article 14 of the Constitution. But when the Notification was not under assail and the same is in consonance with the Act, it is really unfathomable how the High Court could issue directions as to the manner in which a census would be carried out by adding certain aspects. It is, in fact, issuance of a direction for framing a policy in a specific manner.*
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> *26. In this context, we may refer to a three-Judge Bench decision in Suresh Seth V. Commr., Indore Municipal Corporation, (2005) 13 SCC 287 wherein a prayer was made before this Court to issue directions for appropriate amendment in the M.P. Municipal Corporation Act, 1956 so that a person may be debarred from simultaneously holding two elected offices, namely, that of a Member of the Legislative Assembly and also of a Mayor of a Municipal Corporation. Repelling the said submission, the Court held: (SCC pp. 288-89, para 5)*
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> > *"5……In our opinion, this is a matter of policy for the elected representatives of people to decide and no direction in this regard can be issued by the Court. That apart this Court cannot issue any direction to the legislature to make any particular kind of enactment. Under out constitutional scheme Parliament and Legislative Assemblies exercise sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation. In Supreme Court Employees' Welfare Assn. v. Union of*

> *India (1989) 4 SCC 187 (SCC para 51) it has been held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority. This view has been reiterated in state of J & K v A.R. Zakki, 1992 Supp (1) SCC 548. In A.K. Roy v. Union of India, (1982) 1 SCC 271, it was held that no mandamus can be issued to enforce an Act which has been passed by the legislature."*

27. At this juncture, we may refer to certain authorities about the justification in interference with the policy framed by the Government. It needs no special emphasis to state that interference with the policy, though is permissible in law, yet the policy has to be scrutinized with ample circumspection.

28. In N.D. Jayal and Anr. V. Union of India & Ors.(2004) 9 SCC 362, the Court has observed that in the matters of policy, when the Government takes a decision bearing in mind several aspects, the Court should not interfere with the same. In Narmada Bachao Andolan V. Union of India (2000) 10 SCC 664, it has been held thus: (SCC p. 762, para 229)

> *" 229. "It is now well settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy-making process and the courts are ill-equipped to adjudicate on a policy decision so undertaken. The court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution."*

29. In this context, it is fruitful to refer to the authority in Rusom Cavasiee Cooper V. Union of India, (1970) 1 SCC 248, wherein it has been expressed thus: (SCC p. 294, para 63)

> *"63….It is again not for this Court to consider the relative merits of the different political theories or economic policies... This Court has the power to strike down a law on the ground of want of authority, but the Court will not sit in appeal over the policy of Parliament in enacting a law".*

30. In Premium Granites V. State of Tamil Nadu, (1994) 2 SCC 691 while dealing with the power of the courts in interfering with the policy decision, the Court has ruled that: (SCC p.715, para 54)

> *"54. it is not the domain of the court to embark upon unchartered ocean of public policy in an exercise to consider as to whether a particular public policy is wise or a better public policy could be evolved. Such exercise must be left to the discretion of the executive and legislative authorities as the case may be. The court is called upon to consider the validity of a public policy only when a challenge is made that such policy decision infringes fundamental rights guaranteed by the Constitution of India or any other statutory right."*

31. In M.P. Oil Extraction and Anr. V. State of M.P. & Ors.(1997) 7 SCC 592, a two-Judge Bench opined that: (SCC p. 611, para 41)

> *"41..... The executive authority of the State must be held to be within its competence to frame a policy for the administration of the State. Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with any statutory provision, the Court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State."*

32. In State of M.P. V. Narmada Bachao Andolan & Anr.(2011) 7 SCC 639, after referring to the State of Punjab V. Ram Lubhaya Bagga (1998) 4 SCC 117 , the Court ruled thus: (SCC pp. 670-71, para 36)

> *"36. The Court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or more scientific or logical or wiser. The wisdom and advisability of the policies are ordinarily not amenable to judicial review unless the policies [pic]are contrary to statutory or constitutional provisions or arbitrary or irrational or an abuse of power. (See Ram Singh Vijay Pal Singh v. State of U.P., (2007) 6 SCC 44, Villianur Iyarkkai Padukappu Maiyam v. Union of India, (2009) 7 SCC 561 and State of Kerala v. Peoples Union for Civil Liberties, (2009) 8 SCC 46.)"*

33. From the aforesaid pronouncement of law, it is clear as noon day that it is not within the domain of the courts to embark upon an enquiry as to whether a particular public policy is wise and acceptable or whether a better policy could be evolved. The court can only interfere if the policy framed is absolutely capricious or not informed by reasons or totally arbitrary and founded ipse dixit offending the basic requirement of Article 14 of the Constitution. In certain matters, as often said, there can be opinions and opinions but the Court is not expected to sit as an appellate authority on an opinion."

8. Aforesaid exposition of law would go to show that policy matters cannot normally be interfered with by the Courts, except where the policy is contrary to law or is in violation of the provisions of the Constitution or is arbitrary or irrational and the Courts must then perform their constitutional duties by striking it down.

9. Now, in case the principles as enunciated in the aforesaid judgments, is borne in mind, then the decision taken by the respondents to reduce its manpower cannot be termed to be contrary to law or in violation of the provisions of the Constitution or termed to be arbitrary or irrational.

10. Having said so, I find no merit in this petition and the same is accordingly dismissed alongwith pending application(s) if any. The parties are left to bear their own costs.

****

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

Babita Chouhan .....Petitioner.

Versus

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

CWP No. 11618 of 2011
Decided on : 2.11.2015

Constitution of India, 1950- Article 226- Petitioner was appointed as a teacher- a complaint was filed by the respondent No. 5 against his appointment- an inquiry was conducted and it was found that petitioner had taken admission in the Institute in the year 2000, whereas, notification provided that candidates who had taken admission w.e.f. 1.6.2001 till 31.8.2005 were eligible- notification also provided that the services of a candidate admitted in the institute between 1.6.2001 and 31.8.2005 will not be terminated- notification did not provide anyting for the candidates admitted prior to 1.6.2001- hence, order passed by the Inquiry Officer is not sustainable- however, question regarding the recognition of the diploma awarded by the institute was left open. (Para-2 and 3)

For the Petitioner: Ms. Jyotsana Rewal Dua, Sr. Advocate with Ms. Amrita Messi, Advocate.

For the Respondents: Mr. Vivek Singh Attri, Deputy Advocate General, for the respondents-State.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The petitioner as disclosed in Annexure P-12-C was appointed as teacher (Art & Craft) on PTA basis in Government High School, Deva Manal, Sub Tehsil Nohra, District Sirmour, H.P on 4.10.2006. Respondent No.5 instituted a complaint before the Sub Divisional Officer (Civil) Nahan, District Sirmaur, H.P., alleging therein that the appointment of the petitioner herein by respondent No.4 to the post of teacher (Art and craft) on PTA basis in the school concerned was unwarranted. The Sub Divisional Officer (Civil) who conducted the inquiry rendered a conclusion in his inquiry report comprised in Annexure P-3 that since the petitioner herein had taken admission in 2000, in the institution concerned for obtaining therefrom a diploma in Art and craft whereas the notification of 27.10.2008 of the Government eligiblising only those aspirants for being considered for selection and appointment to the post of Teacher (Art and Craft) in the school concerned, who have taken admission in the institution concerned during 01-06-2001 to 31.8.2005. Necessarily then given the factum of the petitioner herein having taken admission in 2000 in the institution concerned rendered her to be ineligible for hers being considered for selection besides rendered her consequential appointment by the respondent concerned to the post of Teacher (Art & craft) on PTA basis in the school concerned, to be vitiated.

2. The reason as meted out in Annexure P-3 stands imbued with a legal infirmity leaving it to be unsustainable especially in the face of this court as manifested in Annexure P-4 having, in paragraph 2 whose contents are extracted hereinafter, mandated therein that the services of any teacher (Art & craft) appointed on PTA basis in the school concerned, who has been admitted in the institute concerned between 1.6.2001 and 31.8.2005 and has been conferred by it a diploma in the discipline aforesaid, shall not be

terminated. Apart therefrom with a manifestation therein of the services of any Teacher (Art and Craft) appointed on PTA basis in the school concerned who has been awarded a diploma in the apposite discipline between 1.6.2001 and 31.8.2005 being not amenable to termination, lends amplifying vigor to an apt conclusion that hence when the petitioner herein had a justifiable right for hers being considered for selection to the post of Teacher (Art & Craft) on PTA basis in the school concerned, renders hence her appointment thereto being not legally infirm especially with hers having in consonance with the verdict of this Court comprised in Annexure P-4 conferred, by the institution concerned a diploma in Art and craft between 1.6.2001 and 31.8.2005.

> *"2. We are informed that certain directions have been issued from the Directorate to terminate the services of the candidates, contrary to what has been observed above. It is made clear that no C&V teacher who has been awarded diploma in Art and Craft between 01.06.2001 and 31.8.2005 and no candidate who has been admitted between 01.06.2001 and 31.8.2005 and subsequently been awarded diplomas, shall be terminated from service. In case any contrary communication has been issued in this regard, the same shall be recalled forthwith. "*

3. In sequel, the Inquiry Officer in Annexure P-3 was disempowered to de-eligiblise the petitioner herein for hers being considered for selection and appointment to the post of Teacher (Art and craft) on PTA basis in the school concerned by applying a notification of 27.10.2008 issued by the respondents-State. Obviously, Annexure P-3 has been rendered in ignorance of Annexure P-4. In sequel the impugned order is per incuriam vis-à-vis the rendition of this court comprised in Annexure P-4. Necessarily then it warrants its being quashed and set aside. However, the issue of hers as manifested in Annexure P-3 holding a diploma in the discipline concerned not recognized by the Government of H.P is left open. In view of above, present petition stands disposed of, as also the pending applications, if any.

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

Cr.M.P(M) No. 1669 of 2015
a/w Cr.M.P(M) Nos. 1670 and 1671 of 2015.
Decided on : 21.11.2015.

Cr.M.P(M) No. 1669 of 2015

Dev Raj Malhotra. .....Petitioner.

Versus

State of Himachal Pradesh ....Respondent.

Cr.M.P (M) No. 1670 of 2015

Sourav. .....Petitioner.

Versus

State of Himachal Pradesh ....Respondent.

Cr.M.P (M) No. 1671 of 2015

Ritu. .....Petitioner.

Versus

State of Himachal Pradesh ....Respondent.

Code of Criminal Procedure, 1973- Section 438- An FIR was registered for the commission of offences punishable under Sections 363, 366, 376, 342, 195A & 506 read with Section 34 IPC- marriage between applicant and the prosecutrix was solemnized and an affidavit

was executed to this effect- marriage was duly registered under the Registration of Marriages Act- prima facie it can be inferred that parties had entered into a valid marriage- the fact that no protest was made at the time of registration of the marriage shows that registration was voluntary- no material was brought on record to show that applicant will interfere with the investigation and evidence- hence, bail application allowed. (Para-3 to 5)

For the Petitioner(s): Mr. Dheeraj K. Vashisht, Advocate.
For the Respondent: Mr. Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

All these petitions arise out of a common FIR, hence are liable to be disposed of by a common order.

2. The instant petitions have been instituted by the bail petitioners under Section 438 Cr.P.C, for grant of anticipatory bail to them as they apprehend their arrest, for theirs having allegedly committed offences punishable under Sections 363, 366, 376, 342, 195A & 506 read with Section 34 IPC, recorded in case FIR No. 94/2015 of 5.11.2015, registered at Police Station, Fatehpur, District Kangra, H.P.

3. The Investigating Officer has filed a detailed status report. The learned Deputy Advocate General does not contest the factum of the prosecutrix, aged 21 years having solemnized marriage with bail applicant, Sourav. An affidavit portraying the factum of the prosecutrix having solemnized marriage with bail applicant, Sourav is appended with their petitions as Annexure P-1. Bail applicants, Ritu and Dev Raj are respectively the sister and brother-in-law of bail applicant, Sourav, both of whom are alleged to have facilitated the marriage inter se bail applicant, Sourav with the prosecutrix. The prosecutrix and the bail applicant, Sourav lived together as husband and wife for a period of one month. However, thereafter acrimony erupted in their marital relations, which constrained the prosecutrix to lodge an FIR with a narration therein of hers being subjected to forcible sexual intercourse by bail applicant, Sourav. The perpetration of forcible sexual intercourse upon the prosecutrix by bail applicant, Sourav is alleged to have occurred during the subsistence of a wedlock inter se the bail applicant, Sourav and the prosecutrix. Given the narration in the FIR of bail applicant, Sourav, as stands enunciated by the prosecutrix both in the FIR as well as in her statement recorded under Section 164 Cr.P.C. before the Magistrate concerned having subjected her to forcible sexual intercourse only during the subsistence of their lawful wedlock, besides wherein she alleges it to be a sequel to exertion of compulsion besides duress upon her by bail applicant, Sourav. However, before countenancing the aforesaid allegation against the bail applicant, Sourav constituted in the aforesaid material, this Court is enjoined to unearth from the apposite material the preeminent factum of the contract of marriage entered inter se bail applicant, Sourav and the prosecutrix, with the former being aided and abetted by the co-bail applicants being palpably void arising from it having been induced both by exercise of misrepresentation or duress exerted by the bail applicants/accused upon the prosecutrix, emanation whereof would render the sexual intercourses, if any performed by bail applicant, Sourav with the prosecutrix even during the subsistence of a marriage inter se them to be construable to be bereft of any consensuality. However, the manifestation both in the FIR as well as in the statement of the prosecutrix recorded under Section 164 Cr.P.C. before the Magistrate concerned of hers having been compelled by the co-bail applicants to enter into a wedlock with bail applicant, Sourav appears to be per se ingrained with falsity arising from the

imminent fact of the marriage inter se bail applicant, Sourav with the prosecutrix having come to be solemnized in consonance with Hindu rites and customs, in pursuance whereto the competent authority under the Registration of Marriages Act had come to register it. The factum of the marriage of the bail applicant, Sourav with the prosecutrix having come to be registered by the competent authority constituted under the Registration of Marriages Act, rendered it to be presumably a valid marriage unless the said presumption stood rebutted by the prosecutrix by contesting the factum of it having to be registered by the competent authority constituted under the Registration of the Marriages Act without hers appearing before it. However, the aforesaid material to rebut the presumption of the prosecutrix having entered into a valid wedlock with the bail applicant, Sourav remains unadduced. In sequel the presumption drawn by this Court qua the validity of matrimony entered inter se the bail applicant, Sourav with the prosecutrix attains conclusivity. Ensuably, an inference is of the competent authority constituted under the Registration of Marriages Act having proceeded to register the marriage solemnized inter se bail applicant, Sourav and the prosecutrix, only on theirs appearing before it especially for want of material in negation thereto, whereat there being no demonstrable evidence of the prosecutrix having either protested before the competent authority for constraining it to not register their marriage nor evidence existing of theirs having not appeared before the competent authority, absence whereof begets an inference of both on theirs appearing before the competent authority having volitionally conceded before it qua theirs having entered into a voluntary matrimony, hence leading the competent authority to register their marriage. Concomitantly, there-from an inference which upsurges is of the marriage of the prosecutrix with bail applicant, Sourav being free from any stain or taint of it having been contracted by exertion of compulsion or duress by bail applicant, Sourav upon the prosecutrix, besides its consummation being not facilitated by co-bail applicants also exerting duress or compulsion upon her. Obviously, when the marriage inter se bail applicant, Sourav and the prosecutrix is free from any stain of exercise of coercion or duress by the bail applicant upon the prosecutrix, naturally then with bail applicant, Sourav having during its subsistence performed sexual intercourses with the prosecutrix, cannot render his act of performing sexual intercourses with the prosecutrix to be acquiring any penal culpability, especially when there is no narration or unfoldment in the FIR as well as in the statement of the prosecutrix recorded under Section 164 Cr.P.C. before the Magistrate concerned of bail applicant, Sourav at any stage having threatened or coerced her to perform sexual intercourses with her. Moreover, the MLCs prepared by the doctor concerned qua the prosecutrix or hers examining the prosecutrix omits to unearth the factum of the prosecutrix having gained any injuries on her private parts or any other part of the body nor when even the MLC prepared qua the accused is reflective of any injuries having occurred on his person reflective of the prosecutrix resisting the sexual overtures of bail applicant, Sourav. In aftermath, absence thereof in the apposite MLCs qua both the prosecutrix and the bail applicant, fastens a conclusion of bail applicant, Sourav during the subsistence of a lawful marriage with the prosecutrix having not performed any forcible sexual intercourses with the latter or subjected her to any threat, violence or assault. Consequently, in face of the aforesaid discussion displaying prima-facie at this stage the innocence of the bail petitioners in the act of bail applicant, Sourav having during the subsistence of his lawful wedlock with the prosecutrix performed with her any alleged forcible sexual intercourses or subjected her to any alleged threat, violence or assault, necessarily then this Court is constrained to afford the facility of bail in favour of the bail petitioners**.**

4. Moreover, when at this stage no material has been placed on record by the prosecution demonstrating that in the event of bail being granted to the bail petitioners, there is every likelihood of theirs fleeing from justice or tampering with prosecution

evidence, further constrains this Court to afford the facility of bail in favour of the bail petitioners. Accordingly, the indulgence of bail is granted to the bail petitioners and the order rendered on 17.11.2015 is confirmed on the following conditions:-

1 That they shall join the investigation, as and when required by the Investigating agency;

2. That they 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 from disclosing such facts to the Court or to the Police;

3. That they shall not leave India without the previous permission of the Court;

4. That they shall deposit their passports, if any, with the Police Station, concerned;

5. That in case of violation of any of the conditions, the bail granted to the petitioners shall be forfeited and they shall be liable to be taken into custody;

6. That they shall apply for bail afresh when the challan is filed before the trial Court.

5. In view of above, petitions stand disposed of. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case and the trial Court shall decide the matter uninfluenced by any observation made herein above. "Copy Dasti"

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

Sh. Lal Singh & ors. .....Appellants.

Versus

Gauri Dutt & another .....Respondents.

RSA No. 516 of 2014.
Reserved on: 29.10.2015.
Decided on: 02.11.2015.

Code of Civil Procedure, 1908- Section 100- Plaintiffs challenged the revenue entries showing the defendants No. 1 to 8 as tenants and co-sharers over the suit land asserting that defendants no. 1 to 8 were never inducted as tenants-they further challenged the conferment of the proprietary rights by AC 2nd Grade- injunction also sought against the defendants to prevent their interference over the suit land-the defendants justified the entries and asserted their status as non-occupancy tenants before the ownership rights were vested-suit dismissed by the trial court- the first appellate court reversed the judgment of trial court and decreed the suit- held that, the tenancy is a bilateral act and payment of rent is a sine-qua-non for its creation-the revenue record shows that there is no entry in the rent column- Assistant Collector 2nd Grade, has no jurisdiction to confer proprietary rights upon the defendants, therefore, the order passed by him is nullity- appellate court had rightly decreed the suit- appeal dismissed. (Para 18 to 23)

Cases referred:

Besru vrs. Shibu, 1999(1) Shim.L.C. 343

Krishan Chand and ors. vrs. Jeet Ram and another, Latest HLJ 2009 (HP) 978

For the appellant(s): Mr. K.D.Sood, Sr. Advocate, with Mr. Rajnish K. Lall, Advocate.
For the respondents: Mr. G.D.Verma, Sr. Advocate, with Mr. B.C.Verma, 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), Mandi, H.P., (Camp at Karsog), dated 5.8.2014, passed in Civil Appeal No. 41 of 2013.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the respondents-plaintiffs (hereinafter referred to as the plaintiffs), have instituted suit for declaration and injunction against the appellants-defendants (hereinafter referred to as the defendants) regarding land comprised in Khewat No. 42, Khatauni No. 74, Kh. Nos. 220, 237, 259 and 367, Kita 4, measuring 2-0-3 bighas situated in Muhal Kuftu/190, Tehsil Karsog, Distt. Mandi, H.P. The suit land is owned and possessed by the plaintiffs. The entries showing defendants No. 1 to 4 as co-sharers and tenants are wrong and illegal. The copy of jamabandi for the year 2005-06 was also annexed. The suit land comprised in Khewat No. 43, Khatauni No. 75, Kh. No. 184, 185 and 190 Kita 3, measuring 0-3-6 bighas situated in Muhal Kuftu/190, Tehsil Karsog, Distt. Mandi, H.P. is also owned and possessed by the plaintiffs. The entries showing defendants No. 5 to 8 as co-sharers and tenants are wrong and illegal. The defendants or their predecessors have never been inducted as tenants by plaintiffs or their predecessors over the suit land. The entries showing the defendants and their predecessors firstly as non-occupancy tenants and thereafter as co-sharers or tenants with the plaintiffs are wrong and illegal. Sh. Khinthu and Tula Ram have never cultivated the suit land nor did possess the same in any capacity. Sh. Khinthu and Tula Ram during settlement operation in connivance with the revenue agency have manipulated the fake entries in their name as tenants. The alleged tenants have never paid rent (Galla Batai) to the plaintiffs or their predecessors nor they were in possession of the suit land. On the basis of the wrong revenue entries, the revenue agency behind the back of the plaintiffs and their predecessors have conferred the ownership rights in favour of Khinthu and Tula Ram vide mutation Nos. 36 and 37 dated 12.2.1976. The mutation did not confer any right title or interest in favour of the defendants or their predecessors. The revenue agency while effecting the ownership rights in favour of Khinthu and Tula Ram has not complied with the mandatory provisions of law. The defendants took undue advantage of the wrong revenue entries and applied for partition of the suit land alongwith other landed property. The plaintiffs have raised the question of title before the revenue court, however, order dated 15.11.2011 was passed by Assistant Collector 2nd Grade, Karsog. The revenue agency has wrongly disallowed the objections raised by the plaintiffs regarding the question of title. After the death of Khinthu, on the basis of Will defendants No. 1 to 3, namely, Lal Singh, Ram Lal and Amin Chand, claimed themselves to be owner of the suit land. Khinthu had no legal right to confer any right, title or interest in favour of defendants No. 1 to 3. The entries reflecting Paras Ram, defendant No. 4 as non-occupancy tenant are also fake and fictitious. There was no justification as to how, he was inducted as tenant.

3. The suit was contested by the defendants by filing written statement. They have justified the revenue entries. According to them, these entries were continuing since settlement operation of 1965-66. The land was jointly owned and possessed by Udmia, Dahlu, Kansu, Chuhdu and plaintiffs. The forefather of defendants used to cultivate the suit land as non-occupancy tenant. The defendants used to pay revenue to the government. Defendant No. 4 Paras Ram is owner by way of registered sale deed dated 10.11.1994

executed by plaintiffs Gauri Dutt and Balu and also by way of exchange of land with Khinthu etc. They were tenants on the suit land on the basis of conferment of proprietary rights vide mutation Nos. 36 & 37 dated 12.2.1976. The plaintiffs had not raised any objection before the Assistant Collector 2nd Grade, Karsog at the time of attestation of mutations.

4. The learned Civil Judge (Jr. Divn.) Karsog, framed the issues on 7.5.2012. The suit was dismissed vide judgment dated 26.6.2013. The plaintiffs, feeling aggrieved, preferred an appeal against the judgment and decree dated 26.6.2013. The learned Addl. District Judge, Mandi (I), (Camp at Karsog), allowed the same on 5.8.2014. Hence, this regular second appeal.

5. The regular second appeal was admitted on the following substantial questions of law on 5.11.2014:

> "1. Whether the findings of the court below are perverse, based on misreading of oral and documentary evidence as also pleadings of the parties, particularly, revenue records i.e. jamabandis Ext. PW-1/C, Ext. PW-1/D to Ext. PW-1/G and Ext. PW-1/J, mutation Ext. PW-1/E as also the order of the Assistant Collector 2nd Grade, Karsog dated 15.11.2011 Ext. PW-1/H to which presumption of truth is attached?
>
> 2. Whether the civil court had jurisdiction to entertain the suit and set aside the partition proceedings as also the order of the Land Reforms Officer when in view of the provisions of the Land Revenue Act and the provisions of the H.P. Tenancy and Land Reforms Act the jurisdiction of the civil Court was barred?
>
> 3. Whether the suit of the plaintiff was within limitation and the courts below have ignored the presumption of truth attached to the revenue records as also the orders of the Revenue Officers and the Land Reforms officer which had attained finality?"

6. Mr. K.D.Sood, Sr. Advocate, appearing on behalf of the appellants with Mr. Rajnish K. Lall, advocate, on the basis of the substantial questions of law framed, has vehemently argued that the Courts below have not correctly appreciated the revenue record. According to him, the Civil Court had no jurisdiction to entertain the suit and set aside the partition proceedings and the order of the Land reforms Officer in view of the H.P. Tenancy and Land Reforms Act. He then contended that the presumption of truth is attached to the revenue record. On the other hand, Mr. G.D.Verma, Sr. Advocate, appearing with Mr. B.C.Verma, Advocate, has supported the judgment and decree dated 5.8.2014.

7. Since all the substantial questions of law are inter-connected, hence are taken up together for discussion to avoid repetition of evidence.

8. I have heard learned counsel for the appellant and have also gone through the judgments and records of the case carefully.

9. Plaintiff Gauri Dutt has appeared as PW-1. He led his evidence by filing affidavit Ext. PW-1/A. He has proved copy Missal Haquiat Bandobast Jadid Ext. PW-1/B, Nakal Jamabandi for the year 1974-75 Ext. PW-1/D, copy of mutation No. 36 Ext. PW-1/E, copy of mutation No. 37 Ext. PW-1/F, copy of mutation No. 125 Ext. PW-1/G, copy of order of Tehsildar Ext. PW-1/H dated 15.11.2011 and copy of Jamabandi for the year 2005-06 Ext. PW-1/J. He denied the specific suggestion that father of defendants Jai Nand and Tula Ram were in possession of the suit land before the settlement. He denied that predecessors of defendants were tenants of this land and they used to pay rent to government. He also

denied that mutation Nos. 36, 37 dated 12.2.1976, respectively and mutation No. 125 dated 24.5.2007 were attested in favour of the defendants.

10. PW-2 Keshav Ram has also tendered his evidence by way of affidavit Ext. PW-2/A. The suit land was owned and possessed by the plaintiffs. Defendants never came in possession of the suit land. Earlier, the suit land was owned and possessed by Balu and Chuhru and after their death the suit land is owned and possessed by the plaintiffs. The suit land was never cultivated by defendants or their predecessors. Defendants have never paid any rent (Galla Batai) to the plaintiffs or their predecessors.

11. PW-3 Balak Ram has also led his evidence by filing affidavit Ext. PW-3/A. He has corroborated the statement of PW-2 Keshav Ram.

12. DW-1 Ganga Ram Patwari has stated that he was taken to spot by Lal Chand for identification of some khasra numbers. When he appeared on the spot, Lal Chand, Gauri Dutt etc. were present on the spot. In his cross-examination, he admitted that no application was filed for visiting the spot before him.

13. DW-2 Lal Singh deposed that his grandfather was Khinthu. He executed Will in favour of three brothers. Earlier, his grandfather was tenant of the land and became owner thereof under the Tenancy Act. The land was in their possession. He had no knowledge whether any writing was made for inducting them as tenants. He deposed particularly that neither his grandfather, father nor they paid any "Galla Batai" to the plaintiffs. Their grandfather became owner of the suit land in the year 1976. He had no specific knowledge when the grandfather became owner of the suit land and whether plaintiffs and co-owners were called on the spot. He also admitted that plaintiffs came to know qua revenue entries when they filed partition suit of the suit land.

14. DW-3 Leeladhar deposed that the name of his father was Tula Ram and defendants No. 5 to 8 are sons of Tula Ram. They have planted Apple and Almond plants on this land. He has also admitted that neither they nor their father paid 'Galla Batai' in their presence.

15. DW-4 Alam Chand deposed that the name of his father was Paras Ram. The plaintiffs executed Will in favour of his father of land measuring 0-8-17 bighas in the year 1994 vide sale deed Ext. D-1.

16. DW-5 Sher Singh deposed that the Patwari has visited the spot. The Patwari has told the parties about the possession of the khasra numbers as per the revenue record.

17. According to the Misal Haquiat Bandobast Jadid Ext. PW-1/B, copy of jamabandi for the year 1974-75 PW-1/C, the entries in the rent column are vacant. Similarly, in the jamabandi for the year 1964-65 Ext. PW-1/D, the rent column is vacant. The proprietary rights were conferred by the Assistant Collector 2nd Grade, Karsog. The copy of mutation No. 36 is Ext. PW-1/E and mutation No. 37 is Ext. PW-1/F. Even in the jamabandi for the year 2005-06, there is no mention of rent paid by the tenants. The witnesses appearing on behalf of the plaintiffs have specifically deposed that the defendants have never paid any rent rather the witnesses appearing on behalf of the defendants have admitted that no rent (Galla Batai) was ever paid by the tenants.

18. The tenancy is a bilateral act. The payment of rent is a sine-qua-non for creation of tenancy. It has come on record that plaintiffs remained in possession of the suit land and the defendants have never cultivated the land. The defendants were never inducted as tenants by the plaintiffs.

19. The Assistant Collector 2nd Grade, Karsog, has no jurisdiction to confer proprietary rights upon the defendants. The order passed by Assistant Collector 2nd Grade, Karsog, is without jurisdiction. Similarly, Assistant Collector 2nd Grade, Karsog has no jurisdiction to pass orders Ext. PW-1/H dated 15.11.2011. The defendants have also not placed any written document to prove their tenancy. Since the order passed by the Assistant Collector 2nd Grade, Karsog of conferring the proprietary rights upon the predecessor of the defendants was without authority and jurisdiction, thus the Civil Court had the jurisdiction to entertain and decide the present lis.

20. In the case of ***Besru vrs. Shibu,*** reported in ***1999(1) Shim.L.C. 343,*** this Court has held that it was evident from Rule 29 of the H.P. Tenancy and Land Reforms Rules, 1975 that only Assistant Collector (Ist Grade) was competent Land Reforms Officer to hold enquiry under Section 14 of the Act. It has been held as follows:

> "9. Rule 28 of the Rules provides that mutation is to be attested in the presence of the parties and Rule 29 provides that a dispute under sub-section (4) of Section 104 of the Act shall be decided by the Land Reforms Officer in his capacity as an Assistant Collector 1st Grade in accordance with the relevant provisions of the Punjab Land Revenue Act or the H.P. Land Revenue Act, as the case may be, though the inquiry held by him would be summary inquiry. In the H.P. Land Revenue Act, which applies to the present case. Sections 20 to 23 provide for summoning persons for the purpose of any business before a Revenue Officer and the mode of service of summons. Under Section 21 thereof, it is stated that summons issued by a Revenue Officer shall, if practicable, be served personally upon the person to whom it is addressed or failing him, his recognized agent, or in case it is refused by affixation on the last known address or by sending the same by registered post of proclamation, etc. etc.
>
> 10. Admittedly, in the present case no attempt was made by the Assistant Collector 2nd Grade to serve the plaintiff in accordance with law. As such, the mutation is void ab initio being violative of the principles of natural justice. It can be held so for another reason that it was not passed by the competent authority. From Rule 29 of the Rules, it is clear that only Assistant Collector of the 1st Grade was the competent Land Reforms Officer to hold inquiry under Section 104 of the Act. It is further fortified by the Notifications dated 27th/29th September, 1995 whereby all the Tehsildars in Himachal Pradesh were conferred with powers of Assistant Collector of 1st Grade for purposes of Chapter X of the Act under which Section 104, pertaining to acquisition of proprietary rights by the tenants, fails. By another Notification of the same date, Tehsildars conferred with the powers of Assistant Collector 1st Grade were appointed Land Reforms Officers for carrying out the purposes of Chapter X of the Act within their respective jurisdiction with immediate effect. So far the present case is concerned, from the perusal of mutation, it is clear that it was attested by the Assistant Collector 2nd Grade who had no jurisdiction to do so. Had the plaintiff been served in accordance with law and the competent authority held proper inquiry, the mutation conferring proprietary rights on the defendants would not have been passed in view of the Bar under sub-section (8)(a) of Section 104 of the Act."

21. In the case of ***Krishan Chand and ors. vrs. Jeet Ram and another,*** reported in ***Latest HLJ 2009 (HP) 978,*** this Court has held that the proceedings for

conferment of proprietary rights conducted by A.C. 2nd Grade, would be void *ab initio*. This Court has further held that since the very purpose of the tenancy had been challenged, the Civil Court had the jurisdiction to decide the matter. It has been held as follows:

> 6. Learned counsel has urged that proprietary rights were conferred on the appellants herein in accordance with law and has emphasized that Ex.DX-1 to DX-3 which are the basis and foundation for claiming ownership under Section 104 of the H.P. Tenancy and Land Reforms Act, 1972 (hereinafter referred to as the `Act').
>
> 8. By Notification No.1-8/68-Rev.1 issued by the competent Authority under Section 86 of the Act, it is only the Assistant Collector Ist Grade, who is empowered to take-up proceedings of conferment of proprietary rights. Notification reads:-
>
> > "No.1-8/68-Rev.1- In exercise of the powers vested in him under sub-section (1) of section 86 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 (Act No.8 of 1974) and all other powers enabling him in this behalf, the Governor, Himachal Pradesh, is pleased to confer on all the Tehsildars in Himachal Pradesh, all the powers exercisable by an Assistant Collector of First Grade, for the purposes of Chapter IX of the aforesaid Act, within their respective jurisdiction, with immediate effect."
>
> It is undisputed that the provision of conferment of proprietary rights by tenants is contained in Chapter-IX of the Act as aforesaid.
>
> These proceedings are, therefore, void ab initio, having been conducted by an officer who is not empowered to exercise power to grant proprietary rights or to perform any other ancialling act. The very basis set up by the defendants for claiming ownership is, therefore, without any basis. This question would have concluded the entire controversy, however, since the appeal has been admitted on other questions, I am taking them up for consideration.
>
> Question No.5:
>
> 9. This question is answered against the appellants. The jurisdiction of the Civil Court is not ousted as pleaded. The decisions in Pritam Singh vs. Krishan Kumar, 1997(1) Sim.L.C. 255, Birbal vs. Udhami 1992(1) Sim.L.C. and Shankar vs. Rukmani, 2003(1) Sim.L.C. 300 are clear and unequivocal that where the proceedings have been conducted without jurisdiction, where the question of tenancy is disputed, independent of the proceedings under the HP Tenancy and Land Reforms Act, there is no finality to the adjudication of the revenue officials and the jurisdiction of the Civil Court is not barred.
>
> In Rukmani's case supra this Court held:-
>
> > "After analyzing the judgment in Chuhniya Devi v. Jindu Ram's case (supra), we have no doubt that the jurisdiction of the Civil Court is barred under the Act if the dispute pertaining to the relationship of landlord and tenant arises during the proceedings of conferment of proprietary rights upon the tenant and resumption of land by the land owner and the order in respect thereof has been passed by the authorities under the Act except in a case where it is found that the statutory authorities envisaged by that Act had not acted in conformity with the fundamental principles of judicial procedure or

where the provisions of the Act had not been complied with. But if the dispute of landlord and tenant arises independent of the proceedings under the Act, the Civil Court has the jurisdiction."

In the present case the very basis and foundation of conferment of proprietary rights has been questioned. The case pleaded by the plaintiffs is one of suppression of facts, exercise of powers by an officer not competent to do so and the very basis of tenancy has been challenged. This question is, therefore, answered against the appellants."

22. It is also settled law that mutation does not confer any right. The revenue entries are used only for the fiscal purposes. Though, presumption of truth is attached to the revenue entries, but these are rebuttable. That the suit land was allegedly purchased by defendant Gauri Dutt is not borne out from the records. There is no evidence of any exchange of land by the plaintiffs with defendant No. 4. The first appellate Court below has correctly appreciated the revenue entries. The Civil Court had the jurisdiction in the matter since the Assistant Collector 2nd Grade, Karsog had no jurisdiction to confer proprietary rights under the H.P. Tenancy and Land Reforms Act. The principles of natural justice were also violated. Thus, the orders passed by Assistant Collector 2nd Grade, Karsog, were null and void. Similarly, Assistant Collector 2nd Grade, Karsog, could not pass orders in partition proceedings on the basis of the mutations No. 36 and 37 dated 12.2.1976. The substantial questions of law are answered accordingly.

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

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

Lalit Mohan ...Petitioner.

Versus

H.P. Public Service Commission ...Respondent.

CWP No. 3866 of 2015
Decided on: 02.11.2015

Constitution of India, 1950- Article 226- Petitioner had filed objection regarding some questions- he obtained some marks and again disputed answers to some other questions- respondent stated that objection can be raised within a specific time frame which he had not done- held, that a person can raise objection within the stipulated period of time and no objection can be raised thereafter- writ dismissed. (Para- 2 to 8)

Case referred:

Arvind Kumar & others vs. Himachal Pradesh Public Service Commission,ILR 2014 (V) HP 905

For the petitioner: Mr. Dinesh Bhanot, Advocate.

For the respondent: Mr. D.K. Khanna, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Mr. Dinesh Bhanot, learned counsel for the writ petitioner, stated at the Bar that he is under instructions not to file rejoinder. His statement is taken on record. Accordingly, right of the writ petitioner to file rejoinder is closed.

2. By the medium of this writ petition, the writ petitioner has sought quashment of order, dated 24.08.2015 (Annexure A-6), made by the H.P. State Administrative Tribunal (for short "the Tribunal") in OA No. 2799 of 2015, titled as Lalit Mohan versus H.P. Public Service Commission (for short "the Commission") wherein and whereunder his prayer for interim relief has been rejected by the Tribunal (for short "the impugned order").

3. In nutshell, the writ petitioner has questioned the result of the preliminary examination of the Himachal Pradesh Administrative Services Combined Competitive Examination conducted by the respondent-Commission, in which he has been declared to be unsuccessful.

4. It is apt to record herein that after participating in the preliminary examination, the writ petitioner has filed objections in terms of the mechanism in place, viz-a-viz questions No. 67, 74 and 84 of Booklet Series "C" of Paper-II (Aptitude Test) and after obtaining some marks in that process, has now questioned Question No. 68 of Booklet Series "C" of Paper-I (General Knowledge) and Question No. 76 of Booklet Series "C" of Paper-II (Aptitude Test).

5. As per the mechanism in place, the writ petitioner had to file objections at the relevant point of time, i.e. within time frame from the date of displaying the answer key by the Commission, which he has not done.

6. Moreover, the respondent, in para 3 of the reply, has specifically replied the same and has taken the ground. It is apt to reproduce para 3 of the reply on merits herein:

> *"Para 3: That as per the prevailing instructions/decision of the Commission, the respondent Commission had displayed the answer key on 16-06-2015 before declaring the result of H.P. Administrative Services (Preliminary) Examinations-2014 giving the opportunity to the candidates to file objections if any, against the answer key within 7 days i.e. up to 22-06-2015. In response, the Commission received some objections from the candidates against the Answer key. The petitioner had objected question No. 67, 74 & 84 of Booklet series 'C' of Paper-II (Aptitude Test) by preferring a representation within the time allowed to the appeared candidates to raise objections. A Copy of representation is attached as Annexure R-1. All the representations along with the representation of the Petitioner were placed before the Expert Committee for taking their opinion. After giving due thought to the objected questions, the Expert Committee examined the objections, some mistakes were found and were rectified before preparing the result.*
>
> *After taking into account the opinion rendered by the Expert, the Commission had declared the result of H.P. Administrative Services (Preliminary) Examinations-2014 on 24-07-2015. It is pertinent to mention here that the result of H.P. Administrative Services*

(Preliminary) Examinations-2014 has been prepared strictly in accordance with the opinion rendered by the Expert of the subject on the objections raised by the appeared candidates.

However, no objections have been raised by the petitioner against the question/answer key of Question Nos. 68 of Booklet series 'C' of Paper-I (General Knowledge) and question No. 76 of Booklet series "C" of Paper-II (Aptitude Test) in his representation which are challenged in the present writ petition. Now objecting the correctness of questions and answers at this stage is afterthought and the objections raised at this stage is not maintainable."

7. The similar issue came up for consideration before this Court in a batch of writ petitions, **CWP No. 9169 of 2013,** titled as **Vivek Kaushal & others versus Himachal Pradesh Public Service Commission,** being the lead case, decided on 17.07.2014, and it has been held that any person aggrieved has to make objections within a stipulated period. No such objection was made within the stipulated period and the writ petitions were dismissed.

8. The said judgment has also been followed in another batch of writ petitions, **CWP No. 6812 of 2014,** titled as **Arvind Kumar & others versus Himachal Pradesh Public Service Commission,** being the lead case, decided on 16.10.2014.

9. Applying the test to the instant case, no case for interference is made out.

10. Accordingly, the writ petition is dismissed alongwith all pending applications.

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

Sajjan Kumar ...Appellant.
Versus
State of Himachal Pradesh. ...Respondent.

Cr. Appeal No. 4236 of 2013
Judgment reserved on: 27.10.2015
Date of Decision: November 2, 2015.

N.D.P.S. Act, 1985- Section 20- Accused was found carrying yellow coloured bag in his lap- bag was checked and was found to be containing 1 kg 865 grams of charas- independent witnesses did not support the prosecution version and turned hostile- they stated that contraband was recovered from an unclaimed bag lying on the shelf near front window of the bus- there were contradictions in the testimonies of official witnesses regarding the place from where the police party entered in the bus and the seat where the accused was sitting- police had detained the driver and conductor, therefore, the possibility of their involvement cannot be ruled out- passengers of the bus were not cited as witnesses- police had left the place for routine traffic checking and it was not explained as to why police had carried the weighing scale with it- held, that all these circumstances make prosecution case doubtful- accused acquitted. (Para-27 to 34)

Cases referred:
Shivaji Sahabrao Bobade and another Versus State of Maharashtra, (1973) 2 SCC 793
Lal Mandi v. State of W.B., (1995) 3 SCC 603
Jagir Singh Versus The State (Delhi Administration), AIR 1975 SC 1400
Sat Paul Versus Delhi Administration, (1976) 1 SCC 727
State of U.P. Versus Ramesh Prasad Misra @ Anr., (1996) 10 SCC 360
Radha Mohan Singh @ Kaksagev Versus State of U.P., (2006) 2 SCC 450
Khairudding and others Versus State of West Bengal, (2013) 5 SCC 753
Sushil Ansal Versus State through Central Bureau of Investigation, (2014) 6 SCC 173
Balak Ram & Anr. v. State of U.P., AIR 1974 SC 2165
Allarakha K Mansuri v. State of Gujarat, (2002) 3 SCC 57
Raghunath v. State of Haryana, (2003) 1 SCC 398
State of U.P. v. Ram Veer Singh & Ors., (2007) 13 SCC 102
S. Rama Krishna v. S. Rami Reddy (D) by his LRs. & Ors., AIR 2008 SC 2066
Sambhaji Hindurao Deshmukh & Ors. v. State of Maharashtra, (2008) 11 SCC 186
Arulvelu & Anr. v. State, (2009) 10 SCC 206
Perla Somasekhara Reddy & Ors. v. State of A.P., (2009) 16 SCC 98
Ram Singh alias Chhaju v. State of Himachal Pradesh, (2010) 2 SCC 445
Sheo Swaroop and Ors. v. King Emperor, AIR 1934 PC 227
Chandrappa and Ors. v. State of Karnataka, (2007) 4 SCC 415
State of Uttar Pradesh v. Banne @ Baijnath & Ors., (2009) 4 SCC 271
Govindaraju alias Govinda v. State by Srirampuram Police Station and another, (2012) 4 SCC 722
Tika Ram v. State of Madhya Pradesh, (2007) 15 SCC 760
Girja Prasad v. State of M.P., (2007) 7 SCC 625
Aher Raja Khima v. State of Saurashtra, AIR 1956
Tahir v. State (Delhi), (1996) 3 SCC 338

For the Appellant:	Mr. Anoop Chitkara, for the appellant.
For the Respondent:	Mr. Kush Sharma, Deputy Advocate General and Mr. J.S. Guleria, Assistant Advocate General, for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

In this appeal filed under Section 374 Cr.P.C., convict Sajjan Kumar has assailed the judgment dated 26.10.2013, passed by Special Judge-I, Sirmaur District at Nahan, H.P., in Sessions Trial No.23-ST/7 of 2013, titled as *State of Himachal Pradesh Versus Sajjan Kumar*, whereby he stands convicted for having committed an offence punishable under the provisions of Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) and sentenced to undergo rigorous imprisonment for a period of ten years and to pay fine of Rs.1,00,000/- (rupees one lac) and in default thereof, further undergo simple imprisonment for a period of one year.

2. It is the case of prosecution that on 28.12.2012, police party comprising of HC Jagir Singh, Constable Vicky (not examined), Baljeet Singh (PW.3), headed by SI Ankush Dogra (PW.7) were on patrol duty at Giripul (H.P). A Naka was set up and vehicles were checked. At about 5.30 PM, bus bearing No.HP-64-7494, which came from Pulbahal side

was checked. Accused, who was sitting inside the bus, was found carrying a yellow coloured bag on his lap. By associating independent witnesses Som Chand (PW.1) and Lokesh Attri (PW.2), the bag was checked and contraband substance weighing about 1 kg 865 grams was recovered. NCB form (Ex.PW.7/B) was filled up on the spot. The bag was sealed with a seal having impression 'P' and after taking sample of the seal on a separate piece of cloth (Ex.PW.7/A), seal was handed over to Som Chand (PW.1). The contraband substance was seized. Baljeet Singh (PW.3) carried Rukka (Ex.PW.3/A) which led to registration of FIR No.119/2012, dated 28.12.2012 (Ex.PW.3/B), under the provisions of Section 20 of the NDPS Act, by ASI Rajinder Kumar (PW.4) at Police Station, Rajgarh, District Sirmaur, H.P., against the accused. Accused was arrested on the spot. Contraband substance was entrusted to MHC Ram Lal (PW.8), who after making entries in the Malkhana register sent the sample through Anil Kumar (PW.5) for chemical analysis, report (Ex.PW.7/J) whereof, was also obtained by the police. With the completion of investigation, which revealed complicity of the accused to the alleged crime, challan was presented in the Court for trial.

3. The accused was charged for having committed an offence punishable under the provisions of Section 20 of the NDPS Act, to which he did not plead guilty and claimed trial.

4. In order to establish its case, in all, prosecution examined as many as eight witnesses. Statement of the accused under the provisions of Section 313 of the Code of Criminal Procedure was also recorded, in which he took defence of innocence and false implication. No evidence in defence was led by the accused.

5. Appreciating the testimonies of the prosecution witnesses, Trial Court convicted the accused of having committed an offence punishable under the provisions of Section 20 of the NDPS Act and sentenced him as aforesaid. Hence the present appeal by the convict.

6. Having heard Mr. Anoop Chitkara, learned counsel, on behalf of the appellant as also Mr. Kush Sharma, learned Deputy Advocate General and Mr. J.S. Guleria, learned Assistant Advocate General, on behalf of the State, as also 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 trial Court committed great illegality in convicting the accused, for the reasons discussed hereinafter. Contradictions and improbabilities which are glaring, rendering the prosecution case to be extremely doubtful, if not true, stand ignored. Conviction has resulted into travesty of justice.

7. In *Shivaji Sahabrao Bobade and another Versus State of Maharashtra,* (1973) 2 SCC 793, the apex Court, has held as under:

> "…Lord Russel delivering the judgment of the Board pointed out that there was "no indication in the Code of any limitation or restriction on the High Court in the exercise of its powers as an appellate Tribunal", that no distinction was drawn "between an appeal from an order of acquittal and an appeal from a conviction", and that "no limitation should be placed upon that power unless it be found expressly stated in the Code". …
>
> (Emphasis supplied)

8. The apex Court in *Lal Mandi v. State of W.B.,* (1995) 3 SCC 603, has held that in an appeal against conviction, the appellate Court is duty bound to appreciate the evidence on record and if two views are possible on the appraisal of evidence, benefit of reasonable doubt has to be given to the accused.

9. Also it is settled position of law that graver the punishment the more stringent the proof and the obligation upon the prosecution to prove the same and establish the charged offences.

10. It is a matter of record that independent witnesses Som Chand (PW.1) and Lokesh Attri (PW.2) did not support the prosecution. They were declared hostile and extensively cross-examined by the Public Prosecutor, yet nothing fruitful could be elicited by the prosecution. We find that trial Court erred in rejecting their testimonies in toto. While doing so, trial Court relied upon the decision rendered by the apex Court in *Jagir Singh Versus The State (Delhi Administration),* AIR 1975 SC 1400. It is here, we find the trial Court to have misapplied the provisions of law, for the judgment was based on distinguishable facts and attending circumstances and subsequently overruled in *Sat Paul Versus Delhi Administration,* (1976) 1 SCC 727.

11. On the issue, Hon'ble Supreme Court of India, in *Sat Paul (supra)* has held that:-

> "Granting of a permission by the Court to cross-examine his own witness does not amount to adjudication by the Court as to the veracity of a witness. It only means a declaration that the witness is adverse or unfriendly to the party calling him and not that the witness is untruthful."

12. In *State of U.P. Versus Ramesh Prasad Misra @ Anr.,* (1996) 10 SCC 360 Hon'ble Supreme Court of India has further held that:-

> "It is equally settled law that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted."

13. In *Radha Mohan Singh @ Kaksagev Versus State of U.P.,* (2006) 2 SCC 450, a three Judge Bench of Hon'ble Supreme Court of India has held that:-

> "It is well settled that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof. [See: *Bhagwan Singh Versus State of Haryana,* AIR 1976 SC 202, *Rabinder Kumar Dey Versus State of Orissa,* AIR 1977 SC 170, *Syed Akbar Versus State of Karnataka,* AIR 1979 SC 1848 and *Khujji @ Surendra Tiwari Versus State of Madhya Pradesh,* 1992(3) RCR (Crl.) 158 (SC)".]

14. This decision stands followed in *Khairudding and others Versus State of West Bengal,* (2013) 5 SCC 753 and *Sushil Ansal Versus State through Central Bureau of Investigation,* (2014) 6 SCC 173.

15. Thus, trial Court erred in holding that with the witness being declared hostile and cross-examined, he loses credibility and his testimony cannot be relied upon by the defence.

16. Though independent witnesses state that bus and the passengers sitting inside were searched, but they have categorically denied recovery of the contraband substance from the conscious possession of the accused. It be only observed that the witnesses in their uncontroverted testimonies have also deposed that police recovered the contraband substance from an unclaimed bag lying on the shelf, near the front window of

the bus. Witnesses have further clarified that they signed the papers under pressure and threat of false implication. Their version stands probablized in view of admission made by the Investigating Officer Ankush Dogra (PW.7). He admits that though the police party had challaned several vehicles, but despite the driver and the conductor (private witnesses) not producing the permit, the bus was not challaned. Why so? remains unexplained.

17. In this backdrop, we find the version of the prosecution of having recovered the contraband substance from the conscious possession of the accused to be extremely doubtful. In fact two views with regard to recovery of the contraband substance from the conscious possession of the accused have emerged on record.

18. It is also well established principle of law that (i) the appellate Court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be more probable; (ii) while dealing with a judgment of acquittal, the appellate court must consider entire evidence on record, so as to arrive at a finding as to whether views of the trial court are perverse or otherwise unsustainable; (iii) the appellate court is entitled to consider whether in arriving at a finding of fact, trial Court failed to take into consideration any admissible fact; and (iv) the trial Court failed to take into consideration any admissible evidence and/or had taken into consideration evidence brought on record contrary to law. (See: *Balak Ram & Anr. v. State of U.P.,* AIR 1974 SC 2165; *Allarakha K Mansuri v. State of Gujarat*, (2002) 3 SCC 57; *Raghunath v. State of Haryana*, (2003) 1 SCC 398; State of *U.P. v. Ram Veer Singh & Ors.*, (2007) 13 SCC 102; *S. Rama Krishna v. S. Rami Reddy (D) by his LRs. & Ors.*, AIR 2008 SC 2066; *Sambhaji Hindurao Deshmukh & Ors. v. State of Maharashtra*, (2008) 11 SCC 186; *Arulvelu & Anr. v. State*, (2009) 10 SCC 206; *Perla Somasekhara Reddy & Ors. v. State of A.P.*, (2009) 16 SCC 98; *and Ram Singh alias Chhaju v. State of Himachal Pradesh*, (2010) 2 SCC 445).

19. In *Sheo Swaroop and Ors. v. King Emperor*, AIR 1934 PC 227, the Privy Council held that:

> "...the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses...."

20. In *Chandrappa and Ors. v. State of Karnataka*, (2007) 4 SCC 415, the apex Court observed as under:

> "(1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.
>
> (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
>
> (3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail

> the power of the court to review the evidence and to come to its own conclusion.
>
> (4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.
>
> (5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

21. In *State of Uttar Pradesh v. Banne @ Baijnath & Ors.*, (2009) 4 SCC 271, the apex Court gave illustrations of certain circumstances in which the Court would be justified in interfering with a judgment of acquittal by the High Court, which principle, in our considered view, would squarely apply to the judgment under review by us. The circumstances include; (i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position; (ii) The High Court's conclusions are contrary to evidence and documents on record; iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice; (iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case; (v) Apex Court must always give proper weight and consideration to the findings of the High Court; and (vi) the apex Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal. The apex Court further held that "Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial Court's acquittal bolsters the presumption of his innocence. Interference with the decision of the trial court in a routine manner, where the other view is possible should be avoided, unless there are good reasons for such interference." (Emphasis supplied).

22. It is also a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. It cannot be stated as a rule that a police officer can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and if required duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people; in that event, no credibility can be attached to the statement of such witness.

23. 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.

24. 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].

25. 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."

26. Now when we peruse the testimonies of Baljeet Singh (PW.3) and Ankush Dogra (PW.7), we do not find the same to be inspiring in confidence. Baljeet Singh is not signatory to the recovery memo or for that matter any of the documents prepared on the spot. Except for his oral testimony, his presence on the spot remains unproven on record. The contradiction which we find to be material in the testimonies of these police officials further renders his presence to be doubtful.

27. According to SI Ankush Dogra (PW.7), both he and Baljeet Singh (PW.3) entered the bus from the rear window. Luggage was kept on the shelves inside the bus. Accused, who had kept a yellow coloured bag on his lap, was sitting ahead of the rear window of the bus. But this version stands contradicted by Baljeet Singh, according to whom, (i) he entered the bus from the front window and that (ii) the accused was sitting on the seat near the rear window. Presence of Baljeet Singh is further rendered to be doubtful, for he does not even remember how many bags were checked or whether any luggage was lying on the shelf or not. In this backdrop version of even Ankush Dogra is rendered doubtful.

28. Admittedly police had detained driver Som Chand (PW.1) and conductor Lokesh Attri (PW.2). Why so? remains unexplained. Possibility of their involvement in the crime has not been ruled out. Surprisingly no passenger of the bus was associated as a witness, for it is not the case of prosecution that except for the accused none else was sitting

inside the bus or that none agreed to associate themselves. In fact, it is the admitted case of the police that at least 5-7 passengers were travelling at the time bus was checked.

29. Lokesh Attri (PW.2) does talk of recovery of a black coloured bag lying on the luggage shelf**.** It is a settled proposition of law that where there are two sets of evidence available on record, one favouring the accused must be preferred over the view favourable to the prosecution. We may observe that accused does not dispute his presence in the bus, but then his defence of false implication, being a soft target, as an outsider, stands probablized on record.

30. Further prosecution case is rendered doubtful with the admission of the Investigating Officer Ankush Dogra (PW.7) of having prepared the site plan (Ex.PW.7/D) subsequently. Why so? he fails to explain. This renders his version of having prepared the documents on the spot to be doubtful.

31. Further this witness admits that in his previous investigations, he never carried weighing scales and camera. In the case in hand, police had no prior intimation of trafficking of any contraband substance. Only for routine traffic checking duty, police left the Police Station. Hence, version of the witness of having carried the weighing scales with him, cannot be said to be inspiring in confidence.

32. Decision rendered in *Jagir Singh* (supra) (by two Judges) cannot be taken as a binding precedence in view of the subsequent decisions rendered by Larger Benches of the same Court.

33. In this view of the mater, it would be highly unsafe to agree with the reasoning adopted and the findings returned by the trial Court in convicting the accused.

34. 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.

35. Hence, for all the aforesaid reasons, appeal is allowed and the judgment of conviction and sentence, dated 26.10.2013, passed by Special Judge-I, Sirmaur District at Nahan, H.P., in Sessions Trial No.23-ST/7 of 2013, titled as *State of Himachal Pradesh Versus Sajjan Kumar,* is set aside and convict Sajjan Kumar is acquitted of the charged offence. Convict Sajjan Kumar, who is in jail, be released forthwith, if not required under any other process of law. Release warrants be prepared accordingly. Amount of fine, if deposited by the convict, be refunded to him. Appeal stands disposed of, so also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Sanjeev Aggarwal and other .. Plaintiffs.

Versus

Roshan Lal Sood ..Defendant.

CS No.41 of 2003.
Judgment reserved on: 3rd August, 2015.
Date of Decision: 2nd November, 2015.

Code of Civil Procedure, 1908- Order 20 Rule 18- Suit for partition of super structure decreed by the Court and preliminary decree for partition declaring the share of the plaintiffs to be 2/5th and share of the defendant to be 1/5th passed -the decree became final as no appeal was filed- 'T' was appointed as Local Commissioner to partition the land in accordance with preliminary decree- he suggested mode of partition- plaintiff accepted the report, but defendant objected to the same on the ground that Local Commissioner had not taken into account the observation of the Court in preliminary decree and the documents qua the tenancy of the shop, and secondly, report was not as per law- held, that tenancy is not proved from the evidence led on record as the alleged executant was not examined- further, held that report of Local Commissioner is as per law - objections dismissed and final decree passed on the basis of report of Local Commissioner. (Para-19 to 30)

Cases referred:

Puran Chand (deceased) through LRs and others v. Kirpal Singh (deceased) and others, (2001) 2 SCC 433

Nalakath Sainuddin v. Koorikadan Sulaiman, AIR 2002, SC 2562

T. Lakshmipathi and others v. P. Nithyananda Reddy and others, (2003) 5 SCC 150

India Umbrella Manufacturing Co. and others v. Bhagabandei Agarwalla (deceased) by LRs Savitri Agarwalla (Smt) and others, (2004) 3 SCC 178

Pramod Kumar Jaiswal and others v. Bibi Husn Bano and others, (2005) 5 SCC 492

Savitri Devi v. Santa and others, 1982 Sim.L.C. 135

Shafiq Ahmad v. Smt. Sayeedan, AIR 1984 Allahabad 140

Ishwar Dayal and others v. Ram Deo, 1985 (1) R.C.J. 619

Balak Ram v. Kedar Nath (deceased) through his L.Rs. Joginder Paul and others, 1995 (1) Sim.L.C. 191

Hameeda Begum and another v. Champa Bai Jain and others, 2009 (2) RLR 518

For the plaintiffs: Mr. S.K. Jain, Advocate.

For the defendant: Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

In the instant suit, the plaintiffs have claimed the following relief:

"It is, therefore, prayed that suit of plaintiffs be decreed in favour of plaintiffs and against the defendant ordering and directing the partition of suit property by metes and bounds comprising of building bearing Municipal No.135, Lower Bazar, Shimla-171001 consisting of four storeys beside sub basement built on land measuring 75 square feet as per khasra Paimaish 1907 and presently described in latest revenue records in Missal Haquiat Bandobast Zadid for 2002-2003 by Khewat No.1 min, Khatauni No.257, Khasra No.1046 measuring 68-38 Sq. meters situate in Bazar Ward, Bara Shimla, Tehsil Shimla (Urban) and District Shimla by passing a preliminary decree at the first instance and thereafter a final decree be passed in favour of plaintiffs and against the defendant in accordance with laws. The costs of the suit be also awarded to the plaintiffs against the defendant. The share of each of plaintiff be separated by metes and bounds and physical vacant

possession of each of the share which may be allotted to each of the plaintiffs be ordered to be delivered to the plaintiffs on final decree."

2. Undisputedly, the plaintiffs and defendant are co-owners of the suit property bearing Municipal No.135, Lower Bazar, Shimla comprising four storeys, besides sub basement and land underneath measuring 75 square yards, bearing Khasra No.413 (old), Khasra Paimaish 1907 and at present Khewat No.1 min, Khatauni No.257, Khasra No.1046, measuring 68-38 square meters, as per latest Missal Haquiat Bandobast Jadid 2002-2003, situate in Bazar Ward, Bara Shimla, Tehsil Shimla (Urban). The previous owner of the suit property admittedly was one Shri Chiranji Lal Sood, who had obtained the same in partition of joint family properties of Nauranga and Khazana sons of Bilasa. After the death of Chiranji Lal and his wife Smt. Saraswati Devi, the suit property was inherited by their sons and daughters. It is from them, the plaintiffs and defendant have purchased the same through registered sale deeds. There is again no quarrel so as to plaintiffs are owners of the suit land to the extent of 2/5 share each, whereas the defendant 1/5 share. As a matter of fact, the parties to the suit have purchased undivided shares from its previous owners in the suit property, hence the suit for the decree of partition thereof by metes and bounds firstly by preliminary decree and ultimately a final decree.

3. This Court on 21.9.2004 has passed a preliminary decree after considering the pleadings of the parties on both sides and the preliminary objections qua valuation of the suit for the purposes of court fee and jurisdiction raised by the defendant. The judgment dated 21.9.2004 reads as follows:

> "Keeping in view the facts as briefly noted hereinabove regarding each one of the parties being admittedly in possession of a part of the suit property, and it being not joint family property, I am satisfied that Section 7(v)(b) as well as 7(iv)(c) of the H.P. Court Fees Act, 1968 is inapplicable to the facts and circumstances of this case. What follows from this is that the suit is properly valued for the purposes of court fee and jurisdiction. This view is supported by the two decisions of this Court, referred to in the preceding paras of this order.
>
> Another point on behalf of the defendant urged was, regarding determination of status of the defendant over the suit premises. With a view to call for findings on this issue, learned senior counsel referred to the provisions of Order XX Rule 18 CPC. By referring to the provisions of Section 111 (d) of the Transfer of Property Act, he urged that there is no question of merger so far ownership and tenancy of his client in the demised premises is concerned. I am of the view that this question is not to be determined at this stage, and is thus left open. Ordered accordingly.
>
> No other point is urged.
>
> In view of the aforesaid discussion, OMP No.349 of 2003 stands dismissed, by holding that the suit is properly valued for purposes of court fee and jurisdiction.
>
> Keeping in view the fact that there is no dispute regarding shares of the parties in the suit property for partition by metes and bounds whereof present suit has been filed by the plaintiffs against the defendant, and shares of the parties being admittedly 2/5 and 2/5 each of plaintiffs and 1/5 of the defendant, a preliminary decree is passed holding so. A Local Commissioner needs to be appointed for working out the modalities of partition by metes and bounds as well as keeping

in view the provisions of Partition Act. Parties are directed to suggest a mutually acceptable person to be appointed as Local Commission for suggesting the mode of partition of the suit property. For this purpose, the case is ordered to be listed on 15.10.2004."

4. No appeal has been preferred against the preliminary decree passed by this Court on 21.9.2004. The same, therefore, has attained finality. Since as per the preliminary decree it was left open to the parties to suggest a mutually acceptable person to be appointed as Local Commissioner for suggesting mode of partition of the suit property, with their consent one Shri Triloki Nath Verma was appointed as Local Commissioner vide order dated 17.11.2004, which reads as follows:

"Learned Counsel for the parties, on instructions received from their respective clients, submitted that Shri Triloki Nath Verma, Retired Assistant Engineer, resident of Near Hari Mandir, Rajgarh Road, Solan, may be appointed as Local Commissioner for partitioning the property by metes and bounds. In view of this submission made by the learned counsel for the parties, he is appointed as Local Commissioner for doing the needful. His tentative fee is fixed at Rs.10,000/-. This amount will be paid by the parties in the ratio of their shares in the suit property. The learned counsel for the parties further submitted that view a view to avoid delay a date may be fixed by the Court for appearance of their clients before the said Local Commissioner. Accordingly, parties are directed to appear before the said Local Commissioner at 11 a.m. on 5.12.2004. Fifty per cent of the amount will be paid on that date to him against receipt. During the course of the proceedings before the Local Commissioner, parties will be free to ask the Local Commissioner to effect partition by metes and bounds as they may deem fit. Learned Counsel for the parties have further assured the Court that they will render all possible assistance to the Local Commissioner in expediting the submission of his report in this case. Registry is directed to send the following documents to the Local Commissioner:

a) a copy of this order;

b) copy of the preliminary decree alongwith the judgment on which it is based; and

c) a copy of the complete set of pleadings filed by the parties in the suit and also copies of all the documents filed by both the parties in support of their respective pleadings.

Suit may be listed before the Court after receipt of the report of the Local Commissioner. Urgent copy of this order may be made available to the learned counsel for the parties next week after the dispatch of the aforesaid documents forthwith to the Local Commissioner."

5. Consequently, the Local Commissioner conducted the demarcation of the suit property on the spot on 5.12.2004 and 13.12.2004 in the presence of the parties on both sides. After the inspection of the spot and carrying out measurements of the suit property, the Local Commissioner submitted his report, which reads as follows:

"The building bearing No.135 is situated in the Lower Bazar Main Market at Shimla. Four floors (other than the shop) namely sub-

basement floor, basement floor, ground floor and first floor have the only access from Mohalla known as Pursharthi Basti through a common staircase and passages. There is no connectively from Lower Bazar level to those floors as all the floors are below Lower Bazar level and are being used for residential purposes.

Floor wise area is as under:

FLOOR WISE SURFACE AREA:

Sub-Basement Floor:

12'-6" x 14'-0"	=	175.00	Sqft.
[(14'-0" x 5'-6")/2]	=	38.00	"
[(12'-6" x 5'-0")/2]	=	31.25	"
[(11'-0" x 6'-0")/2] x [12'-0" x 9'-0")/2]			
8.5 x 10.5	=	89.25	
	Total	334.00	Sqft.

Basement Floor:

1.	13'-3" x 24'-9"	=	318.00	Sqft.
2.	[(13'-3" x 4'-5")x 4'-5)/2]	=	29.81	"
3.	[(4'-3" x 21'-0")/2]	=	44.62	"
4.	[(4'-3" x 2'-6")/2]	=	5.31	"
5.	[(5'-0" x 2'-9")/2]	=	4.37	"
		Total	402.11	Sqft.

Ground Floor:

1.	38'-0" x 13'-3"	=	503.50	Sqft.
2.	8'-3" x 5'-0"	=	41.25	"
3.	5'-0" x 5'-0"	=	25.00	"
4.	[(37'-0" x 1'-6")/2]	=	27.75	"
5.	[(3'-6" x 7'-6")/2]	=	13.12	"
6.	[(2'-0" x 5'-0")/2]	=	5.00	"
		Total	615.62	Sqft.

First Floor:

1.	38'-0" x 13'-3"	=	503.50	Sqft.
2.	8'-3" x 5'-0"	=	41.25	"
3.	5'-0" x 5'-0"	=	25.00	"
4.	[(37'-0" x 1'-6")/2]	=	27.75	"
5.	[(3'-6" x 7'-6")/2]	=	13.12	"
6.	[(2'-0" x 5'-0")/2]	=	5.00	"
		Total	615.62	Sqft.

Sub basement Floor	=	334.00	Sqft.
Basement Floor	=	402.11	"

Ground Floor	=	615.62	”
First Floor	=	615.62	”
	Total	1967.35	Sqft.

This area is to be divided in three shares in the ratio 2:4:4 i.e. 393.47 Sqft : 786.94 Sqft : 786.94 Sqft.

20% share: Seems to be justified with basement floor having 402. 11 Sqft.

1st 40% share

Ground Floor	=	615.62	Sqft.
Half share as shown in Plan Mark ‘A’	=	167.00	”
	Total	782.62	Sqft.

IInd 40% share

First Floor	=	615.62	Sqft.
Half share as shown in Plan Mark ‘B’	=	167.00	”
	Total	782.62	Sqft.

Difference in the quantities of floor area with respect to the ratio 40:40:20 is negligible and these quantities are very near to the shares of 40% : 40% : 20%.

COMMERCIAL PORTION:

Shop (Commercial Portion) consists of 13’-4” long frontage along Lower Bazar and the length shown in the plans.

Two proposals can be considered:

First: The total frontage width can be divided in the ratio 20:40:40 along the total length of shop. The width of shares works out to 32”:64”:64” frontage as shown in plans.

Second: In second consideration a common passage can be provided on one side of shops and on the other side with length of 8’, 16’, 16’.

In this proposal share holder having first shop will be having more commercial benefits as compared to other share holders and which share holder should be kept in first shop seems to be a very complicated job. Hence the proposal does not seem to be justified.

The total Covered area of shop is : 684.24 Sqft.

This area is to be divided in three shares in the ratio of 2:4:4 i.e.: 136.80 Sqft : 273.69 Sqft : 273.69 Sqft.

The detail of Area and partition is shown in the enclosed plans.

- The area of divided share adjacent Shop No.136 (20%) comes to 136.66 Sqft.

- The area of the middle portion (40%) 273.94 Sqft.
- The area of the shop towards shop No.134 (40%) 273.64.
- All common passages and common staircase shall remain for common use for all the co-sharers.

The partition in the shop Floor shall be of minimum division laid on the centre line of the division marked on the site as per the plans attached so as to utilize the maximum space."

6. Annexed to the report is the site plan, in which the Local Commissioner has indicated the area in respective shares of the parties, residential portion and commercial portion.

7. The parties were given opportunity to go through the report and file objections, if any. The plaintiffs did not file any objection to the report and rather accepted the mode of partition of the suit property suggested by the Local Commissioner, however, the defendant has objected to the authenticity and genuineness thereof on the grounds *inter alia* that the Local Commissioner has not taken into consideration the observations made by this Court in the preliminary decree and the documents particularly qua his tenancy over the shop, a part of the suit property handed over to him, have not been taken into consideration. According to him, he is in possession of lesser area than the one in his share and as such his possession could have not been disturbed while suggesting mode of partition. In case the commercial portion in the possession of the defendant is partitioned in the manner as suggested by the Local Commissioner, the same cannot be used and rather will render useless. The plaintiffs allegedly father and son in relation, are in possession of more commercial area as compared to their share. The report of the Local Commissioner is biased and has been prepared at the instance of the plaintiffs.

8. The plaintiffs in reply to the objections filed on behalf of the defendant, have denied the same being wrong and submitted that the Local Commissioner has taken into consideration all relevant facts and suggested the best possible mode of partitioning the suit property. The measurements carried out by the Local Commissioner are as per factual position on the spot. It is denied that the defendant-objector is entitled to retain his possession or that the same cannot be disturbed in the manner as suggested by the Local Commissioner. It is also submitted that the Local Commissioner has taken into consideration all relevant factors and ensured that none of the parties is put to disadvantageous position while partitioning the suit property. The objections allegedly have been raised merely to retain more area than the entitlement of the defendant-objector. It is denied that the commercial portion, i.e., shop in occupation of defendant-objector cannot be partitioned in the manner as suggested by the Local Commissioner. His claim qua tenancy rights over the commercial portion has also been denied being wrong. The authenticity and genuineness of the documents regarding the alleged tenancy of defendant-objector has also been disputed.

9. In rejoinder, the defendant-objector has denied the contentions to the contrary in the reply being wrong and reiterated the objections he raised to the report of the Local Commissioner. On such pleadings of the parties, following issues came to be framed on 23.8.2005:

1. Whether the objector has right of tenancy, if any over the premises in question as alleged, if so, its effect? OP Objector.

2. Whether the report of the Local Commissioner is liable to be set aside on the grounds as set out in the objection petition? OP Objector.

3. Relief.

10. It is seen that the onus to prove both issues is on the objector-defendant. In order to discharge the onus on him, he himself stepped into the witness box as DW-1 and produced in evidence the rent deed Ext.DW-1/A, rent receipts Exts.DW-1/B to DW-1/G, site plans mark 'X' and 'Y' and copies of assessment reports Exts.DW-1/H-1 to Ext.DW-1/H-9. DW-2 Vijay Kumar Sharma, Senior Draftsman, Municipal Corporation, Shimla has proved the original revised plans of the suit property Exts.DW-2/A and DW-2/B. DW-3 Om Parkash Sood has been examined to prove the agreement Ext.DW-1/A allegedly executed by Shri Mahinder Pal on behalf of Smt. Sarswati Devi, the previous owner qua the creation of tenancy of the commercial portion of the suit property, i.e., shop in favour of the defendant. DW-4 Yoginder Pal Sood is the real brother of the defendant, who has been examined to prove that initially right from 1952 "Paul Boot House" was being run in shop No.135 (suit property), by the partnership firm of his and his brother Roshan Lal (defendant). Later on the partnership firm ceases to function as such about 5-6 years prior to 1986 and thereafter defendant Roshan Lal was running business in shop No.135.

11. Learned Counsel representing the defendant-objector in his own statement has produced in evidence the copy of sale deed Ext.DX, copies of judgments Ext.DY, Ext.DZ and Ext.DZ/1, dated 29.10.1981, 7.11.1984 and 28.3.1981, respectively.

12. On the other hand, plaintiff No.1 Sanjeev Aggarwal has himself stepped into the witness box as PW-1 and has tendered in evidence the copy of the order passed by Rent Controller (2), Shimla Ext.PA.

13. On an application filed by the defendant, the Local Commissioner was summoned and cross-examined on his behalf.

14. On behalf of the defendant-objector, learned arguing Counsel has raised manifold submissions including that the proceedings conducted by the Local Commissioner on the spot behind the back of the defendant cannot be believed and the report submitted cannot be treated to be legal and valid nor on the basis thereof the suit property can be partitioned and also that the tenancy of the shop in possession of the defendant cannot be said to have been determined by way of merger on acquiring a portion, the share of Shri Jatinder Lal by way of sale by the defendant and as such the shop in his possession in the capacity of a tenant cannot be partitioned.

15. Learned Counsel has further argued that what is the share of the defendant in the commercial/ non-commercial portion, the report is silent. Overwhelming evidence comprising oral as well as documentary shows that the defendant has been inducted as tenant over the commercial portion, i.e., shop by the previous owners and as such irrespective of he having acquired share of one of the co-owner by way of sale the shop being in his possession in the capacity of tenant cannot be partitioned. He allegedly has become tenant of the plaintiffs, who have purchased the remaining suit property from the previous owners. The tenancy of the shop in favour of the defendant, according to him, cannot be bifurcated. In the event of the shop is partitioned, the area will split up, which is said to be not legally permissible.

16. Learned Counsel representing the plaintiffs/ non-objector while repelling the arguments addressed on behalf of the defendant, has strenuously pointed out that no evidence is forth coming that the defendant or his brother were tenant under the owner Smt. Sarswati Devi Sood and when Jatinder Lal and Mohinder Paul were co-owners the shop in question could have not been rented out to defendant only by Mohinder Paul alone. The original rent deed remains with the landlord, however, the rent deed Ext.DW-1/A has been

produced in evidence by the defendant. The genuineness and authenticity of the rent receipts and also the assessment reports Ext.DW-1/H-1 to DW-1/H-9 have also been disputed. Learned Counsel has vehemently argued that the defendant, who agreed for appointment of Shri Trioloki Nath Verma as Local Commissioner, participated in the proceedings conducted by the Local Commissioner on the spot and even shared the fees paid to the Local Commissioner now cannot turn around and dispute the authenticity and genuineness of the report filed by the Local Commissioner. It is also pointed out that the best possible arrangement has been suggested by the Local Commissioner to partition the suit property. The attention of this Court has also been drawn to the order Ext.PA in previous rent petition to show that the defendant was not held to be the tenant so far as the shop in question is concerned. The attention of this Court has also been invited to the judgment in the litigation instituted by Shri Yoginder Lal Sood (DW-4), the own brother of the defendant against him qua the tenancy in question. According to learned Counsel, if the area suggested to be allotted to each party, as per the mode of partition, is compared with the plan, the variance is minor, which otherwise is also bound to come.

17. It is also pointed out from the record that rights of lessee are superior whereas the tenancy rights inferior and on acquiring a share in the suit property by the defendant such inferior rights merge into superior rights. It is also not the case of the defendant that the measurement has not been carried out on the spot and rather that the measurement is wrong, however, no evidence has been produced to substantiate the same. It is also argued on behalf of the plaintiffs that in case they are found to be in surplus area, they are ready to surrender the same. It is further urged that the objection qua report is illegal and that the Local Commissioner was biased to the defendant should have not been raised by the defendant.

18. On analyzing the evidence available on record and also the rival submissions, my findings on the aforesaid issues are as under:

ISSUE NO.1.

19. As a matter of fact, this is the pivotal issue in the *lis*. The defendant claims himself to be a tenant inducted by way of rent deed Ext.DW-1/A by the previous owners of shop No.135, the part of the suit property. This document has been executed by one Shri Mohinder Paul, one of the co-owners. The recitals of this document reveal that he has executed the same in the capacity of co-owner on behalf of other co-owners also, being authorized by them to do so. No document whereby said Shri Mohinder Paul was authorized by other co-owners, however, has seen the light of the day. If reverse of first page of this document is seen, the stamp papers worth Rs.10/- and Rs.5/- were purchased for reducing the same into writing. It is, however, only one stamp paper, i.e., Rs.10/- has been utilized for the purpose. Since this document is running in three pages, therefore, it is not understandable as to why the stamp paper worth Rs.5/- has not been used for reducing the same into writing. The number of two judicial papers used for reducing this document also varies, as first paper bears No.338070, whereas the second 338068. The missing of judicial paper bearing No.338069 also renders this document highly doubtful.

20. Above all, the executant Shri Mohinder Paul has not been examined nor is there any explanation qua his non-examination forth coming. No doubt, DW-3 Om Parkash Sood allegedly witnessed the execution of this document and admits his signatures thereon, however, if his testimony in cross-examination is seen, the same reveals that Mohinder Paul is only owner of the shop is not true because the rent deed itself reveals that besides said Shri Mohinder Paul others were also the co-owners of the same. Who were other co-owners, this witness has no knowledge in this regard. Smt. Sarswati Devi Sood, who admittedly, was co-owner of the shop in question, was also not known to him. On the other hand, defendant

being son-in-law of his parental uncle is closely related. When he did not know that the stamp papers were purchased before he came there or not, how he could have stated that the rent deed was reduced into writing in his presence. Not only this, but no exchange of money had taken place between executant Shri Mohinder Paul and defendant Roshan Lal, whereas the rent deed reveals that a sum of Rs.4,922/- towards the rent and municipal taxes was paid by the defendant to said Shri Mohinder Paul on that day. Not only this, but as per the version of DW-1, on the day of execution of Ext.DW-1/A (rent deed), business was being run in the shop in question by defendant and his brother Yoginder Paul in the name and style "Paul Boot House", whereas as per version of Yoginder Paul, the partnership firm had ceased to exist 5-6 years prior to 1986. As per his statement, he is not the adjoining shopkeeper and rather there exists 60-70 shops between his shop and the disputed shop, i.e., "Paul Boot House". When there were a large number of shops in both sides of the disputed shop, it is not known as to why the adjoining shopkeepers were not called for to witness this document. According to him, it is after execution of Ext.DW-1/A defendant started running business in the disputed shop under the name and style "Akash Boot House". Therefore, in the totality of the circumstances and close scrutiny of the statement made by DW-3 it would not be improper to conclude that he being in close relation of the defendant has deposed falsely and also that the execution of Ext.DW-1/A is not at all supported from his testimony.

21. If coming to the statement of DW-4 Yoginder Paul, who is none else but real brother of the defendant, he admits in his cross-examination that in the civil suit he filed in the year 1993 he had claimed himself to be the sole tenant in respect of the disputed shop and his brother Roshan Lal was defendant in that suit. He has admitted his signatures on the plaint of such suit bearing No.12-S/1998. Therefore, when DW-4 has disputed his brother, Roshan lal defendant herein to be inducted as tenant in the shop in dispute, his testimony that he was inducted as tenant by Mohinder Paul in the year 1986 cannot be believed to be true by any stretch of imagination. When this witness has blown hot and cold in the same breath, it is not safe to place reliance on his testimony. Otherwise also, he being the real brother of defendant possibility of he having deposed falsely to help him cannot be ruled out. If the statements of DW-3 and DW-4 are excluded from the evidence and the rent deed Ext.DW-1/A is also held legally inadmissible, there hardly remains any legal and acceptable evidence to show that the defendant was inducted as tenant in the disputed shop which form the part of the suit property owned by the previous owners.

22. The own testimony of the defendant as DW-1 cannot be relied upon to arrive at a conclusion that he was inducted as tenant by the owners in accordance with law. The rent receipts Exts.DW-1/B to DW-1/D are on the letter-head of Akash Boot House, the proprietor whereof is defendant and allegedly signed by Smt. Sarswati Devi Sood, the owner. As noticed hereinabove, said Smt. Sarswati Devi has not executed the rent deed Ext.DW-1/A in favour of the defendant. Whether these receipts have been issued by her, again there is no iota of evidence on record. Above all, these receipts are on the own letter-head of the defendant, therefore, the possibility of having been forged and fabricated cannot be ruled out. The rent receipt Ext.DW-1/E is on the plain paper whereby it has been shown that the landlord has received the rent of the disputed shop. The rent receipts Exts.DW-1/F and DW-1/G are on the letter-head of Mohinder Paul. There is no iota of evidence that these receipts have been issued by Mohinder Paul alone and not forged or fabricated documents, therefore, the same cannot be relied upon.

23. Reliance has also been placed on the tax assessment reports Ext.DW-1/H-1 to DW-1/H-9. No doubt, in these reports the defendant has been shown in possession of one room in the building 135, Lower Bazar, Shimla on payment of rent. However, when it is not

proved on record that he has been inducted as tenant in accordance with law and also that the tax assessment reports are prepared by the Municipal Corporation, Shimla in routine, it cannot be said that he is in possession of the shop in question in the capacity of a tenant.

24. Now if coming to the judgment/order Ext.PA produced in evidence by the plaintiffs, learned Rent Controller while deciding the rent petition filed by the previous owner Jatinder Paul Mohinder Paul against the defendant and his brother, it has been held that defendant Roshan Lal was never inducted as tenant over the shop in question and it is rather his brother Yoginder Paul (wrongly mentioned as Yoginder Lal) was tenant under the owners. Therefore, it lies ill in the mouth of the defendant to claim that initially he being partner of "Paul Boot House" was running his business in the capacity of tenant in the shop in question and subsequently was inducted as tenant vide rent deed Ext.DW-1/A. Otherwise also, had he been already inducted as a tenant where was the occasion for him to have executed the fresh rent deed Ext.DW-1/A. The defendant, therefore, was not inducted as tenant in the disputed shop nor could he prove the payment of rent to the owners. Of course, he is in possession of the shop in question which form the part of the suit property, but he failed to make out a case that the shop in question cannot be partitioned and also that he being the tenant under the plaintiffs who acquired share in the suit property subsequently by way of sale, is tenant under them and that they are entitled only to the payment of rent as agreed upon.

25. On behalf of the defendant-objector reliance has been placed on ***Puran Chand (deceased) through LRs and others*** v. ***Kirpal Singh (deceased) and others, (2001) 2 SCC 433, Nalakath Sainuddin*** v. ***Koorikadan Sulaiman, AIR 2002, SC 2562, T. Lakshmipathi and others*** v. ***P. Nithyananda Reddy and others, (2003) 5 SCC 150, India Umbrella Manufacturing Co. and others*** v. ***Bhagabandei Agarwalla (deceased) by LRs Savitri Agarwalla (Smt) and others, (2004) 3 SCC 178, Pramod Kumar Jaiswal and others*** v. ***Bibi Husn Bano and others, (2005) 5 SCC 492, Savitri Devi*** v. ***Santa and others, 1982 Sim.L.C. 135, Shafiq Ahmad*** v. ***Smt. Sayeedan, AIR 1984 Allahabad 140, Ishwar Dayal and others*** v. ***Ram Deo, 1985 (1) R.C.J. 619, Balak Ram*** v. ***Kedar Nath (deceased) through his L.Rs. Joginder Paul and others, 1995 (1) Sim.L.C. 191*** and ***Hameeda Begum and another*** v. ***Champa Bai Jain and others, 2009 (2) RLR 518***, to urge that in view of acquisition of partial proprietary rights in the suit property by the defendant by way of purchase of share of one of the previous owners the tenancy cannot be said to have determined because the proprietary rights qua the remaining suit property are with the plaintiffs and as such for want of complete transfer of the suit property in favour of the defendant the principle of merger is not applicable, i.e., the interest of the landlord in its entirety not vested and merged into the interest of the defendant-tenant in its entirety.

26. There is no quarrel to the law laid down in the judgments cited supra, however, when the defendant-objector has miserably failed to prove himself to be the tenant inducted in the disputed shop in accordance with law with all humility in my command, the ratio of the law laid down in these judgments is not at all attracted in the present case. Otherwise also, as per the law laid down in these judicial pronouncements, nothing is there that the co-sharer cannot seek partition of that portion of the suit property, which has been rented out. Therefore, the shop in dispute, which is part of the suit property, can be partitioned; however, the defendant can only be ousted therefrom under due process of law. Therefore, this issue is accordingly answered against the defendant-objector.

ISSUE NO.2.

27. Though objections have been raised to the report of the Local Commissioner that the same is biased and the suit property has not been measured in the presence of the defendant nor the mode of partition suggested legally sustainable, however, without producing any evidence which can be termed as cogent and reliable.

28. On an application filed by the defendant, Local Commissioner Shri Triloki Nath Verma was summoned for cross-examination. He has been cross-examined by the defendant. True it is that as per the Local Commissioner, Shri Akash Sood son of the defendant remained present during the course of proceedings conducted on the spot on 5.12.2004, however, as per his testimony on the next date, i.e., 13.12.2004, both parties were present, meaning thereby that defendant was also present on that day. An effort has been made to dispute the authenticity and correctness of the report of the Local Commissioner by cross-examining him that he has associated one Mr. Bhambra, Architect and that it is he who has drawn the entire proceedings, however, unsuccessfully as the defendant has failed to elucidate any material in this regard during the cross-examination of the Local Commissioner. On the other hand, it has come in his statement that he got signed the proceedings conducted on 5.12.2004 and 13.12.2004 from the parties on both sides and according to him on behalf of the defendant, the proceedings were signed by his son Shri Akash Sood. It is thus seen that by cross-examining the Local Commissioner the defendant has failed to elucidate something material lending support to the objections raised against the report of the Local Commissioner. Even it is believed to be true that he was not present on 5.12.2004 and 13.12.2004, it is his son Akash Sood who remained present on both these dates and has signed the proceedings without any protest. Otherwise also, as per own testimony of the defendant, his son Akash Sood was assisting him during the course of the proceedings in the suit. It has also come in evidence that the defendant is a disabled man.

29. Above all, the Local Commissioner was appointed with the consent of the parties on both sides. The fee was also paid to him by the parties on both sides as directed by this Court. Not only this, but the defendant-objector never objected to the proceedings conducted by the Local Commissioner on the spot, as no evidence to this effect has been brought on record. He has raised objections that the measurement carried out on the spot is wrong, however, how it is wrong, he has failed to produce any evidence. Since the plaintiffs are entitled to the extent of their shares in the suit property including the disputed shop and as the defendant on partition will get share in the shop in question to the extent of his ownership and as he is running business in the shop in question, therefore, with a view to grab the shop he has raised frivolous objections to the report of the Local Commissioner. The Local Commissioner, a technical expert has conducted the inspection of the spot and carried out the measurement and thereafter he has suggested the mode of partition of the commercial and non-commercial portions of the suit property in accordance with respective shares of the parties to the suit. I accept the report of the Local Commissioner and reject the objections thereto raised by the defendant. This issue, therefore, is also answered against the defendant.

RELIEF.

30. In view of my findings on both issues hereinabove, the final decree is passed in favour of the plaintiffs and it is ordered that the suit property be partitioned amongst the plaintiffs and the defendant as per the mode of partition suggested by the Local Commissioner. The report of the Local Commissioner be made part of the decree. No order as to costs. Decree sheet be prepared accordingly.

****

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

Sh. Sukhwinder Singh and another .....Petitioners.
Versus
Smt. Kusum Sharma .....Respondent.

CMPMO No.401 of 2015.
Judgment reserved on: 15.10.2015.
Date of decision: November 02 , 2015.

Code of Civil Procedure, 1908- Order 7 Rule 11- Plaintiff filed a civil suit for permanent prohibitory injunction- defendants filed an application for rejection of the plaint pleading that suit was barred by the provisions of Arbitration and Conciliation Act, 1996 as it was provided in the partnership agreement that in event of any dispute, same shall be referred to the Arbitrator, whose decision shall be final- plaintiff filed a reply pleading that partnership deed had been dissolved and it was not permissible to rely upon the arbitration clause- trial Court held that complicated question of law and fact are involved which could not be referred to the Arbitrator and Civil Court will have jurisdiction to decide those questions- held, that arbitration clause will continue to be operative even after the dissolution of the partnership - suit is for injunction but the claim arises out of the partnership deed – therefore, matter is required to be referred to the Arbitrator – mere fact that complicated questions of law and fact are involved is no ground for not referring the dispute to the Arbitrator- the plaint ordered to be rejected leaving the parties to approach the Arbitrator.

(Para-7 to 25)

Cases referred:

Ravi Prakash Goel versus Chandra Prakash Goel & Anr. AIR 2007 SC 1517
Branch Manager, M/s Magma Leasing & Finance Ltd., & Anr. versus Potluri Madhavilata & Anr. AIR 2010 SC 488
M/s Reva Electric Car Co. P. Ltd. versus M/s Green Mobil AIR 2012 SC 739
M/s Sundaram Finance Limited and another versus T.Thankam AIR 2015 SC 1303
Ravi Prakash Goel versus Chandra Prakash Goel & Anr. AIR 2007 SC 1517,
Branch Manager, M/s Magma Leasing & Finance Ltd., & Anr. versus Potluri Madhavilata & Anr. AIR 2010 SC 488
M/s Reva Electric Car Co. P. Ltd. versus M/s Green Mobil AIR 2012 SC 739
M/s Sundaram Finance Limited and another versus T.Thankam AIR 2015 SC 1303
Jagdish Chandra Gupta versus Kajaria Traders (India) Ltd. AIR 1964 SC 1882
Loonkaran Sethia etc. versus Mr.Ivan E.John and others etc. AIR 1977 SC 336
M/s Shreeram Finance Corporation versus Yasin Khan and others AIR 1989 SC 1769
Krishna Motor Service by its partners versus H.B. Vittala Kamath (1996) 10 SCC 88
M/s Raptakos Brett & Co. Ltd versus Ganesh Proeprty AIR 1998 SC 3085
The Employees in the Caltex (India) Ltd. Madras and another versus The Commissioner of Labour and Conciliation Officer, Government of Madras and another AIR 1959 Madras 441
D.C.Upreti versus B.D. Karnatak AIR 1986 Allahabad 32
Chamunda Spun Pipe Industry versus Ishwar Dass and others (1996) II ACC 261 (DB).
N.Radhakrishnan versus Maestro Engineers and others (2010) 1 SCC 72
Swiss Timing Limited vs. Commonwealth Games 2010 Organising Com. (2014) 6 SCC 677

For the Petitioners : Mr.Ashok K.Tyagi, 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 takes exception to the order passed by the learned Civil Judge (Junior Division) Nahan, on 14.09.2015 whereby the application filed by the defendants-petitioners for rejection of the plaint came to be dismissed.

The facts as are necessary for the adjudication of this petition may be stated thus.

2. The respondent-plaintiff filed a suit for prohibitory injunction in respect of the suit property comprised in Khata Khatauni No.78/99 min, Khasra No.277/219/121/2, measuring 05-00 bigha which was in the shape of a built-up area and also vacant land in Village Meerpur Gurdwara, Tehsil Nahan, District Sirmaur. It was alleged that after registration of sale deed No.646/2011 dated 23.11.2011, a partnership firm in the name and style of M/s Lavender Dairy and Milk Products was constituted which purchased the land and mutation No.279 dated 02.12.2011 was also attested in favour of the firm. On 30.06.2015, a partnership deed No.122/2015 came to be registered which comprised of the plaintiff, her husband Shri L.D.Sharma and the petitioners. The shares of the parties were 50% each. It was alleged that the plaintiff-respondent started causing illegal interference and began creating hindrance in running of the unit and, therefore, taking recourse to Clause No.5 of the partnership deed, the petitioners took over the firm from the plaintiff-respondent and were in physical possession and control of the same.

3. The main plea taken in the application for rejection of the plaint was that the suit was barred by the provisions of Arbitration and Conciliation Act, 1996 (for short 'Arbitration Act') in view of Clause-16 contained therein which stipulated that in the event of any dispute that may arise between the partners, the same shall be referred to the Arbitrator to be mutually appointed by the parties and whose decision shall be final.

4. The plaintiff-respondent in response to the application filed reply wherein it was stated that since partnership deed No.122/2015 has already been dissolved vide dissolution deed No. 150/2015, as per Sections 39, 41 (b) and Section 42 of the Indian Partnership Act, 1932 (for short 'Partnership Act'), therefore, in such eventualities, the petitioners could not fall back on the arbitration clause contained in the deed which was non-existent.

5. The petitioners-defendants filed rejoinder wherein, for the first time, they contended that the suit was not maintainable in view of the specific bar contained in Section 69(2) of the Partnership Act.

6. The learned trial Court dismissed the application by concluding that since complicated questions of law and facts were involved in the case, the same could not be referred to the Arbitrator as it was the Civil Court alone which could try and adjudicate such issues. Insofar as the question regarding suit being not maintainable under Section 69(2) of the Partnership Act is concerned, this contention was repelled by concluding that since the partnership firm had been dissolved and the relief sought was only for permanent prohibitory injunction, the same has nothing to do and did not arise out of the rights of the partnership deed and thus the suit was maintainable.

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

7. Clause-16 of the Partnership Deed dated 29th June, 2015 reads as under:-

> "That any dispute that may arise amongst the partners shall be referred to the arbitrator appointed mutually by the partners and his decision shall be final and binding to both the partners."

8. It is contended by Shri Ashok K.Tyagi, learned counsel for the petitioners that even if the partnership deed has been dissolved, the arbitration clause therein would still remain alive and operative and in support of his submission, he has relied upon the judgment of the Hon'ble Supreme Court in ***Ravi Prakash Goel versus Chandra Prakash Goel & Anr. AIR 2007 SC 1517, Branch Manager, M/s Magma Leasing & Finance Ltd., & Anr. versus Potluri Madhavilata & Anr. AIR 2010 SC 488, M/s Reva Electric Car Co. P. Ltd. versus M/s Green Mobil AIR 2012 SC 739***, a judgment of the learned Single Judge of the Delhi High Court in ***Himalya International Ltd. versus Simplot India Foods Pvt. Ltd., and another, Civil Suit (OS) No.1231/2013***, decided on 17.01.2014 and a recent judgment of the Hon'ble Supreme Court in ***M/s Sundaram Finance Limited and another versus T.Thankam AIR 2015 SC 1303***.

9. In ***Ravi Prakash Goel versus Chandra Prakash Goel & Anr. AIR 2007 SC 1517***, the Hon'ble Supreme Court held that on dissolution of the firm, the arbitration clause does not come to an end and so if a dispute is arisen during the lifetime of deceased-partner, his legal representatives would be entitled to take proceedings under Section 20 of the Arbitration Act, 1940. It is apt to reproduce paras 23 and 24 of the judgment which reads thus:-

> "23. On the dissolution of the firm, the arbitration clause does not come to an end and so if a dispute had arisen during the lifetime of the deceased partner, his legal representatives would be entitled to take proceedings under Section 20 of the Arbitration Act, 1940.
>
> 24. When a partner dies and the partnership comes to an end it is not only right but also the duty of the surviving partner to realize the assets for the purpose of winding up of the partnership affairs including the payment of the partnership debts. However, it is true that in a general sense the executors or administrators of the deceased partner may be said to have a lien upon the partnership assets in respect of his interest in the partnership and taking the partnership account."

10. In ***Branch Manager, M/s Magma Leasing & Finance Ltd., & Anr. versus Potluri Madhavilata & Anr. AIR 2010 SC 488***, it was held by the Hon'ble Supreme Court that arbitration clause is a collateral term in the contract which relates to resolution of disputes, and not performance. Therefore, even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. It was held:-

> "16. In the case of National Agricultural Co-op. Marketing Federation India Ltd. v. Gains Trading Ltd. (2007) 5 SCC 692, this Court held thus:
>
> > "6. The respondent contends that the contract was abrogated by mutual agreement; and when the contract came to an end, the arbitration agreement which forms part of the contract, also came to an end. Such a contention has never been accepted in law. An arbitration clause is a collateral term in the contract, which relates to resolution disputes, and not performance. Even if the performance of the contract comes to an end on account of repudiation, frustration

> or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. (Vide Heyman v. Darwins Ltd.[(1942)AC356], Union of India v. Kishorilal Gupta & Bros (AIR 1959 SC 1362) and Naihati Jute Mills Ltd. v. Khyaliram Jagannath (AIR 1968 SC 522). This position is now statutorily recognised. Sub-section (1) of Section 16 of the Act makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, an arbitration clause which forms part of the contract, has to be treated as an agreement independent of the other terms of the contract; and a decision that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

17. Recently, in the case of P.Manohar Reddy & Bros. vs. Maharashtra Krishna Valley Development Corporation And Ors (2009 AIR SCW 1356), while dealing with the argument of the respondent therein that in terms of the contract the claim for extra work or additional work should have been raised during the pendency of the contract itself and not after it came to an end, this Court considered the concept of separability of the arbitration clause from the contract and made the following observations :

> "27. An arbitration clause, as is well known, is a part of the contract. It being a collateral term need not, in all situations, perish with coming to an end of the contract. It may survive. This concept of separability of the arbitration clause is now widely accepted. In line with this thinking, the UNCITRAL Model Law on International Commercial Arbitration incorporates the doctrine of separability in Article 16(1). The Indian law -- the Arbitration and Conciliation Act, 1996, which is based on the UNCITRAL Model Law, also explicitly adopts this approach in Section 16(1)(b), which reads as under:
>
> > "16. Competence of Arbitral Tribunal to rule on its jurisdiction.--(1) The Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,--
> >
> > (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
> >
> > (b) a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."
> >
> > (emphasis supplied)
>
> Modern laws on arbitration confirm the concept.
>
> 28. The United States Supreme Court in a recent judgment in Buckeye Check Cashing Inc. v. Cardegna [546 US 460 (2005)] acknowledged that the separability rule permits a court "to enforce an arbitration agreement in a contract that the arbitrator later finds to be void". The Court, referring to its earlier judgments in Prima Paint Corpn. v. Flood & Conklin Mfg. Co.[18 L.Ed. 2d 1270] and Southland Corpn. v. Keating [465 US 1 (1984)], inter alia, held:

> "Prima Paint and Southland answer the propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."
>
> But this must be distinguished from the situation where the claim itself was to be raised during the subsistence of a contract so as to invoke the arbitration agreement would not apply."
>
> 18. The statement of law expounded by Viscount Simon, L.C. in the case of Heyman as noticed above, in our view, equally applies to situation where the contract is terminated by one party on account of the breach committed by the other particularly in a case where the clause is framed in wide and general terms. Merely because the contract has come to an end by its termination due to breach, the arbitration clause does not get perished nor rendered inoperative; rather it survives for resolution of disputes arising "in respect of" or "with regard to" or "under" the contract. This is in line with the earlier decisions of this Court, particularly as laid down in Kishori Lal Gupta & Bros. (AIR 1959 SC 1362).
>
> 19. In the instant case, clause 22 of the hire purchase agreement that provides for arbitration has been couched in widest possible terms as can well be imagined. It embraces all disputes, differences, claims and questions between the parties arising out of the said agreement or in any way relating thereto. The hire purchase agreement having been admittedly entered into between the parties and the disputes and differences have since arisen between them, we hold, as it must be, that the arbitration clause 22 survives for the purpose of their resolution although the contract has come to an end on account of its termination."

11. In ***M/s Reva Electric Car Co. P. Ltd. versus M/s Green Mobil AIR 2012 SC 739***, it was held by the Hon'ble Supreme Court that even after the termination of the Memorandum of Understanding (MOU) arbitration agreement contained therein would continue and the dispute between the parties relating to the subject matter of relationship between the parties which came into existence through the 'MOU' will have to be referred to the Arbitrator. It is apt to reproduce para 34 of the judgment which reads thus:-

> "34. The aforesaid provision has been enacted by the legislature keeping in mind the provisions contained in Article 16 of the UNCITRAL Model Law. The aforesaid Article reads as under :-
>
> "Article 16 - Competence of arbitral tribunal to rule on its jurisdiction –
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
>
> (2).....
> (3)....."
>
> Under Section 16(1), the legislature makes it clear that while considering any objection with respect to the existence or validity of

> the arbitration agreement, the arbitration clause which formed part of the contract, has to be treated as an agreement independent of the other terms of the contract. To ensure that there is no misunderstanding, Section 16(1)(b) further provides that even if the arbitral tribunal concludes that the contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause. Section 16(1)(a) presumes the existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the other terms of the contract. By virtue of Section 16(1)(b), it continues to be enforceable notwithstanding a declaration of the contract being null and void. In view of the provisions contained in Section 16(1) of the Arbitration and Conciliation Act, 1996, it would not be possible to accept the submission of Ms.Ahmadi that with the termination of the MOU on 31st December, 2007, the arbitration clause would also cease to exist. As noticed earlier, the disputes that have arisen between the parties clearly relate to the subject matter of the relationship between the parties which came into existence through the MOU. Clearly, therefore, the disputes raised by the petitioner needs to be referred to arbitration. Under the arbitration clause, a reference was to be made that the disputes were to be referred to a single arbitrator. Since the parties have failed to appoint an arbitrator under the agreed procedure, it is necessary for this Court to appoint the Arbitrator."

12. In ***Himalya International Ltd. versus Simplot India Foods Pvt. Ltd., and another, Civil Suit (OS) No.1231/2013***, decided on 17.01.2014, it was held by the Delhi High Court that no suit covered under the arbitration clause would be maintainable as the same would be barred under Section 5 of the Arbitration Act. It is apt to reproduce paras 8 to 14 of the judgment which reads as under:-

> "8. Section 5 of the Arbitration & Conciliation Act reads as under:
>
> > "5. Extent of judicial intervention. Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."
>
> 9. This Court in the case of Shri Roshan Lal Gupta vs. Shri Parasram Holdings Pvt. Ltd., 157(2009) DLT 712 in paras 21 and 23 held as follows:-
>
> > "21. There is yet another reason for me to hold so and it is reflected in the substantial questions of law framed on 29th January, 2009. The relief of declaration is guided by Section 34 and the relief of permanent injunction by Section 41 of the Specific Relief Act. Grant or non-grant of declaration is in the discretion of the court. A permanent injunction cannot be granted under clause (h) of Section 41 when equally efficacious relief can be obtained by any other usual mode of proceeding except in case of breach of trust. The discretion of the court ought not to be exercised in a manner so as to adversely affect the arbitral proceedings or to negate the purport of the 1996 Act. Similarly, it is not as if, if injunction restraining the arbitration is not given, the party challenging the validity of the arbitration agreement would be rendered remediless. The said party has the equally efficacious remedy of Sections 16 and 34 of the Arbitration

> Act. The suit for declaration and permanent injunction is found to be barred by provisions of Specific Relief Act also.
>
> 23. In my view, the law with respect to the adjudication by the courts while dealing with an application under Section 8 or Section 11 of the Act would not apply to the suit. Firstly, the proceedings under Sections 8 and 11 are provided for by the Act itself while the suit challenging the validity of the arbitration agreement has not been provided for in the Act and is barred under Section 5 of the Act. Thus merely because while interpreting Section 8 and Section 11 it has been held that the court before referring the parties to arbitration should satisfy itself of the existence of the arbitration agreement would not justify the institution of a suit for the same relief. Section 8 application is filed when a substantive suit is already before court and the question to be determined is whether that suit is to proceed or the parties are to be referred to arbitration. Similarly, Section 11 is an application for appointment of the arbitrator. Merely, because the court when faced with such provisions as provided for under the Act is to satisfy itself of the existence of the agreement cannot be understood to lay down that it is open to a party to even where no suit for substantial relief and application under Section 11 has been filed, an independent suit only for the relief of challenging the validity of the arbitration agreement can be instituted. I, therefore, do not feel the need to refer to the judgments filed by the counsel for the petitioner/appellant alongwith the synopsis on Section 8 and Section 11 of the Act."

10. In those facts, the Court held that a suit for declaration that an agreement containing an Arbitration Clause is forged, fabricated, unenforceable and null and void and for injunction restraining the arbitration does not lie and is barred under Section 5 of the Arbitration and Conciliation Act and under Sections 34 and 41 (h) of the Specific Relief Act read with Section 16 of the Arbitration Act. The above judgment was again reiterated by the said Court in the case of Shree Krishna Vanaspati Industries (P) Ltd. vs. Virgoz Oils and Fats Pte Ltd. and Anr., MANU/DE/1681/2009.

11. Similarly, the Hon'ble Supreme Court in the case of Aurohills Globe Commodities Ltd. vs. Maharashtra STC Ltd., (2007) 7 SCC 120 in para 13 held as follows:-

> "13. In the present case, M/s Aurohill Global Commodities Ltd. has filed this petition under Section 11(9) read with Section 11(5) of the said Act. Section 11 falls in Part I. The alleged contract is an international transaction, therefore, this Court has the power to appoint an arbitrator in accordance with the terms of the contract. Under the said Act, the Arbitral Tribunal has very wide powers. The powers of the courts have been curtailed. The Arbitral Tribunal's authority under Section 16 of the said Act is not confined to the width of its jurisdiction but goes to the very root of its jurisdiction (see Secur Industries Ltd. vs. Godrej & Boyce Mfg. Co. Ltd.). In the present case, therefore, the question as to whether the draft purchase order acquired the character of a concluded contract or not and the question as to whether the contract was non est can only be

> decided by the arbitrator. Therefore, the aforestated question have got to be decided by arbitration proceedings. ....."

12. The case of Clearwater Capital Partners (Cyprus) Ltd., Vs. Gurmeher Singh Majithia (Supra) also related to a case where the suit was filed seeking the relief of declaration that the Shareholder Subscription Agreement and Shareholder Agreement are illegal and therefore void ab intio and for an injunction restraining defendant No. 1 from initiating any legal action for enforcement of any terms of the said two Agreements including but not limited to invocation of the arbitration clause. This Court held as under:

> "Under Section 33 of the 1940 Act, the Arbitrator could examine the question of the existence or validity of the arbitration agreement. Section 16 of the Act not only preserves this power of the arbitrator but in fact expands it. The wording of Section 16(1) indicates that the arbitrator could rule on his own jurisdiction "including ruling on any objections with respect to the existence or validity of the arbitration agreement". The word "including" shows that the scope of the examination of the questions concerning the jurisdiction of the arbitral tribunal is not limited to the existence of the arbitration agreement itself. Therefore, it is inconceivable that where there is a violation of mandatory requirement like Section 21 of the Act, the arbitrator cannot examine that question as well. If the existence of the arbitration agreement is a sine qua non for commencement of arbitration proceedings and if such a question is to be examined only by the arbitrator, it is difficult to accept the proposition that the question whether a valid notice under Section 21 has been received by the respondent in a claim petition, cannot be gone into by the arbitrator."

13. Based on the above legal position this Court held that no suit for such a relief can be entertained by the court when defendant No. 1 had prior thereto elected to refer the disputes for arbitration in the manner envisaged in the Shareholder Agreement.

14. The legal position that follows aforesaid is that the issues that are raised by the plaintiff, namely, non -compliance of Clause 12.3(a) and Clause 12.3(b) are issues which have to be gone into by the Arbitral Tribunal. Section 5 of the said Act takes away the jurisdiction of the civil court. The said statutory provision has to be given effect to."

13. In ***M/s Sundaram Finance Limited and another versus T.Thankam AIR 2015 SC 1303***, it was held by the Hon'ble Supreme Court that once an application in due compliance of Section 8 of the Arbitration Act is filed, the approach of the Civil Court should be not to see whether the Court has jurisdiction, it has to see whether its jurisdiction has been ousted. It is apt to reproduce para 15 of the judgment which reads thus:-

> "15. Once an application in due compliance of Section 8 of the Arbitration Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. It should be to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statue, the civil court should first see whether there is ouster of jurisdiction in terms or compliance of the procedure under the special statute. The general law should yield to

> the special law –generalia specialibus non derogant. In such a situation, the approach shall not be to see whether there is still jurisdiction in the civil court under the general law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the court."

14. Shri Ashok K.Tyagi, learned counsel for the petitioners, would further argue that in view of the specific bar imposed by sub-section (2) of Section 69 of the Partnership Act, the suit is not maintainable. He in support of his submission has relied upon ***Jagdish Chandra Gupta versus Kajaria Traders (India) Ltd. AIR 1964 SC 1882, Loonkaran Sethia etc. versus Mr.Ivan E.John and others etc. AIR 1977 SC 336, M/s Shreeram Finance Corporation versus Yasin Khan and others AIR 1989 SC 1769, Krishna Motor Service by its partners versus H.B. Vittala Kamath (1996) 10 SCC 88, M/s Raptakos Brett & Co. Ltd versus Ganesh Proeprty AIR 1998 SC 3085***. The ratio in all the aforesaid judgments is that sub-section (2) of Section 69 of the Partnership Act is a penal provision which deprives the plaintiff of his rights to get the case examined on merits by the Court and simultaneously deprives the Court of its jurisdiction to adjudicate on the merits of the controversy between the parties until or unless the plaintiff is a registered partnership firm and since the provision is mandatory in nature, the same would make the suit incompetent on the very threshold.

15. On the other hand, Shri Ajay Sharma, learned counsel for the respondent, has made three-fold submissions. His first contention is that the provisions of the Arbitration Act are not at all attracted to the instant case for the simple reason that the suit does not arise out of or does not even touch the agreement where the arbitration clause is contained, rather the same is independent of it. His second submission is that nowhere in the application had the petitioners invoked the provisions of Section 69(2) of the Partnership Act and it is only in the rejoinder that this plea, for the first time, has been raised. That being so, the plea of non compliance of Section 69(2) of the Partnership Act cannot be even looked at as it is settled law that the pleadings only comprise of the plaint and the written statement. His third submission is that the suit is not based on the breach of any covenant of the agreement, rather the relief claimed in the suit is independent of the partnership deed which otherwise stands dissolved.

16. In support of his submissions, learned counsel for the respondent has relied upon the judgments of the Madras High Court in ***The Employees in the Caltex (India) Ltd. Madras and another versus The Commissioner of Labour and Conciliation Officer, Government of Madras and another AIR 1959 Madras 441, D.C.Upreti versus B.D. Karnatak AIR 1986 Allahabad 32 and Chamunda Spun Pipe Industry versus Ishwar Dass and others (1996) II ACC 261 (DB)***. The ratio which can be deduced from a reading of the aforesaid judgments is that any suit which does not arise out of a contract between the parties would not attract the penal provisions of sub-section (2) of Section 69 of the Partnership Act.

17. In order to appreciate the rival contentions of the parties, it is necessary to peruse the plaint and it would be evident from a perusal thereof that though the suit is one for permanent injunction, but the claim essentially arises out of the covenant as contained in the partnership deed dated 29.06.2015 as is evident from the averments contained in paragraphs 5 to 8 of the plaint which read thus:-

> "5. That the defendants contacted the plaintiff and her husband at their residence and also interested to see the said firm of the plaintiff and in this connection, they used to visit in the firm of the plaintiff and also properly

saw the function of the firm and ultimately in the month of June, 2015 the defendants requested the plaintiff and her husband to do the business in the firm with them and in this connection the defendants promised to become the partners in the said firm and also ready to invest the amount for future loss and profits in the production of the said firm and for this purpose also the partnership deed dated 3.6.2015 was mutually prepared by them and in which the share of the parties i.e. plaintiff and her husband of 50% and the defendants also 50% share for future loss and profit in the said firm and it was also mutually agreed that the defendant will invest Rs.50,00,000/- as fresh Capital within the period of 10 days for the smooth running of the business. This deed was also got notorised by the parties but the defendants before investment of the above amount stated that this deed should have been got attested and registered with the Sub Registrar, Nahan and thereafter they will invest the amount for future loss and profit in the firm and also mutually agreed that a fresh bank account of the firm will be opened in any scheduled Nationalised bank and the entire investment will be made through the fresh bank account of the firm. The defendants theirselves and through their skilled persons enquired the matter of the land as well as property and the loan of the firm.

6. That the defendants took the deed which was prepared on 3.6.2015 (3rd June, 2015) from the plaintiff by stating that they will prepare the deed on the same terms and conditions of the deed dated 3.6.2015 for registration the same with the Sub Registrar, Nahan and on 29.6.2015 the defendants prepared the fresh deed of partnership in the absence of the plaintiff and her husband and they called the plaintiff and her husband on 30.6.2015 at about 4.00 P.M. for obtaining the signature and when the plaintiff and her husband requested them to readover and explain the same to them, but the defendants stated that the same are based on the terms and conditions of the partnership deed dated 3.6.2015 and further stated that they have not made any change, alteration and addition in the fresh deed to the deed of 3.6.2015. In this way the defendants as have already gained the faith of the plaintiff and her husband obtained the signature on the fresh deed prepared on 29.6.2015 in the absence of plaintiff and her husband, without going through the plaintiff and her husband of the contents of the same as well as without readover and explain by themselves and also scriber and identifier and also presented to the Sub Registrar, Nahan Distt. Sirmaur, where the Sub Registrar, Nahan did also not ask about the same from the plaintiff and her husband as the things had already been manipulated by the defendants witnesses and scriber including the identifier, and where the signature were also obtained in good faith, which were also put by the plaintiff and her husband at the instance of the defendants in good faith.

7. That when the plaintiff visited to the office of the Tehsildar, Nahan and met with the dealing hand for obtaining the registered deed No.122/2015 and gone through the contents of the same of the copy of the same, then he came to know that the deed No.122/15 had been taken by the defendants and the plaintiff and her husband found major alteration and additions in the deed No.122 in respect of the cash payment of Thirty lacs as well as takeover the firm when no such type of line/words were in the deed No. 3rd June, 2015 and contacted the defendants as to why these words and lines were added by them when no such type of payment has ever been made by them to the plaintiff and her husband, in cash, then they promised that

they will rectify their mistake and get the deed No.122 be cancelled by them but till 13.7.2015 , the defendants did not turn up and rectify their mistake, the plaintiff and her husband issued the notice on 13.7.2015 to the defendants which was sent to the defendants through postal receipt on 14.7.2015 by giving the time of 7 days to get the deed No.122 be cancelled within 7 days and after receipt of this notice, they did not turn up and the deed No.122 was got dissolved as per the provisions of the Partnership Act, 1932 vide deed No.150/2015 by the plaintiff and her husband. The both the deeds are enclosed herewith.

8. That since the property as well as the firm is in existence and also in the owner in possession of the plaintiff and her husband on the spot and the defendants are creating nuisance in the said firm by creating interference in the same without any right, title and interest and on 3.8.2015 they broken the lock of main gate of the firm and the report to this effect was lodged with the Police. The plaintiff/her husband put the fresh lock on the main gate and when the Police called the defendants for investigation then they threatened that they will use the Trademark and name of the firm M/s Lavender Dairy and Milk Products for defaming the firm in the Market by any means and for this purpose, they are also trying to create the evidence, thus the plaintiff and her husband has also reasonable apprehension that the name and Trade Mark of the firm of the plaintiff may not be misused and also defamed in the market by the defendants. The plaintiff and her husband have also come to know that the same can be misused by them to harm the plaintiff's reputation in the market alongwith the said firm."

18. Here, it shall also be apt to reproduce the relief as claimed in the suit which reads thus:-

"It is, therefore humbly prayed that a decree of permanent injunction qua the suit property comprised in Khata/Khatauni No.78/99 min Khasra No.277/219/121/1/2 measuring 5.0 bigha situated at Mauza and Village Meerpur Gurudwara Tehsil Nahan Distt. Sirmaur H.P. may kindly be passed in favour of the plaintiff and against the defendants by way of restraining the defendants causing any sort of interference in any manner whatsoever and also restraining them from using the name and Trade mark of the firm M/s Lavender dairy and Milk products in the market and also restraining them from defaming the firm of the plaintiff in the market in any manner whatsoever and causing any damage to the suit property in future, either themselves through their agents, servants and assigns. And or any other relief to which the plaintiff may be found entitled may also be passed in favour of the plaintiff and against the defendants with costs of the suit."

19. Once, it is held that the suit infact arises out of breach of covenant of the partnership deed which as on date stands dissolved, then as per the ratio of the judgments laid down by the Hon'ble Supreme Court in ***Ravi Prakash Goel***, ***M/s Magma Leasing and Finance, M/s Reva Electric Car and M/s Sundaram Finance Limited*** (supra), the suit is not maintainable and is required to be referred to the Arbitrator.

20. Apart from the aforesaid, it needs be observed that even the trial Court had no doubt in its mind regarding the applicability of provisions of the Arbitration Act, but

rejected the contention of the petitioners on the ground that no application under Section 8 of the Arbitration Act had been preferred and moreover since there were allegations of fraud and misrepresentation etc., which essentially were complicated questions of law and facts, therefore, it would be Civil Court alone which could adjudicate upon the dispute.

21. Insofar as non filing of the application under Section 8 of the Act is concerned, suffice it to say, that mere mentioning of a wrong provision of law or non mentioning of a provision of law is of no avail as it is the substance and prayer contained in the application which is primarily required to be seen, rather than the provisions of law under which it is alleged to be filed.

22. Now coming to the question of suit being triable only by the Civil Court on account of there being complicated questions of law and facts, it may be noticed that to reach such a conclusion, the trial Court had relied upon the judgment of the Hon'ble Supreme Court in ***N.Radhakrishnan versus Maestro Engineers and others (2010) 1 SCC 72.*** But, then the judgment in ***N.Radhakrishnan's case*** (supra) has been subsequently considered by the Hon'ble Supreme Court in case of ***Swiss Timing Limited versus Commonwealth Games 2010 Organising Committee (2014) 6 SCC 677*** and held to be not laying down the correct law and was declared to be "per incuriam". The relevant observation of the Hon'ble Supreme Court in this regard reads as under:-

> "20. This judgment in P. Anand Gajapathi Raju v. P.V.G. Raju (2000) 4 SCC 539 was not even brought to the notice of the Court in N.Radhakrishnan v. Maestro Engineers (2010) 1 SCC 72. In my opinion, the judgment in N.Radhakrishnan is per incuriam on two grounds: firstly, the judgment in Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums (2003) 6 SCC 503 though referred to has not been distinguished but at the same time is not followed also. The judgment in P. Anand Guajarati Raju[6] was not even brought to the notice of this Court. Therefore, the same has neither been followed nor considered. Secondly, the provisions contained in Section 16 of the Arbitration Act, 1996 were also not brought to the notice by this Court. Therefore, in my opinion, the judgment in N.Radhakrishnan[2] does not lay down the correct law and cannot be relied upon."

23. Not only this, the Hon'ble Supreme Court in the case of ***Swiss Timing Limited*** (supra) held that the Court can decline to refer disputes to arbitration only when the Court reaches the conclusion that the contract is void on a meaningful reading of contract document itself without requirement of any further proof.

24. In view of the aforesaid discussion, the other question regarding the applicability/non-applicability of the provisions of Section 69 of the Partnership Act, in such circumstances, is only rendered academic.

25. Consequently, this petition is allowed and the suit filed by the plaintiff-respondent is held to be not maintainable in view of Clause-16 contained in the partnership deed dated 29.06.2015. The plaint is ordered to be rejected leaving the parties to approach the Arbitrator to be mutually appointed by the parties in terms of Clause-16. Pending application, if any, also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Shiv Chand ... Appellant/defendant
Versus
Parwati Devi ... Respondent/plaintiff.

RSA No. 144 of 2012-D
Judgment Reserved on : 27.8.2015
Date of Decision : November 3, 2015

Indian Succession Act, 1925- Section 63- Plaintiff filed a civil suit claiming herself to be legally wedded wife of the deceased and owner in possession of the suit land - Will stated to have been executed by the deceased was pleaded to be an act of fraud, misrepresentation, deception etc.- defendant pleaded that a valid Will was executed in his favour by the deceased after being satisfied about the services being rendered by him - Will was executed 18 days prior to the death- no satisfactory evidence was led to prove that defendant had served or stayed with the deceased- scribe of the Will stated that Will was witnessed by two witnesses, whereas, one person had signed the will as an identifier and not as a witness- held, that in these circumstances Will was not proved. (Para-12 to 20)

Cases referred:
Durga Das vs. Collector & others, (1996) 5 SCC 618
Suman Verma vs. Union of India & others, (2004) 12 SCC 58
Balwant Singh & another vs. Daulat Singh (Dead) by LRs & others, (1997) 7 SCC 137
Mahila Bajrangi (dead) through LRs & others vs. Badribai w/o Jagannath & another, (2003) 2 SCC 464
H. Lakshmaiah Reddy & ors. vs. L. Venkatesh Reddy, JT 2015 (4) SC 284
S.R. Srinivasa and others vs. S. Padmavathamma, (2010) 5 SCC 274
Lalitaben Jayantilal Popat vs. Pragnaben Jamnadas Kataria, (2008) 15 SCC 365
Mathew Oommen vs. Suseela Mathew, (2006) 1 SCC 519
Pentakota Satyanarayana and others vs. Pentakota Seetharatnam and others, (2005) 8 SCC 67
N. Kamalam (Dead) & another vs. Ayyasamy & another, (2001) 7 SCC 503
M.L. Abdul Jabbar Sahib vs. M.V. Venkata Sastri & Sons and others, (1969) 1 SCC 573
Durgi Devi & others vs. Krishan Chand & another, Latest HLJ 2014 (HP) 1338

For the appellant : Mr. Bimal Gupta, Sr. Advocate with Mr. Satish Sharma, Advocate, for the appellant.
For the respondent : Mr. G. R. Palsra, Advocate, for the respondent.

The following judgment of the Court was delivered:

Sanjay Karol, J.

This is the defendant's Regular Second Appeal filed under Section 100 of the Code of Civil Procedure.

2. Jogu Ram owned land comprising of khewat No. 45/44, khatauni No. 73, khasra Nos. 207, 210, 211, 213, 215, 208, 209, 212 and 214, kita – 9, measuring 22-10-5

bighas situated in village/Muhal Shilh/511, Sub Tehsil Aut, District Mandi, H.P. with other co-sharers to the extent of 1380 shares out of 18010 shares. On 9.7.2007, Parwati (plaintiff – respondent herein) filed a suit claiming to be owner in possession of the same (suit land) as legally wedded wife of Sh. Jogu Ram who expired on 8.2.2007. Challenge was laid to an unregistered Will dated 21.1.2007 propounded by Shiv Chand (defendant – appellant herein), who also got entries of mutation recorded in his name. Plaintiff pleaded the Will to be an act of fraud, misrepresentation, deception etc.

3. In defence, defendant who is the real nephew of Jogu Ram pleaded valid execution of the Will in lieu of the services rendered by him. Jogu Ram was issueless and since there was none to look after him, defendant took care of him.

4. Based on the respective pleadings of the parties, trial Court framed the following issues:

1. Whether the plaintiff is owner in possession of the suit land? OPP

2. Whether the plaintiff being legally wedded wife of Jogu Ram is entitled to inherit the property of Jogu Ram, as alleged? OPP

3. Whether the Will dated 21.1.2007 of Jogu Ram in favour of the defendant is forged fictitious document and is the result of fraud and mis-representation, as alleged? If so, its effect? OPP

4. Whether the mutation No. 957, dated 25.4.2007 is wrong and illegal, as alleged? OPP

5. Whether the plaintiff is entitled for permanent prohibitory injunction, as prayed? OPP

6. Whether the suit is not maintainable in the present form? OPD

7. Whether the plaintiff has no cause of action to file the present suit? OPD

8. Whether the plaintiff has no locus standi to file the present suit?OPD

9. Whether the suit of the plaintiff is not properly valued for the purpose of court fee and jurisdiction, as alleged? OPD

10. Whether Jogu Ram has executed legal and valid Will in favour of the defendant dated 21.1.2007, as alleged? If so, its effect? OPD

11. Relief."

5. Finding the Will to have been validly executed in favour of the defendant, trial Court in terms of judgment and decree dated 30.4.2011, passed in Civil Suit No. 56 of 2007, titled as *Smt. Parwati vs. Sh. Shiv Chand,* dismissed the suit.

6. In the plaintiff's appeal, the lower appellate Court in terms of judgment and decree dated 20.1.2012, passed in Civil Appeal No. 25 of 2011, titled as *Smt. Parwati Devi vs. Shiv Chand*, while reversing the findings of fact, decreed the suit, holding the plaintiff to be the sole legal heir of deceased Jogu Ram and the Will propounded by the defendant to be not only shrouded by suspicious circumstances but also not proved in accordance with law. Consequently entries of mutation effected in favour of the defendant, based on the Will in question, were also held to be null and void and plaintiff being the owner, defendant was restrained from interfering with her ownership and possession of the suit land.

7. Hence the present appeal admitted on the following substantial questions of law:-

"1. Whether the learned first appellate Court below was right in making out a new case for the plaintiff, which was neither pleaded nor otherwise proved on record?

2. Whether the learned first appellate Court below while passing the impugned judgment and decree has rightly not considered the plea of fraud and misrepresentation for execution of Will Ext. DW-1/A in the absence of particulars of such fraud and mis-representation?

3. Whether the learned first appellate Court below has misread, misinterpreted the statement of DW-4 Shri Bhag Chand and has rightly held DW-4 Shri Bhag Chand not as an attesting witness but as an identifier in an unregistered Will?

4. Whether the learned Court below has rightly set aside the Will Ext. DW-1/A, when it has come on record that at the time of attestation of mutation in favour of appellant on the basis of Ext. DW-1/A, plaintiff was present and plaintiff at no point of time assailed the said mutation in the hierarchy of revenue Courts and failed to give explanation for assailing the mutation Ext. DW-1/F when stepped into witness box."

8. Having heard learned counsel for the parties as also perused the record, I am of the considered view that no ground for interference is made out in the present appeal.

9. It is a settled position of law that entries of mutation in the revenue record do not confer any title to the property. It is only an entry for collection of land revenue from the person in possession. The title to the property has to be on the basis of the title with regard to the acquisition of land and not by mutation entries. Unless contrary is established, entries of mutation are taken to be correct. [See: *Durga Das vs. Collector & others,* (1996) 5 SCC 618 {relied upon in *Suman Verma vs. Union of India & others,* (2004) 12 SCC 58}; *Balwant Singh & another vs. Daulat Singh (Dead) by LRs & others,* (1997) 7 SCC 137; *Mahila Bajrangi (dead) through LRs & others vs. Badribai w/o Jagannath & another,* (2003) 2 SCC 464; and *H. Lakshmaiah Reddy & ors. vs. L. Venkatesh Reddy,* JT 2015 (4) SC 284.]

10. On the strength of Will (Ext. DW-1/A), entry of mutation No. 957 dated 25.4.2007 was effected in favour of the defendant. Record reveals that on 9.7.2007 itself, plaintiff laid challenge to the same. Hence there is no question of acquiescence on the part of the plaintiff. It also cannot be argued that the plaintiff accepted the Will. The suit was very much maintainable as only a Civil Court could have gone into the validity of the Will and title of the land in question. Effective remedy only lied with the Civil Court.

11. It is argued that the plaintiff accepted and acted upon the Will inasmuch as, in terms thereof, she withdrew the amount lying in the bank account of late Sh. Jogu Ram. The testator, as per the Will, had desired that she be given the money lying in the account. Significantly there is nothing on record to establish the exact amount which the plaintiff received from the bank. Also there is nothing on record to establish that such withdrawal was by way of acceptance of the Will. Record of the bank from where the amount was withdrawn is neither produced nor proved by the defendant.

12. Perusal of the written statement as also findings returned by the trial Court, which remain unassailed, establish that there is not much challenge to the fact that plaintiff was the only legally wedded wife of Jogu Ram. In any event, such fact stands proved through the testimony of the plaintiff, as also Bhan Singh (PW-2) and Shaila Devi (PW-3) who have proved the pariwar register (Ext.PW-1/E).

13. It is not the case of the parties that relation between Jogu Ram and plaintiff were either strained or that they were residing separately. It is a fact that deceased Jogu Ram had no issue and defendant is his real nephew.

14. It also cannot be disputed, as is evident from the ocular evidence, that Jogu Ram was a rustic villager; illiterate and a simpleton. Jogu Ram aged 75 years, died on 8.2.2007. The Will which is an unregistered document was executed on 21.1.2007, just eighteen days prior to his death.

15. Plaintiff, as is evident from the amended plaint, categorically pleaded fraud and misrepresentation. Also it is her case, so emerging from the record, that the execution of the Will is shrouded with suspicious circumstances.

16. Under these circumstances, onus to prove the Will is on the propounder.

17. There is no cogent evidence, establishing the fact that the defendant ever served or stayed with Jogu Ram. Though it has come on record that last rites were performed by the defendant but then one cannot lose sight of the fact that customarily in the absence of any direct male descendant, falling within Class-I heir, last rites are normally performed by a male lineal descendant (collateral). But then this would not mean that rights of Class-I heirs, specifically protected by law, would automatically stand ignored and defeated. There is no custom to such effect.

18. Undisputedly the Will is scribed by an Advocate namely Sh. Ram Dayal Rathour (DW-1), according to whom, on the asking of Jogu Ram he prepared the Will, which was signed by Chaman Lal (DW-2) as an attesting witness. Bhag Chand (DW-4) signed it as an identifier and as a witness. But perusal of the document reveals that there is only one attesting witness i.e. Chaman Lal and not Bhag Chand who has signed only as an identifier. His version is uninspiring and the witness not worthy of credence. He admits to have been interrogated by the police in connection with a complaint filed by the plaintiff under the provisions of Section 420 of the Indian Penal Code. His version that Jogu Ram had desired bequeathing his immoveable property in favour of his nephew Shiv Chand is absolutely uninspiring in confidence. It is not the case of the parties that Jogu Ram was a litigant; familiar with the legal procedures or functioning of the Courts. Even by conduct, he had not expressed such desire, for it is not the case of the defendant that even during the life time of Jogu Ram he used to till the land. The Will, even according to the scribe was executed in the house of Jogu Ram where Chaman Lal and Bhag Chand had reached before him. Who and how this witness was brought remains unproven on record. Even he does not state who took him, for it is not that Jogu Ram knew him from before and that he went to the Court or to his office. Why would this witness visit the house of the testator, remains unexplained, for after all it is not his case or that of the defendant that Jogu Ram knew him from before and reposed confidence only in him. He never advised the testator of getting the Will registered. Why so? he does not disclose. Yet he got his photograph affixed on the Will. His version that Jogu Ram was not unwell and was of sound disposing state of mind cannot be said to be inspiring in confidence for under normal circumstances the testator, who died within eighteen days, would have come to the office of the Advocate or the Court complex. The Will, scribed in Hindi, bears thumb impression of Jogu Ram. The scribe could have very well written that Bhag Chand signed both as a witness and an identifier, which he did not do so. Also if the scribe knew Jogu Ram from before, then where was the question of getting the testator identified from a third person. Also Will does not assign any special reason for bequeathing the immoveable property in favour of the defendant. Testimonies of Chaman Lal (DW-2) and Bhag Chand (DW-4) also cannot be said to be inspiring in confidence. Bhag

Chand is the Nambardar of the area. He does not convincingly depose any special reason, which prompted Jogu Ram to divest the plaintiff from his immoveable property.

19. One cannot ignore the fact that the property in question is a huge chunk of land of approximately 22 bighas having high value and great potential of being put to commercial use. The will was executed just eighteen days prior to the death. While ascertaining the intent of the testator, Court is duty bound to factor all attending circumstances in the execution of a valid Will. Lower appellate Court found the Will not to have been signed by two attesting witnesses. Such findings are correct. In law there is no bar for either the identifier or the scribe to be an attesting witness [*S.R. Srinivasa and others vs. S. Padmavathamma,* (2010) 5 SCC 274; *Lalitaben Jayantilal Popat vs. Pragnaben Jamnadas Kataria,* (2008) 15 SCC 365; *Mathew Oommen vs. Suseela Mathew,* (2006) 1 SCC 519; *Pentakota Satyanarayana and others vs. Pentakota Seetharatnam and others,* (2005) 8 SCC 67; *N. Kamalam (Dead) & another vs. Ayyasamy & another,* (2001) 7 SCC 503; *M.L. Abdul Jabbar Sahib vs. M.V. Venkata Sastri & Sons and others,* (1969) 1 SCC 573; and *Durgi Devi & others vs. Krishan Chand & another,* Latest HLJ 2014 (HP) 1338], but then such fact needs to be pleaded and proved by leading clear, cogent and consistent piece of evidence, which in the instant case is missing. As already observed, testimonies of the witnesses so examined by the defendant cannot be said to be inspiring in confidence on the question of execution of a valid will.

20. Substantial questions of law which stand considered cumulatively are answered accordingly.

21. Reference of decisions rendered by various courts of the land is of no avail to the appellant. However it is reflective of the Counsel's industry.

22. Hence, in my considered view, there is no merit in the present appeal and the same is accordingly dismissed. It cannot be said that the judgment passed by the lower appellate Court is based on incorrect and incomplete appreciation of facts and material placed on record by the parties or that the same is perverse which has resulted into miscarriage of justice.

Pending application(s), if any, also stand disposed of accordingly.

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

Rajwant Singh ....Petitioner.
Versus
Tejwant Singh ....Respondent.

CMPMO No. 197 of 2014.
Date of decision: 3.11.2015.

Code of Civil Procedure, 1908- Section 24- Petitioner approached the Court for transfer of the suit from the Court of Civil Judge (Senior Division) Kinnaur at Rekcong Peo to Civil Judge (Sr. Division), Shimla on the ground that respondent was an influential political person and Advocates practising at Rekcong Peo were not prepared to provide adequate legal services to the petitioner under the influence of the respondent- held, that one advocate was representing the respondent at Rekcong Peo and no aspersion was cast on the

professional competence of that advocate- further held, that acceptance of the submission on behalf of the petitioner would tantamount to a vindication of the inherent fact ingrained in the aforesaid submission that the Courts of law in Himachal Pradesh were under political influence- no merits in the petition, hence, dismissed.

For the petitioner: Mr. G.C.Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.
For the respondent: Mr. Arvind Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)

The respondent herein has instituted a civil suit being Civil Suit No.54/1 of 2013 against the petitioner herein. The aforesaid civil suit is pending in the Court of the learned Civil Judge (Sr. Division) Kinnaur at Rekcong Peo. The petitioner herein/defendant before the learned trial Court has through this petition sought for transfer of Civil Suit No. 54/1 of 2013 alongwith CMP No. 34/06 of 2013 titled as Tejwant Singh vs. Rajwant Singh pending in the Court of learned Civil Judge (Sr. Division), Kinnaur at Rekcong Peo to the Court of any learned Civil Judge stationed at Shimla. The ground on which the transfer of the aforesaid lis is asked for from this Court by the petitioner herein is constituted in the factum of the plaintiff respondent herein being an influential political personality of the area besides his maintaining a close acquaintance with all the Advocates practicing at Reckong Peo, who while being under his influence are either not extantly affording adequate legal services to him or have refused to afford any legal assistance to the petitioner herein in the civil suit, for facilitating his efficaciously defending the suit filed against him by the plaintiff/respondent herein, hence enfeebling his contest. The allegations constituted in the application stand denied by the respondent by filing a detailed reply to it. The imminent fact which upsurges from a perusal of the records, is of the instant petition having been filed before this Court by the petitioner herein through his General Power of Attorney, a practicing lawyer at Shimla. The petitioner herein had come to be proceeded against ex-parte for his non appearance before the learned trial Court on the date designated for his appearance before it, in the summons served upon him. In the application instituted by the petitioner herein before the learned trial Court under Order 9 Rule 7 CP.C. for setting aside the order by which he was proceeded against ex-parte, the grounds which stand portrayed therein in explanation for the non appearance of the defendant/petitioner herein before the learned trial Court on the date he was so enjoined to in the summons served upon him, are manifestly spurred by his inability to reach the premises of the learned trial Court in time on the apposite day. The application for setting aside the order by which the petitioner herein was proceeded against ex-parte was filed by Shri Amar Chand Negi, Advocate. The factum of the defendant-petitioner herein being defended by Amar Chand Negi is manifested by a perusal of the Zimini orders. The counsel for the petitioner herein has with force contended before this Court that Amar Chand Negi, Advocate is not efficaciously defending him in the civil suit arising from the fact of his not responding to his telephonic calls. The counsel for the petitioner herein during the course of his addressing arguments before this Court has not cast any aspersion upon the professional competence of Shri Amar Chand Negi, Advocate. As a corollary even if Mr. A.C.Negi, Advocate arising from his aforesaid omission is purportedly rendering inadequate legal assistance to the petitioner herein it would not compel this Court to order for the transfer of the lis inter se the petitioner herein and the respondent herein from the Court of learned Civil Judge (Sr. Division), Kinnaur at Rekong Peo to the Court of any learned Civil Judge stationed at Shimla, especially when even if Mr. A.C.Negi is found to be unsuitable to defend the defendant, it is always open to the

petitioner herein to engage counsel other than him available at Recokong Peo. Though the counsel for the petitioner has contended that all the legal practitioners other than Mr. A.C.Negi, Advocate, practicing at Reckong Peo have refused to accept the brief of the petitioner herein, hence leaving him in a quandary to disengage Mr. A.C.Negi. However, the aforesaid submission does not find favour with this Court. The reason for discountenancing the aforesaid submission of the learned counsel for the petitioner herein arises from the factum of there being no averment with specificity qua the counsel at Reckong Peo who were approached by the defendant/petitioner herein and who refused to accept the brief of the defendant/petitioner. In sequel, the aforesaid ground of the petitioner herein being disabled to project an efficacious defence in the lis pending inter se him and the respondent herein before the Court of Civil Judge, (Senior Division), Kinnaur at Recong Peo and its facilitating a conclusion from this Court that to empower the petitioner herein to efficaciously defend his cause in the Civil Suit, it warrants its transfer from the Court of Civil Judge (Senior Division) Kinnaur at Recong Peo to the Court of a Civil Judge stationed at Shimla, is found unsustainable. Even if the counsel for the petitioner herein contended that the weight and size of the political personality of the respondent would stand in the way of the Court wherein the lis inter se the petitioner and the respondent herein is pending, dispassionately adjudicating the lis pending before it yet the aforesaid ground holds no consequence with this Court to hence infer that the lis pending before the Court of learned Civil Judge (Sr. Division), Kinnaur at Reckong Peo warrants its transfer therefrom to the Court of any Civil Judge stationed at Shimla, as acceptance of the aforesaid submission would tantamount to a vindication of the inherent fact ingrained in the aforesaid submission, of Courts of law in Himachal Pradesh working under political influence.

Accordingly, there is no merit in the petition. The same is dismissed. All pending applications stand disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Anil Kumar & others ... Appellants/defendants

Versus

Gokal Chand ... Respondent/plaintiff.

RSA No. 308 of 2006
Judgment Reserved on : 26.8.2015
Date of Decision : November 3, 2015

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit pleading that defendants were interfering with his possession and claimed permanent prohibitory injunction- defendants claimed to be in possession and further claimed that they had become owners by way of adverse possession – plaintiff was proved to have been dispossessed on the date of the filing of the suit- defendants had failed to prove their plea of adverse possession- held, that Court could have moulded the relief and granted relief of the possession, even though, such relief was not specifically pleaded by the plaintiff. (Para-8 to 26)

Cases referred:

Union of India vs. Ibrahim Uddin & another, (2012) 8 SCC 148
Rajendra Tiwary vs. Basudeo Prasad & another, (2002) 1 SCC 90

Ganesh Shet vs. Dr. C.S.G.K. Setty & others, (1998) 5 SCC 381
L. Janakirama Iyer & others vs. P. M. Nilakanta Iyer & others, AIR 1962 SC 633
The Arya Pradishak Pratinidhi Sabha through Lala Hans Raj vs. Chaudhri Ram Chand & others, 1924 Lahore 713 (Two Judges)
Bundi Singh vs. Shivanandan Prasad Sahu, AIR (37) 1950 Patna 89 (Two Judges)
Bal Krishan & others vs. Braham Dass & others, 2002 (2) S.L.J. 1359
Phul Chand Bishan Dass & others vs. Kalu Ram Lachhman Dass & others, AIR 1971 Punjab & Haryana 21
Karam Dass & others vs. Som Parkash, AIR 1986 Punjab & Haryana 89
U.P. State Brassware Corpn. Ltd. vs. Uday Narain Pandey, (2006) 1 SCC 479
Katihar Jute Mills Ltd. vs. Calcutta Match Works (India) Ltd. & another, AIR 1958 Patna 133 (Two Judges)

For the appellant : Mr. Vinod Gupta, Advocate for the appellants.
For the respondent : Mr. G. D. Verma, Sr. Advocate, with Mr. B. C. Verma, Advocate, for the respondent.

Sanjay Karol, J.

Defendants' Regular Second Appeal filed under Section 100 of the Code of Civil Procedure, stands admitted on the following substantial questions of law:-

> "1. Whether the ld. First appellate court could have granted a decree for possession in a suit for injunction simplicitor, more so when the findings of both the courts is that on the date of filing the suit the plaintiff was not in possession and in the plaint no relief qua possession has been prayed for and keeping in view the provisions of Order 7 Rule 7 CPC?
>
> 2. Whether the ld. First appellate court could have granted the relief of possession which was not claimed and for which court fees had not been paid by the plaintiff, as the same had to be given according to the value of the subject matter whereas the court fee was paid only to obtain an injunction. If so, its effect thereupon?
>
> 3. Whether general reliefs can be granted by the civil courts in view of the specific provisions of Order 7 Rule 7 which provides that relief is to be specifically stated. If so its effect thereto?

2. On 3.3.2004 plaintiff Gokal Chand (respondent herein) filed a suit for permanent prohibitory injunction pleading that the defendants Anil Kumar, Roop Lal and Smt. Ram Payari (appellants herein) have been interfering with his cultivatory possession over the suit land owned by him. On 28.2.2004, despite resistance, defendants threw mud over the suit land. With these averments, plaintiff prayed as under:-

> "It is, therefore, prayed that in view of the submissions made herein above, a decree for permanent prohibitory injunction, restraining the defendants from interfering in the suit land of the plaintiff, in any manner or changing the nature of the suit land in any manner may kindly be passed in favour of the plaintiff and against the defendants. And/or any other relief, to which the plaintiff be found entitled to, in view of the facts and circumstances of the present case, may also be awarded in favour of the plaintiff and against the defendants alongwith the costs of present suit and justice be done."

3. Defendants resisted the suit claiming themselves to in possession of the suit land and having perfected their title by way of adverse possession.

4. Based on the respective pleadings of the parties, trial Court framed the following issues:

> "1. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction? OPP
>
> 2. Whether the suit is not maintainable? OPD
>
> 3. Whether the suit is bad for min-joinder of necessary parties? OPD
>
> 4. Relief."

5. Even though no specific issue with regard to the title of the defendants was framed, yet the parties led evidence on the same. Answering the issues and adjudicating the points raised, trial Court, in terms of judgment and decree dated 1.10.2005, passed in Civil Suit No. 8 of 2004, titled as Gokal Chand vs. Anil Kumar & others, dismissed the suit holding that: (i) in view of the demarcation report dated 9.5.2001 (Ext. DW-1/A) prepared prior to the institution of the suit, plaintiff already stood dispossessed from the suit land; and (ii) defendant had no right or title over the same.

6. Such findings stood accepted by the defendant but however in the plaintiff's appeal, the lower appellate Court, in exercise of its powers under Order VII Rule 7 CPC, in terms of the judgment and decree dated 23.5.2006, passed in Civil Appeal No. 114 of 2005, titled as Gokal Chand vs. Anil Kumar & others, while reversing the judgment and decree passed by the trial Court, decreed the plaintiff's suit as under:-

> "As a sequel to my finding on point No. 1 above, the appeal is accepted and the impugned judgment and decree are set aside. The suit filed by the plaintiff is hereby decreed for possession of the land comprised in khewat khatauni No. 72/91 khasra No. 53, 54, and 56 and khata khatauni No. 73/92 khasra No. 55, situated at village Chadyara/346 tehsil Sadar, District Mandi, H.P. However, there is no order as to costs. Decree sheet be prepared."

7. Having heard learned counsel for the parties as also perused the record, I am of the considered view that no ground for interference is made out in the present appeal.

8. Assailing the judgment, learned counsel for the appellant invites attention of the Court to the decision rendered by the apex Court in *Union of India vs. Ibrahim Uddin & another,* (2012) 8 SCC 148.

9. In the said decision, Court was dealing with a case where the plaintiff sought declaration of his title of ownership without praying for the relief of possession and thus, the Court observed as under:-

> "77. This Court while dealing with an issue in *Kalyan Singh Chouhan vs. C.P. Joshi,* (2011) 11 SCC 786, after placing reliance on a very large number of its earlier judgments including *Trojan & Co. vs. Nagappa Chettiar,* AIR 1953 SC 235, *Om Prakash Gupta vs. Ranbir B. Goyal,* (2002) 2 SCC 256, *Ishwar Dutt vs. Collector (LA),* (2005) 7 SCC 190, and *State of Maharashtra vs. Hindustan Construction Co. Ltd.* (2010) 4 SCC 518, held that relief not founded on the pleadings cannot be granted. A decision of a case cannot be based on grounds outside the pleadings of the parties. No evidence is permissible to be taken on record in the absence of the pleadings in that respect. No party can be permitted to travel beyond its pleadings and that all necessary and material facts should be pleaded by the party in support of

> the case set up by it. It was further held that where the evidence was not in the line of the pleadings, the said evidence cannot be looked into or relied upon."
>
> "85.6. The court cannot travel beyond the pleadings as no party can lead the evidence on an issue/point not raised in the pleadings and in case, such evidence has been adduced or a finding of fact has been recorded by the court, it is just to be ignored. Though it may be a different case where in spite of specific pleadings, a particular issue is not framed and the parties having full knowledge of the issue in controversy lead the evidence and the court records a finding on it."

10. Here the facts are different and the decision inapplicable.

11. Suit pertaining to declaratory decrees is filed under Chapter VI, Section 34 of the Specific Relief Act, 1963 and suit for perpetual injunctions is filed under Chapter VIII, Section 38 of the Act. Whereas suit for recovery of immoveable property is filed under Chapter I of the Act.

12. The parties to the *lis*, as is evident from the testimonies of the witnesses, claim their respective title and ownership over the suit land. However, concurrently courts have held the plaintiff to be the lawful owner. In fact, defendants' plea of having perfected his title by way of adverse possession stands repelled concurrently by the courts below.

13. It is true that as on the date of filing of the suit plaintiff stood dispossessed, which fact, as is so observed by the courts below, is evident from the report of the revenue officer.

14. The question which needs to be considered is as to whether the lower appellate Court was right in moulding the relief and directing the defendants to hand over the possession of the suit land or not.

15. Order VII Rule 7 of Code of Civil Procedure reads as under:-

> "7. **Relief to be specifically stated. -** Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement."

16. From the plaint it is evident that the defendants had been repeatedly interfering with the plaintiff's possession. It was so done in the years 1998, 2000, 2001 and lastly in the year 2004. In para-4 of the plaint it is categorically pleaded that on 28.2.2004, despite the plaintiff's request of not interfering with his possession, defendants threw mud on the suit land. Defendants failed to establish their right, title or interest over the suit land by way of adverse possession. They being trespassers had no right in retaining possession. Parties had been litigating for the last 18 years. Plaintiff has been continuously resisting interference. Without relegating the parties to the original position and keeping in view the evidence led by the parties, the lower Appellate Court committed no illegality or irregularity in decreeing the plaintiff's suit by moulding the relief.

17. The jurisdiction of the court in granting such relief is not in dispute. "General or other relief" in the given facts and circumstances would include the relief of possession which the court is competent to grant. The Court in its wisdom thought it just, fair and prudent to grant the said relief, finding itself competent to do the same, to the same extent, as though it had been asked for.

18. Thus the decision rendered by the apex Court in Ibrahim Uddin (supra) is inapplicable in the given facts and circumstances, where there was a statutory bar in not doing so.

19. It is not the case of the appellants that the alternate relief "to which the plaintiff be found entitled to" cannot be granted by the Civil Court. [See: *Rajendra Tiwary vs. Basudeo Prasad & another,* (2002) 1 SCC 90]

20. The apex Court in *Ganesh Shet vs. Dr. C.S.G.K. Setty & others,* (1998) 5 SCC 381 has further held that:-

> "15. The question is whether, when parties have led evidence in regard to a contract not pleaded in the evidence, relief can be granted on the basis of the evidence and whether the plaintiff can be allowed to give a go-by to the specific plea in the plaint. Is there any difference between suits for specific performance and other suits?
>
> 16. It appears to us that while normally it is permissible to grant relief on the basis of what emerges from the evidence - even if not pleaded, provided there is no prejudice to the opposite party, such a principle is not applied in suits relating to specific performance." ... ...

21. The apex Court in *L. Janakirama Iyer & others vs. P. M. Nilakanta Iyer & others,* AIR 1962 SC 633 has held that "In construing the plaint the court must have regard to all the relevant allegations made in the plaint and must look at the substance of the matter and not its form."

22. In *The Arya Pradishak Pratinidhi Sabha through Lala Hans Raj vs. Chaudhri Ram Chand & others,* 1924 Lahore 713 (Two Judges), privy counsel has held that:-

> "Court can award damages in a suit for specific performance though not specifically prayed for. It ought to award damages when it thinks that damages should be awarded. This principle applies even in cases where specific performance is decreed."

23. The High Court of Patna in *Bundi Singh vs. Shivanandan Prasad Sahu,* AIR (37) 1950 Patna 89 (Two Judges), under similar circumstances, where plaintiff pleaded for injunction, decree for possession stood passed.

24. The power of the Court to mould the relief, on the basis of the pleadings and material so placed on record by the parties stands recognized and acknowledged by the various Courts. [*Bal Krishan & others vs. Braham Dass & others,* 2002 (2) S.L.J. 1359. [Also: *Phul Chand Bishan Dass & others vs. Kalu Ram Lachhman Dass & others,* AIR 1971 Punjab & Haryana 21; *Karam Dass & others vs. Som Parkash,* AIR 1986 Punjab & Haryana 89; and *U.P. State Brassware Corpn. Ltd. vs. Uday Narain Pandey,* (2006) 1 SCC 479.]

25. It is a settled principle of law that pleadings particularly those of moffisil courts are to be construed liberally and not very strictly. The expression "general or other relief" is an omnibus phrase and wide enough to cover all such reliefs as are consistent with the averments made in the plaint. None of the parties to the *lis* have been taken by surprise. It is true that plaintiff has not specifically pleaded for the relief of possession but the pleadings generally make out such a case. Insofar as Court fee is concerned, since the suit is on the basis of title, plaintiff can be directed to pay a nominal fee and the suit cannot be dismissed merely on such a ground.

26. The correctness of the reports of the revenue officials was disputed by both the parties and it is in this backdrop no fault can be found with the plaintiff in contending to be the owner of the suit land. In holding so, strength can be drawn from the decision rendered in *Katihar Jute Mills Ltd. vs. Calcutta Match Works (India) Ltd. & another,* AIR 1958 Patna 133 (Two Judges) wherein it is held as under:-

> 19. ... ...
>
> "The phrase "general or other relief" in this provision of law is an omnibus phrase wide enough to cover all such reliefs as are consistent with the averments made in the plaint. Mulla in his commentary on Order 14, Rule 1, Civil Procedure Code (12 Edition) goes to the length of saying:
>
> > "But where the substantial matters which constitute the title of all the parties are touched, though obscurely, in the issues, and they have been fully put in evidence, and have formed the main subject of discussion in the Court, the Court may grant a relief though it may not be founded on the pleadings..... But if a case not alleged by the plaintiff in his pleadings is disclosed in the evidence, the Court should not deal with it, unless a specific issue is raised on it and the defendant is given an opportunity of meeting it: Parshram v. Miraji, ILR 20 Bom 569 (O) and Gauri Shankar v. Jawala Prasad, AIR 1930 Oudh 312 (P)."
>
> Similarly in his commentary on Order 7, Rule 7, Civil Procedure Code, at page 610 it is stated :
>
> > "Where a relief is claimed upon a specific ground, the Court may grant it upon a ground different from that on which it is claimed in the plaint, if the ground is disclosed by the allegation in the plaint and the evidence in the case Rasul Jehan v. Ram Sarun, ILR 22 Cal 589 (Q); Haji Khan v. Baldeo Das, ILR 24 All 90 (R) and Ram Chandra v. Jaith Mal, 1934 AIR(All) 990. Thus, in a case in which a plaintiff claimed an easement by prescription, and it was found that he was not entitled to the easement by prescription, their Lordships of the Privy Council dealing with the case as a special appeal," decreed the claim on the presumption of title arising from a grant: Rajroop v. Abdool, 7 Ind App 240 (PC) (T); Achul v. Rajun, ILR 6 Cal 812 (U) and Secretary of State v. Mathurabhai, ILR 14 Bom 213 (V)."
>
> In my opinion, these rules, as I understand them, are in their own turn rooted in a larger principle, namely, that on one hand no party at the trial should be taken by surprise and on the other in case of an alternative relief the same should not be such as to constitute any embarrassment at least to the party pleading it. Here no question of surprise can arise for the entire defence as also the discussion in the judgment on the issue of part performance is based on the assumption that the original title is with the plaintiff." ... ...

27. Hence, in my considered view, there is no merit in the present appeal and the same is accordingly dismissed. It cannot be said that the judgment passed by the lower appellate Court is based on incorrect and incomplete appreciation of facts and material placed on record by the parties or that the same is perverse which has resulted into miscarriage of justice. Substantial questions of law are answered accordingly. Pending application(s), if any, also stand disposed of accordingly.

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

Budhi Singh .....Appellant.
Versus
State of H.P. .....Respondent.

RSA No. 249 of 2001.
Reserved on: 2.11.2015.
Decided on: 3.11.2015.

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit pleading that he is owner in possession of the suit land- land was allotted to him on 13.6.1981, nazarana was deposited by him, his allotment was subsequently cancelled but defendant was estopped from cancelling the allotment- revenue record shows that State was owner of the land and the land was in possession of the Forest Department- held that land could not have been allotted for non-forest purposes- allotment was cancelled within three years of the discovery of the fraud- Additional District Magistrate had the necessary jurisdiction to go into the question. (Para-13 and 14)

Case referred:
Mangheru Vrs. State of H.P. & ors., I.L.R. 1981 H.P. 283

For the appellant(s): Mr. Ajay Sharma, Advocate.
For the respondent: Mr. Parmod Thakur, Addl. AG with Mr. Neeraj K. Sharma, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Kangra at Dharamshala, H.P. dated 1.3.2001, passed in Civil Appeal No. 126-P/III-99.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the appellant-plaintiff (hereinafter referred to as the plaintiff) has filed a suit for declaration and injunction against the respondent-defendant (hereinafter referred to as the defendant) stating therein that he is owner-in-possession of a parcel of land measuring 0-01-08 hectares and the super structure standing thereon, which is part of the land comprised in Khata No. 217 min, Khatauni No. 599 min, Kh. Nos. 1733/1724 and 1722/1495, situated in Mohal Rodi, Mauza Khalet, Tehsil Palampur, Distt. Kangra, H.P., as entered in the jamabandi for the year 1989-90 (hereinafter referred to as the suit land). The land was allotted to him on 13.6.1981. The same was cancelled on 26.5.1993. He was serving in the Indian Army. He has retired in the year 1977. He was houseless. He constructed one room in the year 1979. The construction was done on the assurance given to him by the functionaries of the State. The allotted Khasra number was given to him on 13.6.1981. He deposited the requisite nazrana of Rs. 11.04. He added more rooms in the year 1991. The villagers lodged complaint against him. It is, in these circumstances, order dated 26.5.1993 was passed. The suit land did not form part of the reserve pool. The defendant was estopped from cancelling the allotment.

3. The suit was contested by the defendant. According to the averments made in the written statement, it came to the knowledge of the public of the area that the land has been allotted to the appellant illegally. The enquiry was got conducted by Tehsildar, Palampur. He was found to be resident of Sutrehar, Mauja Kothi Jhikli in Kangra Tehsil and his father was alive. His father owned land measuring 1-27-57 hectares. In these circumstances, the allotment of land to him was cancelled vide order dated 26.5.1993.

4. The replication was filed by the plaintiff. The learned Sr. Sub Judge, Kangra at Dharamshala, H.P. framed the issues on 21.3.1995. The suit was decreed vide judgment dated 29.4.1999. The respondent, feeling aggrieved, preferred an appeal against the judgment and decree dated 29.4.1999. The learned District Judge, Kangra at Dharamshala, allowed the same on 1.3.2001. Hence, this regular second appeal.

5. The regular second appeal was admitted on the following substantial questions of law on 21.6.2001:

> "1. Whether District Judge below erred in appreciating the provisions of Section 8, 8-A of the Act, Clause 2(bb), 4,5,6,7,8,9,11 and 13 of the Scheme, thereby vitiating the impugned judgment and decree?
>
> 2. Whether orders having been passed without there being any authority in ADM, Kangra dated 25.6.1993 are liable to be ignored being totally void abinitio?
>
> 3. Whether interpretation regarding the limitation with respect to the Nautor Rules as imparted by learned District Judge has vitiated the findings given in the case in hand?"

6. Mr. Ajay Sharma, Advocate, on the basis of the substantial questions of law framed, has vehemently argued that the provisions of the Scheme have been misconstrued by the learned District Judge. The order passed by the Addl. District Magistrate is without jurisdiction. He then contended that the land could not be cancelled since the land has been allotted on 13.6.1981. On the other hand, Mr. Parmod Thakur, Addl. Advocate General for the State has supported the judgment of the first appellate Court.

7. Since all the substantial questions of law are inter-connected, hence are taken up together for discussion to avoid repetition of evidence.

8. I have heard learned counsel for both the sides and have also gone through the judgments and records of the case carefully.

9. PW-1 Ram Saran Dass has testified that the plaintiff constructed a room after retirement from Army. Thereafter, the land was allotted to him. No objection was raised by anyone. PW-2 Mohan Singh has also corroborated the statement of PW-1 Ram Saran Dass. PW-3 Vijay Kumar has proved the certified copy of voter list Ext. PW-3/A. The name of the plaintiff was entered in the voter list of Palampur and plaintiff is resident of Tehsil Palampur.

10. Plaintiff has appeared as PW-4. He deposed that he retired from Army in the year 1977. He constructed one room over the part of the suit land in the year 1979. He started living there. He applied for allotment and the department assured him of the allotment and also permitted him to make construction. The land was allotted to him on 13.6.1981 vide Ext. PW-4/A. The copy of challan is Ext. PW-4/B. Demarcation was also carried out. The villagers thereafter complained the A.D.M. for cancellation. The land was cancelled. No forest land was involved. He was resident of Village Sutrehar, Tehsil Kangra. He admitted that his father owned land there. He also admitted that he did not disclose that he was resident of Sutrehar and his father was owning land. The enquiry was held by

Tehsildar and SDM came to the spot. The notice was issued to him and the allotment was cancelled.

11. PW-5 Bangali Ram, Secretary of Gram Panchayat has proved the copy of Pariwar register vide Ext. PW-5/A. The plaintiff was shown as resident of Thakurdwara. The copy of Missal Hakiat Ext. P-1 is for the year 1989-90. The land was entered in the ownership of the State of H.P. and in possession of the Forest Department subject to the rights of *Bartandars*. Ext. P-2 is the copy of order of the A.D.M dated 26.5.1993, which was challenged by the plaintiff. Ext. P-3 is the copy of Missal Hakiat Bandobast Jadid whereby the land was entered in the name of the Forest Department.

12. The defendant has tendered in evidence documents Ext. D-1 to D-6. Ext. D-1 is the report of the Patwari submitted to the A.D.M. Ext. D-2 is the report of the Tehsildar. Ext. D-3 is the copy of order of A.D.M. Ext. D-4 is the copy of jamabandi for the year 1987-88 of Tehsil Kangra.

13. The land was allotted to the plaintiff on 13.6.1981 vide Ext. PW-4/A. The same was cancelled on 26.5.1993. The plaintiff's father was alive at the time of allotment. He did not belong to the Mohal where the land was allotted to him. PW-1 Ram Saran Dass has himself admitted that the spot was visited by the Tehsildar and SDM. The report was submitted to the A.D.M. He has also issued notice before the cancellation of the land.

14. According to the revenue record, the State was the owner of the land and it was in the possession of the Forest Department. The Forest Conservation Act has come into force in the year 1980. Thereafter, the land could not be allotted to the plaintiff for non-forest purposes. Moreover, the land was in reserve pool. His father owned land measuring 1-27-57 hectares. The complaint was lodged. Thereafter, the Addl. District Magistrate, on the report of the Tehsildar cancelled the allotment. The proceedings were commenced on 2.1.1993 and culminated in the order dated 26.5.1993. The necessary orders have been passed by the Addl. District Magistrate on 26.5.1993 within three years from the date the fraud was detected. He was competent to take *suo motu* action within three years from the date of knowledge of the fraud. The ratio of the decision in the case of ***Mangheru Vrs. State of H.P. & ors.,*** reported in ***I.L.R. 1981 H.P. 283,*** has rightly been applied by the learned District Judge, Kangra. The learned first appellate Court has correctly appreciated the various provisions of the Scheme in vogue. The Addl. District Magistrate had the necessary jurisdiction to go into the entire gamut. The substantial questions of law are answered accordingly.

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

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

Court on its own motion .....Petitioner.

Versus

State of H.P. and others .....Respondents.

CWPIL No.8 of 2015
Order reserved on : 28.10.2015
Pronounced on: 03.11.2015.

Constitution of India, 1950- Article 226- A news item was published in the newspaper regarding the cutting of trees on which cognizance was taken- held, that after the publication of the news item in the news paper, it was the duty of the Deputy Commissioner to ascertain the correctness of the report- Superintendent of Police and Authorities of the forest department were bound to look into the matter as well- directions issued to the Authorities to verify the correctness of the news item and to submit compliance report.

(Para-7 to 18)

Case referred:

T.N. Godavarman Thirumulpad vs. Union of India and others, (2009) 17 Supreme Court Cases 534

For the Petitioner:	Mr.Aman Sood, Advocate, as Amicus Curiae.
For the respondents:	Mr.Shrawan Dogra, Advocate General, with M/s Romesh Verma, Anup Rattan and V.S. Chauhan, Addl.A.Gs. and Mr.J.K. Verma, Dy.A.G., for respondents No.1 to 7 and 9. Mr.Kulbhushan Khajuria, Advocate, for respondent No.8. Mr.R.L. Sood, Senior Advocate, with M/s Arjun Lal, G.S. Rathour and Ajay Sharma, Advocates, for the interveners.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

In terms of the order, dated 27th October, 2015, passed by this Court, the Deputy Commissioner, Kangra at Dharamshala and other Officers (respondents herein) were directed to appear in person before this Court on 28th October, 2015, after noticing the news item, published in the newspaper 'The Tribune', in its issue, dated 26th October, 2015, read with an e-mail received in the Registry from Ghazala Abdullah, on whose letter the instant Public Interest Litigation was diarized.

2. Mr.Aman Sood, learned Amicus Curiae, stated that he has visited the area and submitted his report. We have perused the report. The report in itself shows that the learned Amicus Curiae had made strenuous efforts in visiting various sites, as delineated in the report.

3. During the course of hearing, the learned Amicus Curiae stated that the respondents have failed to prevent the illicit felling of the trees in the area in question.

4. The Learned Advocate General submitted that the guidelines have been framed in regard to marking/felling of the trees. The said guidelines are being followed by the concerned Authorities by putting marks on the identified trees before issuing final orders for the felling of the trees so that no loss is caused to the Government or to the public exchequer.

5. The learned Advocate General further submitted that the news item supra is not factually correct for the reason that the said deodar tree was not green but was a dried one. He further submitted that, in the instant case, the exercise was undertaken by the Authorities concerned in terms of the guidelines before including the tree in question in the list of identified trees worth felling. Therefore, it was submitted that the respondents have not committed any breach.

6. The learned Advocate General was asked to furnish a copy of the guidelines which are being followed by the concerned Authorities in order to declare forest trees of various species as dried trees. The learned Advocate General furnished a copy of the said guidelines on 29th October, 2015.

7. The Deputy Commissioner of a District is the administrative head of a District and the entire district administration spins around him and therefore, is responsible for the smooth functioning of the administration in the entire District. On the other hand, the Superintendent of Police of a District is responsible to maintain the law and order in the District. He is under legal obligation to prevent the crimes in his jurisdiction and in case any crime is noticed, he is bound to draw action against the perpetrator, as warranted under law.

8. After saying so, coming to the instant case, once it was reported either by news item published in the newspaper or through e-mail, it was the duty of the Deputy Commissioner concerned to ascertain whether the said tree was green or otherwise and in order to arrive at a conclusion, he should have sought opinion of an expert, which, he has not done. Similarly, no action has been taken by the concerned Superintendent of Police and by the Authorities of the Forest Department including the Principal Secretary (Forests), to the Government of H.P. and the Chief Conservator of Forests, Himachal Pradesh. Therefore, prima facie, we are of the view that the orders passed by this Court from time to time are not being complied with in letter and spirit.

9. In the given circumstances read with the order passed by this Court from time to time, especially, on 5th June, 2015 and 23rd June, 2015, we deem it proper to direct the concerned Deputy Commissioner to the following effect:

a) To obtain expert opinion to the effect whether the said tree was green or otherwise, after examining the stump of the tree in question;

(b) To examine and report whether the concerned Authorities have followed the guidelines/mechanism in place while marking the trees, including the tree in question, as dried;

(c) Whether the orders passed by this Court from time to time in the instant writ petition are complied with in letter and spirit by all the Sub Divisional Magistrates, Tehsildars, Naib Tehsildars and other State functionaries working under his control.

10. In addition to above, we also deem it proper to pass the following directions:

(a) All the respondents are directed to show cause why action be not drawn against them for non-compliance of the orders passed by this Court from time to time.

(b) The Superintendent of Police, Kangra at Dharamshala is directed to obtain a report from the Police Station concerned whether any complaint was received/registered about the felling of the tree in question and what action was drawn on the said complaint.

(c) The Superintendent of Police is also directed to submit a report as to how many cases have been lodged qua illicit felling of the trees right from 2nd June, 2015.

(d) The Principal Chief Conservator of Forests, Himachal Pradesh, being the head of the Forest Department, is directed to ensure strict compliance of the orders passed by this Court from time to time in this writ petition.

11. The learned Amicus Curiae also pointed out that Shri Chaman Lal, Executive Officer, Municipal Council, Dharamshala was performing his duties with sincerity, but he came to be transferred and now, the charge of the office of the Executive Officer has been given to Shri Joginder Singh, an Engineer. Therefore, the learned Amicus Curiae prayed

that an officer fulfilling the requisite eligibility is required to be posted as Executive Officer of the Municipal Council, Dharamshala, with independent charge. He further stated that as per e-mail received, Shri Joginder Singh, who is having the charge of Executive Officer and accompanied him during his visit, is having interest and is also one of the alleged violators.

12. In view of the above, the concerned State Authorities, including the Deputy Commissioner, are directed to post a competent, efficient and sincere Officer, having the requisite eligibility and qualification, as Executive Officer of the Municipal Council, Dharamshala, with independent charge of the said office, within one week from today and report compliance on the next date of hearing.

13. Status reports/replies, as indicated above, be filed by all the respondents, including the Deputy Commissioner and the Superintendent of Police, within two weeks from today.

14. It is made clear that the Principal Chief Conservator of Forests, Himachal Pradesh, the Deputy Commissioner, Kangra at Dharamshala and the Superintendent of Police, Kangra at Dharamshala are personally responsible for any deviation from the directions passed by this Court in the instant writ petition from time to time.

15. Mr.R.L. Sood, learned Senior Counsel appearing for the interveners, argued that the 'Khair' trees are being allowed to be felled by the Forest Department of the Government for extracting 'Katha', which has medicinal value, in view of the judgment passed by the Apex Court in **T.N. Godavarman Thirumulpad vs. Union of India and others, (2009) 17 Supreme Court Cases 534.** Therefore, Mr.Sood prayed that the 'Khair' trees may be allowed to be felled in view of the judgment of the Apex Court and that the orders passed by this Court from time to time in the instant petition may be clarified.

16. Accordingly, in view of the judgment passed by the Apex Court supra, we clarify that the orders passed by this Court in this writ petition shall not be applicable to the 'Khair' specie and that the felling of the said specie of trees shall be as per the directions passed by the Apex Court.

17. We place on record a word of appreciation for the efforts made by the learned Amicus Curiae.

18. Before parting with, we may place on record, as we have already observed in our earlier orders that human sustenance on the Earth is possible only if the trees sustain here. Trees can be termed as attire of the mother earth. Here, we may also remind of the words of Bryce Nelson, who said:

> "People who will not sustain trees will soon live in a world that will not sustain people."

List on 18th November, 2015. 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.

Kuldeep Singh .....Petitioner

Versus

State of H.P. & others ..... Respondents

CWP No. 1694 of 2015 a/w Ors.
Reserved on: 27.10.2015
Pronounced on: 3.11.2015

Constitution of India, 1950- Article 226- Petitioners are working as teachers in the school managed by the Temple Trust- 144 privately managed government aided schools including school of the petitioner had filed writ petitions in the year 1989 for the payment of salary at par with the teachers in government schools- Writ petitions were allowed - Government of H.P. and Management were asked to satisfy the same in the ratio of 95:5- State Government challenged the decision before the Supreme Court which upheld the judgment but made the same applicable w.e.f. 1.4.1993- scales of the petitioners were revised w.e.f. 1.1.2000- writ petitions were filed which were allowed- order was modified in review to the extent that arrears of salary paid by the management would be recovered from the State Government- subsequently, an order for recovery was passed on the basis of audit report that petitioners are entitled to the arrears of salary for a period of only three years- held, that the orders were passed by the Court and the petitioners are entitled to the payment of salary in accordance with the same- Department should have brought these facts to the notice of the Audit Department and should not have issued the orders- orders passed by the department set aside. (Para-14 to 17)

Case referred:
State of Punjab and others etc. vs. Rafiq Masih (White Washer) etc., 2015 AIR SCW 501

For the petitioner(s):	Mr.Anuj Nag, Advocate.
For the respondents:	Mr. V.S. Chauhan, Additional Advocate General, Mr. J.K. Verma, Deputy Advocate General and Mr.Ramesh Thakur, Assistant Advocate General, for respondents No.1 to 3. Mr.V.D. Khidta, Advocate, for respondents No.4 to 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Writ petitioners, by the medium of instant writ petitions, have laid challenge to the order, dated 16th February, 2015, made by the Temple Officer, Office of Temple Naina Devi Ji, District Bilaspur, H.P., whereby recovery to the tune of Rs.22.41 lacs has been ordered to be effected from the petitioners. Since the facts, merits and law applicable are similar, therefore, all the writ petitions were heard together and are being disposed of by this common judgment.

2. Facts, necessary for the disposal of the present petitions, are enumerated thus. The petitioners are working as teachers in various disciplines in Shri Shakti Senior Secondary School, being managed by the Temple Trust of Shri Naina Devi Ji, Bilaspur, H.P. It is averred that in the year 1989, 144 privately managed government aided schools, including Shri Shakti Senior Secondary School, had filed writ petitions before this Court, being CWP Nos.418 of 1989 and 414 of 1989, praying salary to its teachers at par with the teachers working in the government schools, came to be granted vide judgment and order, dated 9th September, 1992, with the command that the said teachers were entitled to salary and emoluments at par with the teachers in government schools w.e.f. 13th February, 1989, with further command that the Government of Himachal Pradesh and the Management have to satisfy the same in the ratio of 95 : 5, respectively.

3. The State Government, feeling aggrieved, challenged the said decision of this Court before the Apex Court and the Apex Court upheld the said judgment, but modified to

the extent that the amount was to be paid w.e.f. 1st April, 1993, instead of 13th February, 1989.

4. Rules were framed by the respondents and made operative w.e.f. 1.1.1997. Thereafter, the scales of the petitioners were revised at par with the scales of their counterparts working in government schools, by the respondents, but w.e.f. 1st January, 2000.

5. The teachers represented to respondent No.2 i.e. Director of Education and the said respondent, in turn, directed respondent No.3 (District Education Officer) to look into the matter. Thereafter, respondent No.3, after detailed inquiry, reported that the teachers of the School were not being paid salary at par with the teachers working in government schools, w.e.f. 1.4.1993. It was further recommended by respondent No.3 that since the income of the school was not sufficient, therefore, matter for 95% grant-in-aid be taken up with the Government.

6. Subsequently, due to the inaction on the part of the respondents, one of the teachers i.e. Meera Thakur filed a writ petition before this Court, being CWP No.540 of 2004, titled Meera Thakur vs. State of H.P. and others, and this Court vide order dated 4th May, 2007, held as under:

> *"Though this Court is prima facie of the opinion that the petitioner is entitled to revised pay scale of Rs.6400-10640 with effect from the years 1993 to 2000, it is desirable if the Committee comprising of the Secretary(Education) and Secretary (Language and Culture) looks into the matter judiciously. Accordingly the Committee comprising of Secretary (Education) and Secretary (Language and Culture) is constituted to resolve the impasse by whom petitioner's salary is to be paid. If in the ultimate analysis the Committee comes to the conclusion that the salary has to be paid for the years 1993 to 2000 on the basis of the grant-in-aid then the State must take immediate step to release the same in favour of the schools to enable it to disburse the same to the petitioner. If the Committee comes to the conclusion that the salary is to be paid by the Management i.e. respondent No.5 in that eventuality also it will be incumbent upon the management to release the necessary funds immediately in favour of Shakti Senior Secondary School, Naina Devi Ji for its further disbursement to the petitioner. The Committee is directed to take decision within a period of three weeks from the receipt of certified copy of this order."*

7. Pursuant to the above orders passed by this Court, a Committee comprising of Secretary (Education) and the Secretary (Language and Culture), came to be constituted, which recommended the release of arrears of revised pay w.e.f. 1st April, 1993 only in favour of writ petitioner Meera Thakur. Thereafter, other petitioners preferred writ petitions before this Court, (CWP Nos.1211 to 1214, 1216, 1221, 1222, 1223, 1224 and 1225 of 2007), claiming similar relief as had been granted in the case of Meera Thakur, supra, were disposed of by this Court vide a common judgment, dated 18th March, 2008, with the command that the direction given in the writ petition filed by Meera Thakur (CWP No.540 of 2004) would cover those writ petitions also.

8. Feeling aggrieved, the respondents preferred Letters Patent Appeals, being LPA Nos.32 to 41 of 2008, which appeals came to be dismissed vide order dated 19th November, 2009, by observing as under:

> *"After careful consideration of the order and looking to the fact that the order in question dated 18.3.2008 has been passed with the consent of the parties and definite direction has been given for release of the salary to the applicants/private*

respondents from due date by the appellants herein or through the present appeals, the appellants are seeking certain directions to be given for release of the money by the State Government. Such direction, in our considered view cannot be given as the appellants have failed to get the order dated 18.3.2008 either reviewed or modified earlier to the extent for releasing the salary through the Government Agency. We do not find any merit in the appeals. Accordingly, the appeals are dismissed, so also the pending applications."

9. The respondents thereafter filed a review petition, whereby the judgment under review was modified to the extent that the arrears of salary paid by the Management of the School would be recovered from the State Government.

10. Thereafter, respondent No.5, issued the impugned letter dated 16th February, 2015, Annexure P-10, relying on the Office Memorandum dated 15th January, 2002, Annexure P-9, and also on the audit report, directed the petitioners herein to deposit the amount as mentioned against their respective names.

11. It is apt to reproduce Annexure P-9 hereunder:

"It has been observed that various claims regarding allowing of higher pay scale, selection grade, special pay and other financial benefits are being preferred by the employees and such claims are decided by the Hon'ble Tribunals/Courts in favour of applicants with retrospective effect, causing many problems such as payment of arrears, step up of pay of senior employees etc. etc.

The matter has been examined in consultation with the Law Department in the light of the judgment delivered by Hon'ble Supreme Court of India in case of Jai Devi Gupta vs. State of HP reported in AIR 1998 SC 2819 and it has been decided that as and when any dispute is taken to Court or Tribunal by an employee in respect of his pay scale or selection grade or other allowances, etc., the replying respondent should invariably take a defence on the strength of judgment of Hon'ble Supreme Court in case of Jai Dev Gupta Vs. State of HP reported in AIR 1998 SC 2819 that the arrears/back wages should be restricted for a period of three years only. In case the Hon'ble Tribunal or court do not agree with the defence of the government/department the matter should be agitated before the higher court by way of approximate remedy. This may be brought to the notice of all concerned."

12. The order dated 16th February, 2015, Annexure P-10, is the subject matter of instant petitions. This Court, vide order dated 10th March, 2015, stayed the impugned order so far as it pertained to effecting of recovery.

13. From the above, it is crystal clear that the writ petitioners have earned judgments and orders in writ and appeal proceedings before the High Court and the Apex Court also held them entitled to the benefits, as discussed supra, w.e.f. 1st April, 1993. The said judgments have attained finality and accordingly, the writ respondents have complied with the directions contained in the said judgments/orders.

14. While going through the impugned order, Annexure P-10, it appears that the respondents are in breach of the judgments/orders passed by this Court and the Apex Court from time to time, as discussed above, for the simple reason that the respondents have based the impugned order Annexure P-10 solely on the basis of an audit report and Annexure P-9, letter dated 15th January, 2002, and have recorded that the petitioners are entitled to arrears only for three years, whereas that was not direction of the Apex Court, rather the impugned order runs contrary to the directions passed by the Apex Court. It was obligatory for the respondents to have replied to the audit report explaining as to what were

the reasons and under what circumstances the arrears were released in favour of the writ petitioners w.e.f. 1st April, 1993. Without adopting the said course, the respondents passed the impugned orders, which are not in tune with the directions passed by the Apex Court.

15. Indisputably, the writ petitioners have not played any active part in making the orders of arrears. The orders were made, at the cost of repetition, as per the mandate of the judgments/orders earned by the petitioners.

16. We may make a reference to the decision of the Apex Court in **State of Punjab and others etc. vs. Rafiq Masih (White Washer) etc., 2015 AIR SCW 501,** wherein the Apex Court has laid parameters and guidelines for effecting recovery from the government employees. It is apt to reproduce paragraphs 9 and 11 as under:

> *"9. The doctrine of equality is a dynamic and evolving concept having many dimensions. The embodiment of the doctrine of equality, can be found in Articles 14 to 18, contained in Part III of the Constitution of India, dealing with "Fundamental Rights". These Articles of the Constitution, besides assuring equality before the law and equal protection of the laws; also disallow, discrimination with the object of achieving equality, in matters of employment; abolish untouchability, to upgrade the social status of an ostracized section of the society; and extinguish titles, to scale down the status of a section of the society, with such appellations. The embodiment of the doctrine of equality, can also be found in Articles 38, 39, 39A, 43 and 46 contained in Part IV of the Constitution of India, dealing with the "Directive Principles of State Policy". These Articles of the Constitution of India contain a mandate to the State requiring it to assure a social order providing justice - social, economic and political, by inter alia minimizing monetary inequalities, and by securing the right to adequate means of livelihood, and by providing for adequate wages so as to ensure, an appropriate standard of life, and by promoting economic interests of the weaker sections.*
>
> *Xxxxxxxxxxx xxxxxxxxxxxx xxxxxxxxxxxxx*
>
> *11. For the above determination, we shall refer to some precedents of this Court wherein the question of recovery of the excess amount paid to employees, came up for consideration, and this Court disallowed the same. These are situations, in which High Courts all over the country, repeatedly and regularly set aside orders of recovery made on the expressed parameters.*
>
> *(i). Reference may first of all be made to the decision in Syed Abdul Qadir v. State of Bihar, 2009 3 SCC 475, wherein this Court recorded the following observation in paragraph 58:*
>
> > *"58. The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess. See Sahib Ram v. State of Haryana, 1995 Supp1 SCC 18, Shyam Babu Verma v. Union of India, 1994 2 SCC 521, Union of India v. M. Bhaskar, 1996 4 SCC 416, V. Ganga Ram v. Director, 1997 6 SCC 139, Col. B.J. Akkara (Retd.) v. Govt. of India, 2006 11 SCC 709, Purshottam Lal Das v. State of Bihar, 2006 11 SCC 492, Punjab National Bank v. Manjeet Singh, 2006 8 SCC 647 and Bihar SEB v. Bijay Bahadur, 2000 10 SCC 99."*

(Emphasis is ours)

First and foremost, it is pertinent to note, that this Court in its judgment in Syed Abdul Qadir's case recognized, that the issue of recovery revolved on the action being iniquitous. Dealing with the subject of the action being iniquitous, it was sought to be concluded, that when the excess unauthorised payment is detected within a short period of time, it would be open for the employer to recover the same. Conversely, if the payment had been made for a long duration of time, it would be iniquitous to make any recovery. Interference because an action is iniquitous, must really be perceived as, interference because the action is arbitrary. All arbitrary actions are truly, actions in violation of Article 14 of the Constitution of India. The logic of the action in the instant situation, is iniquitous, or arbitrary, or violative of Article 14 of the Constitution of India, because it would be almost impossible for an employee to bear the financial burden, of a refund of payment received wrongfully for a long span of time. It is apparent, that a government employee is primarily dependent on his wages, and if a deduction is to be made from his/her wages, it should not be a deduction which would make it difficult for the employee to provide for the needs of his family. Besides food, clothing and shelter, an employee has to cater, not only to the education needs of those dependent upon him, but also their medical requirements, and a variety of sundry expenses. Based on the above consideration, we are of the view, that if the mistake of making a wrongful payment is detected within five years, it would be open to the employer to recover the same. However, if the payment is made for a period in excess of five years, even though it would be open to the employer to correct the mistake, it would be extremely iniquitous and arbitrary to seek a refund of the payments mistakenly made to the employee. In this context, reference may also be made to the decision rendered by this Court in Shyam Babu Verma v. Union of India, 1994 2 SCC 521, wherein this Court observed as under:

> *"11. Although we have held that the petitioners were entitled only to the pay scale of Rs 330-480 in terms of the recommendations of the Third Pay Commission w.e.f. January 1, 1973 and only after the period of 10 years, they became entitled to the pay scale of Rs 330-560 but as they have received the scale of Rs 330-560 since 1973 due to no fault of theirs and that scale is being reduced in the year 1984 with effect from January 1, 1973, it shall only be just and proper not to recover any excess amount which has already been paid to them. Accordingly, we direct that no steps should be taken to recover or to adjust any excess amount paid to the petitioners due to the fault of the respondents, the petitioners being in no way responsible for the same."*
>
> *(Emphasis is ours)*

It is apparent, that in Shyam Babu Verma's case , the higher pay- scale commenced to be paid erroneously in 1973. The same was sought to be recovered in 1984, i.e., after a period of 11 years. In the aforesaid circumstances, this Court felt that the recovery after several years of the implementation of the pay-scale would not be just and proper. We therefore hereby hold, recovery of excess payments discovered after five years would be iniquitous and arbitrary, and as such, violative of Article 14 of the Constitution of India.

(ii). Examining a similar proposition, this Court in Col. B.J. Akkara v. Government of India, 2006 11 SCC 709, observed as under:

> *"28. Such relief, restraining back recovery of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion to relieve the employees from the hardship that will be caused if recovery is implemented. A government servant, particularly one in*

the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it, genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery."

(Emphasis is ours)

A perusal of the aforesaid observations made by this Court in Col. B.J. Akkara's case reveals a reiteration of the legal position recorded in the earlier judgments rendered by this Court, inasmuch as, it was again affirmed, that the right to recover would be sustainable so long as the same was not iniquitous or arbitrary. In the observation extracted above, this Court also recorded, that recovery from employees in lower rung of service, would result in extreme hardship to them. The apparent explanation for the aforesaid conclusion is, that employees in lower rung of service would spend their entire earnings in the upkeep and welfare of their family, and if such excess payment is allowed to be recovered from them, it would cause them far more hardship, than the reciprocal gains to the employer. We are therefore satisfied in concluding, that such recovery from employees belonging to the lower rungs (i.e., Class-III and Class-IV - sometimes denoted as Group 'C' and Group 'D') of service, should not be subjected to the ordeal of any recovery, even though they were beneficiaries of receiving higher emoluments, than were due to them. Such recovery would be iniquitous and arbitrary and therefore would also breach the mandate contained in Article 14 of the Constitution of India.

(iii). This Court in Syed Abdul Qadir v. State of Bihar held as follows:

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

(Emphasis is ours)

Premised on the legal proposition considered above, namely, whether on the touchstone of equity and arbitrariness, the extract of the judgment reproduced above, culls out yet another consideration, which would make the process of recovery iniquitous and arbitrary. It is apparent from the conclusions drawn in Syed Abdul Qadir's case , that recovery of excess payments, made from employees who have retired from service, or are close to their retirement, would entail extremely harsh

consequences outweighing the monetary gains by the employer. It cannot be forgotten, that a retired employee or an employee about to retire, is a class apart from those who have sufficient service to their credit, before their retirement. Needless to mention, that at retirement, an employee is past his youth, his needs are far in excess of what they were when he was younger. Despite that, his earnings have substantially dwindled (or would substantially be reduced on his retirement). Keeping the aforesaid circumstances in mind, we are satisfied that recovery would be iniquitous and arbitrary, if it is sought to be made after the date of retirement, or soon before retirement. A period within one year from the date of superannuation, in our considered view, should be accepted as the period during which the recovery should be treated as iniquitous. Therefore, it would be justified to treat an order of recovery, on account of wrongful payment made to an employee, as arbitrary, if the recovery is sought to be made after the employee's retirement, or within one year of the date of his retirement on superannuation.

(iv). Last of all, reference may be made to the decision in Sahib Ram Verma v. Union of India, 1995 Supp1 SCC 18, wherein it was concluded as under:

> *"4. Mr. Prem Malhotra, learned counsel for the appellant, contended that the previous scale of Rs 220-550 to which the appellant was entitled became Rs 700-1600 since the appellant had been granted that scale of pay in relaxation of the educational qualification. The High Court was, therefore, not right in dismissing the writ petition. We do not find any force in this contention. It is seen that the Government in consultation with the University Grants Commission had revised the pay scale of a Librarian working in the colleges to Rs 700-1600 but they insisted upon the minimum educational qualification of first or second class M.A., M.Sc., M.Com. plus a first or second class B.Lib. Science or a Diploma in Library Science. The relaxation given was only as regards obtaining first or second class in the prescribed educational qualification but not relaxation in the educational qualification itself.*
>
> *5. Admittedly the appellant does not possess the required educational qualifications. Under the circumstances the appellant would not be entitled to the relaxation. The Principal erred in granting him the relaxation. Since the date of relaxation the appellant had been paid his salary on the revised scale. However, it is not on account of any misrepresentation made by the appellant that the benefit of the higher pay scale was given to him but by wrong construction made by the Principal for which the appellant cannot be held to be at fault. Under the circumstances the amount paid till date may not be recovered from the appellant. The principle of equal pay for equal work would not apply to the scales prescribed by the University Grants Commission. The appeal is allowed partly without any order as to costs." (Emphasis is ours)*

It would be pertinent to mention, that Librarians were equated with Lecturers, for the grant of the pay scale of Rs.700-1600. The above pay parity would extend to Librarians, subject to the condition that they possessed the prescribed minimum educational qualification (first or second class M.A., M.Sc., M.Com. plus a first or second class B.Lib. Science or a Diploma in Library Science, the degree of M.Lib. Science being a preferential qualification). For those Librarians appointed prior to 3.12.1972, the educational qualifications were relaxed. In Sahib Ram Verma's case , a mistake was committed by wrongly extending to the appellants the revised pay scale, by relaxing the prescribed educational qualifications, even though the concerned appellants were ineligible for the same. The concerned appellants were held not eligible for the higher scale, by applying the principle of "equal pay for equal work".

This Court, in the above circumstances, did not allow the recovery of the excess payment. This was apparently done because this Court felt that the employees were entitled to wages, for the post against which they had discharged their duties. In the above view of the matter, we are of the opinion, that it would be iniquitous and arbitrary for an employer to require an employee to refund the wages of a higher post, against which he had wrongfully been permitted to work, though he should have rightfully been required to work against an inferior post."

17. Having glace of the above discussion, we are of the considered view that the impugned orders amount to virtually setting aside the judgment of the Apex Court. However, keeping in view the facts of the cases that the respondents have passed the impugned orders after noticing some audit report, we do not want to draw any contempt proceedings against the respondents.

18. In view of the above, all the writ petitions are allowed and the impugned orders are quashed and set aside. Pending CMPs, if any, also stand disposed of.

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

Rama Kundra ...Appellant.

Versus

M/s. Esskay Woolen & Spinning Mills and others ...Respondents.

OSA No. 12 of 2006
Reserved on: 27.10.2015
Decided on: 3.11.2015

Code of Civil Procedure, 1908- Order 21 Rules 64 and 66- A decree was put to the execution- when the decree was not satisfied, property of J.D. was attached and put to auction- however, Court had not recorded the satisfaction, whether the entire property was required to be sold or sale of a portion was sufficient to satisfy the decree- held, that sale is nullity- sale set aside and amount ordered to be refunded to the legal representatives of auction purchaser. (Para-6 to 20)

Case referred:
Balakrishnan versus Malaiyandi Konar, 2006 AIR SCW 951

For the appellant: Mr. Karan Singh Kanwar, Advocate.
For the respondent: Mr. Virender Singh Rathore, Advocate, for respondents No. 1 & 2 (a).
Mr. K.D. Sood, Senior Advocate, with Mr. Mukul Sood, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

This appeal is directed against the judgment and order, dated 22.09.2006, made by the learned Single Judge in OMPs No. 201 of 1994 & 189 of 1999 and Execution

Petition No. 26 of 1989, whereby and whereunder the sale was set aside and the Execution Petition was dismissed (for short "the impugned judgment").

2. The Decree Holder and the Judgment Debtors have not questioned the impugned judgment, has been questioned by the auction purchaser, namely Smt. Raj Kapoor, who died during the pendency of the appeal and her legal representative has been brought on record, on the ground that she was a bona fide purchaser and no illegality was committed while making the orders under Order XXI Rule 66 of the Code of Civil Procedure, 1908 (for short "CPC") and Order XXI Rule 66 CPC, the impugned judgment be set aside and she be handed over the possession of the property, the subject matter of the appeal.

3. The core question involved in this appeal is - whether the Executing Court, while determining the Execution Petition, has followed the mandate of Order XXI read with the Rules?

4. In order to determine the issue and return the findings, it is necessary to give a brief resume of the case, the womb of which has given birth to the instant appeal.

5. Civil Suit No. 10 of 1980, titled as State Bank of India versus M/s. Esskay Woolen & Spinning Mills (P) Ltd. and another, was filed in the year 1980, which was decided in ex-parte vide judgment and decree, dated 30.04.1981. The Execution Petition was filed by the Decree Holder and notice was issued to the Judgment Debtors for satisfying the decree, failed to do so and execution was sought by attachment and sale of land measuring 442 Kanals 7 Marlas, situated at Mehal Beli, Mauja Satana, District Kangra, which was owned by original defendant No. 2/Judgment Debtor No. 2. Attachment order was made on 09.05.1991, constraining the Decree Holder to lay an application for sale of the attached property and for proclamation in terms of Order XXI Rule 66 CPC, which was diarized as OMP No. 428 of 1991. During the pendency of the said application, the Judgment Debtors filed an application for setting aside the ex-parte decree and execution of the decree was stayed. The said application was dismissed and the stay order was vacated. On 15.03.1994, orders qua warrant of sale were made by the Registrar.

6. While going through the file, one comes to an inescapable conclusion that no order was passed by the Executing Court in terms of Order XXI Rule 64 CPC, which reads as under:

> *"**ORDER XXI***
>
> ***EXECUTION OF DECREES AND ORDERS***
>
> .....
>
> ***64. Power to order property attached to be sold and proceeds to be paid to person entitled.*** *- Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same."*

7. The mandate of law, reproduced above, is to pass an order to record satisfaction as to whether the portion of the attached property or the entire attached property is to be put to sale in order to satisfy the decree. It is not just a formality, but is mandatory, because the said mandate of law gives power to the Court to deprive a person from his property, that is why the Court had to record its satisfaction.

8. Our this view is fortified by the Apex Court judgment in the case titled as **Balakrishnan versus Malaiyandi Konar,** reported in **2006 AIR SCW 951.** It is apt to reproduce paras 10 and 11 of the judgment herein:

> *"10. The provision contains some significant words. They are "necessary to satisfy the decree". Use of the said expression clearly indicates the legislative intent that no sale can be allowed beyond the decretal amount mentioned in the sale proclamation. (See Takkaseela Pedda Subba Reddi v. Pujari Padmavathamma (AIR 1977 SC 1789). In all execution proceedings, Court has to first decide whether it is necessary to bring the entire property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small the Court must bring only such portion of the property the proceeds of which would be sufficient to satisfy the claim of the decree-holder. It is immaterial whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any provision of law, only such portion of the property should be sold. This is not just a discretion but an obligation imposed on the Court. The sale held without examining this aspect and not in conformity with this mandatory requirement would be illegal and without jurisdiction. (See: Ambati Narasayya v. M. Subba Rao and Anr., 1989 Suppl (2) SCC 693). The duty cast upon the Court to sale only such portion or portion thereof as is necessary to satisfy the decree is a mandate of the legislature which cannot be ignored. Similar view has been expressed in S. Mariyappa (Dead) by L. Rs. and Ors. v. Siddappa and Anr. (2005 (10) SCC 235).*
>
> *11. In S. S. Dayananda v. K. S. Nagesh Rao and Ors. (1997 (4) SCC 451) it was held that the procedural compliance of Order XXI Rule, 64 of the Code is a mandatory requirement. This was also the view expressed in Desh Bandhu Gupta v. N. L. Anand and Rajinder Singh (1994 (1) SCC 131)."*

9. The question is - whether such order was made?

10. The learned Single Judge has perused the record and has specifically recorded that no such order was made. We have also gone through the record. In fact, the order has been made under Order XXI Rul 66 CPC, but no order has been made under Order XXI Rule 64 CPC. Thus, any steps taken in breach of Order XXI Rule 64 CPC is nullity and without jurisdiction.

11. It is also worthwhile to mention herein that the Judgment Debtor No. 2 has satisfied the decretal amount while making the payment during the pendency of the Execution Petition.

12. Learned counsel for the appellant argued that the appellant has purchased the property through auction and has deposited the money, is bona fide purchaser.

13. Learned Single Judge has taken care of the said fact and has directed the Registry to refund the said amount to the appellant-auction purchaser alongwith interest, in terms of para 29 of the impugned judgment.

14. Learned counsel for the appellant also argued that if any mistake has been committed by the Court, why his client be made to suffer. The argument is misplaced and devoid of any force for the following reasons:

15. The Court has to pass orders strictly as per the law applicable. Order XXI CPC read with the Rules provides a mechanism how to execute the decrees and what orders are to be made by the Court. It also provides mechanism how to hear the objections of the Judgment Debtors/Decree Holders and by any other person interested including the auction purchaser.

16. The fact that the auction purchaser has deposited the amount, will not clothe him with a right to purchase a property, when the foundation of the said exercise was illegal. It is also a fact that the Judgment Debtors had to part with a big chunk of land, thereby had to suffer from irreparable loss.

17. In the given circumstances, it was the duty of the Executing Court to see whether the entire property was to be put to sale or some portion of it. But, unfortunately, the Executing Court has not passed any order under Order XXI Rule 64 CPC.

18. It is the duty of the Court to see that the action of the Court should not cause prejudice to a party. If any action of the Court prejudices any party, the law of restitution applies in order to redress the same.

19. Having said so, the impugned judgment and order is well reasoned, needs no interference.

20. The amount be refunded in terms of para 29 of the impugned judgment to the auction purchaser/legal representatives of the auction purchaser.

21. Accordingly, the impugned judgment is upheld and the appeal is dismissed alongwith all pending applications.

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

Ramesh Chauhan — Petitioner.

Versus

Rajvir Singh — Respondent.

Cr.MMO No. 35 of 2015 alongwith
Cr.MMO Nos. 36 and 37 of 2015.
Date of decision: 3.11.2015.

Code of Criminal Procedure, 1973- Section 311- Petitioner/accused filed applications under Sections 311 and 315 of Cr.P.C and under Section 45 of Indian Evidence Act before the trial Court- applications were dismissed - prior to filing of applications under Sections 311 and 315 of Cr.P.C, defence of the accused was closed by the trial Court- in revision, Sessions Judge granted opportunity to the accused to adduce defence evidence- again no defence evidence was led, therefore, evidence was subsequently closed by the order of the Court- in the aforesaid background applications under Sections 311 and 315 of Cr.P.C filed before trial Court were dismissed - held, that applications under Sections 311 and 315 of Cr.P.C, were rightly dismissed by the trial Court as the order of trial Court closing the right of the accused to adduce his evidence had attained finality- however, application under Section 45 of Indian Evidence Act was wrongly dismissed by the trial Court as it had no connection with closing of the evidence- hence, order of the trial Court qua dismissal of

applications under Sections 311 and 315 of Cr.P.C upheld, whereas, order qua dismissal of application under Section 45 of Indian Evidence Act set aside. (Para-2 to 4)

For the petitioner: Mr. Raman Prashar, Advocate.
For the respondent: Mr. M.S.Kanwar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)

The petitioner herein/accused had filed three applications before the learned trial Court, one application was filed under Section 311 Cr.P.C, another under Section 315 Cr.P.C and a third application was filed under Section 45 of the Indian Evidence Act.

2. Before proceeding to render an adjudication upon the tenability of the renditions of the learned trial Court impugned before this Court, it is imperative to advert to the factum of the learned trial Court having closed the right of the accused petitioner herein to adduce evidence in defence. The order of the learned trial Court closing the right of the accused/petitioner herein to adduce evidence in defence was assailed before the learned Sessions Judge, Shimla, who while disposing of the revision petition as preferred before it, by the aggrieved, assailing it, modified the order of the learned trial Court whereby it closed the right of the petitioner herein/accused, to adduce evidence in defence, by directing the learned trial Court to afford to the petitioner herein a right to adduce evidence in defence within a period of nine months. However, the petitioner herein yet did not avail the opportunity afforded to him by the learned Sessions Judge to adduce his evidence in defence. Consequently, the learned trial Court was constrained to subsequently order for the closing of the opportunity to the petitioner herein to adduce his evidence in defence. The said order was assailed by the petitioner herein by his instituting Cr.MMO No. 27 of 2015 which petition came to be dismissed by this Court. In face thereof the sequelling ensuing inference is of the petitioner herein being subsequent to the rendition of this Court in Cr.MMO No. 27 of 2015 being consequently debarred to adduce his evidence in defence. The petitioner concerted to move the aforesaid applications before the learned trial Court which vide a common order came to be dismissed. Both the applications under Section 311 Cr.P.C and the application under Section 315 Cr.PC. were both maintainable as well as amenable for acceptance by the learned trial Court, only in the event of the petitioner herein having established that in the garb of the aforesaid applications instituted by him before the learned trial Court, he has not endeavoured to circumvent the conclusive orders of the learned trial Court whereby his right to adduce evidence in defence stood closed. In determining whether the petitioner, has by his taking to subsequently institute applications under Section 311 Cr.P.C and under Section 315 Cr.P.C. before the learned trial Court concerted to circumvent the conclusive orders of the learned trial Court closing his right to adduce evidence in defence, it is imperative to peruse the contents of the applications constituted under Section 311 Cr.P.C. as well as under Section 315 Cr.P.C. There is a manifestation in paragraph 2 of the application under Section 311 Cr.P.C. of the petitioner herein concerting to bring on record certain documents before the learned trial Court inasmuch as affidavit of 4.5.2009, receipt of 7.6.2010, affidavit of 7.2.2015 executed by Narinder Kumar and to also examine him, for a just decision of the case. The effort on the part of the petitioner herein to, through his application under Section 311 Cr.P.C. preferred before the learned trial Court adduce into evidence the aforesaid documents appears to be a cleverly devised machination on his part, to circumvent the order of the learned trial Court whereby his right to adduce evidence in defence stood closed. Even though the amplitude of

the plenary power conferred upon the trial Court under Section 311 Cr.P.C. takes within its ambit any application preferred "at any stage" of any inquiry, trial or proceeding under the Code by either the prosecution or the accused or to summon any person as a witness though not summoned in person besides to recall or re-examine any person already examined. Nonetheless, the plenary powers conferred thereunder upon the trial Court qua it being empowered to "at any stage" of inquiry, trial or any proceedings receive any application preferred before it either by the prosecution or the defence or summon any witness or recall any of the witness, cannot be interpreted or read in isolation vis-a-vis orders recorded by the learned trial Court whereon though opportunities stood afforded to the accused to adduce his evidence in defence, he yet omits to avail of such opportunities, constraining the learned trial Court to record an order closing his right to adduce evidence in defence. Moreso when the order of the learned trial Court closing the right of the accused to adduce his evidence in defence attains conclusivity rendering hence the provisions of Section 311 Cr.P.C. resorted to by the petitioner herein subsequent to the aforesaid conclusive order of the learned trial Court, to be unavailable for reliance by him nor reliefs thereupon were affordable to him, as vindicating such an endevaour on the part of the accused would tantamount to this Court, proceeding to both subvert the order of the learned trial Court whereby the right of the accused to adduce evidence in defence stood conclusively closed besides would also tantamount to countenancing an attempt on the part of the accused petitioner herein, to in the guise of his relying upon the provisions of Section 311 of the Cr.P.C. circumvent the conclusive orders of the trial Court whereby his right to adduce evidence in defence stood closed.

3. Apart therefrom immense succor to the inference aforesaid derived by this Court, of the applications instituted by the petitioner subsequent to the conclusive rendition of the trial Court whereby it closed the right of the accused to adduce evidence in defence, under Section 311 Cr.P.C. and under Section 315 Cr.P.C. being nothing but a cleverly resorted machination on his part to wriggle out beside evade the conclusive rendition of the learned trial Court closing his right to adduce evidence in defence, is garnered by the factum that all the pieces of evidence proposed to be adduced through application under Section 311 Cr.P.C. constituted a part of the defence of the accused which right of the accused to adduce them in evidence in his defence, stood closed by a conclusive rendition of the learned trial Court. As a natural corollary, if the application under Section 311 Cr.P.C. besides the application under Section 315 Cr.P.C. had come to be allowed, it would have facilitated the petitioner herein to adduce evidence in defence which opportunity to him to adduce evidence in defence previously remained unavailed of by him constraining the learned Judge to close his right to adduce evidence in defence. In revering the espousal of the learned counsel for the petitioner herein it would subvert besides erode the essence of the provisions of Section 311 Cr.P.C which are meant to be resorted to only when they are not preceded by a conclusive order of the learned trial Court closing the opportunity of the accused to adduce his evidence in defence. Moreover, the salient nuance borne by the parlance "at any stage" existing in Section 311 Cr.P.C. which stands extracted hereinafter, is of its permitting the defence to adduce evidence in defence besides its permitting the prosecution to resort to its provisions, only when there are no previous conclusive renditions of the trial Court closing the right of the accused to adduce evidence in defence or its conclusively closing the right of the prosecution to adduce its evidence. If any interpretation than the one aforesaid is afforded to the parlance borne by the phrase "at any time" existing in Section 311 of the Cr.P.C. it would open pave way for subversion of besides circumvention of a conclusive rendition of a trial Court closing the right of the accused to adduce evidence in defence.

> **"311. Power to summon material witness or examine person present-** Any Court may, at any stage or any inquiry, trial or other

> proceeding under this Code, summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

For reiteration when the application under Section 311 Cr.P.C was preceded by a conclusive order of the learned trial Court closing the right of the accused to adduce evidence in defence any reliance by the petitioner upon the provisions of Section 315 Cr.P.C. and upon the provisions of Section 311 Cr.P.C. would subvert the purpose, meaning and the stage when the provisions of Section 311 Cr.P.C. have been contemplated by the legislature to acquire operational force. Even otherwise the provisions of Section 311 Cr.P.C viewed in another perspective acquire force and come into play besides empower the learned trial Judge to summon any person as a witness though not summoned in person or recall or re-examine any person already examined, necessarily then the provisions of Section 311 of the Cr.P.C. hence are rather confined to be exercised by the learned trial Court only qua summoning any person as a witness besides recall or re-examine a person already examined yet it does not extend to facilitate the endeavour of the petitioner herein to in its grab adduce documents into evidence as averred in paragraph 2 of the application and which constitute pieces of evidence in defence of the accused right qua whose right of adduction into evidence by the accused stands closed by a conclusive rendition of the trial Court. Apart therefrom when the provisions of Section 311 were mis-resorted to by the petitioner herein the documents as proposed to be adduced in evidence recited in paragraph 2 of the application under Section 311 Cr.P.C may have been taken to be adduced into evidence by his invoking provisions, other than the one existing in Section 311 of the Cr.P.C. For similarly available analogous reasons, the dismissal of the application of the petitioner under Section 315 Cr.P.C. by the learned trial Court is sustainable. The outcome of the above discussion is that the order of the learned trial Court dismissing the applications of the petitioner herein preferred by him before it under the provisions of Section 311 and Section 315 of the Cr.P.C. is both sustainable as well as vindicable.

4. Now the validity of the order of the learned trial Court in refusing relief to the petitioner herein in an application preferred by him before it under Section 45 of the Indian Evidence Act has to be gauged. The learned trial Court in ordering to refuse relief to the petitioner herein in an application preferred by him before it under Section 45 of the Indian Evidence Act, has in its order portrayed a legally unsound reason of there being no occurrence in the application qua the scribe of the documents annexed with the application besides one of the documents proposed to be sent for expert opinion inasmuch as Ext.D-2 being in Hindi. Apart therefrom the reason, for its disallowing the apposite application preferred before it by the petitioner herein under Section 45 of the Indian Evidence Act, of theirs already existing sufficient evidence on record other than expert evidence as sought to be elicited by the petitioner for resting the controversy rendered unnecessary the elicitation of an expert opinion on the documents recited in the application, also lacks in legal sustainability. The learned trial Court appears to have been guided by the factum that the conclusive order of the learned trial Court closing the right of the accused to adduce evidence in defence also forestalled him to elicit the opinion of the expert concerned on the disputed documents recorded in the application at hand. However, the provisions of Section 45 of the Indian Evidence Act are independent of both Sections 311 Cr.P.C. and of Section 315 Cr.P.C. besides concomitantly also the operational sway of the conclusive order of the learned trial Court closing the right of the accused to adduce evidence in defence excludes any reliance upon the provisions of Section 45 of the Indian Evidence Act by the petitioner

herein especially when the said opinion would both facilitated as well as aided the learned trial Court to render an effective adjudication qua the authorship of the adduced documents. Obviously then, when the application under Section 45 of the Indian Evidence Act was preferable and maintainable at any stage and would have facilitated the learned trial Court to render a judicious pronouncement qua the authorship of the documents recited therein hence the learned trial Court for a legally unsound reason having come to reject the application preferred before it by the petitioner under Section 45 of the Indian Evidence Act, has committed a gross error. In sequel the order of the learned trial Court declining relief to the petitioner herein on his application under Section 45 of the Indian Evidence Act, is set-aside. Consequently, the petitions bearing numbers Cr.MMO No. 35 of 2015 and Cr.MMO No. 37 of 2015 are dismissed and the petition bearing number Cr.MMO No.36 of 2015 is allowed. In sequel the order of the learned trial Court dismissing the applications of the petitioner herein both under Section 311 and 315 Cr.P.C is maintained and upheld. However, the findings of the learned trial Court in application under Section 45 of the Indian Evidence Act are set-aside. Record be sent back forthwith. Parties are directed to appear before the learned trial Court on 15th December, 2015.

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

Satish Kumar ..... Appellant

Vs.

State of H.P. and others .... Respondents

LPA No. 180 of 2009
Reserved on: 27.10.2015
Date of decision: 3.11.2015

Constitution of India, 1950- Article 226- An advertisement was issued for inviting the applications for filling up the posts of Lecturers (College Cadre) in the subject of Music (Vocal)- one post was reserved for ex-servicemen and in case of non-availability, the dependent sons/daughters of ex-servicemen were eligible for the post - respondent no. 3 was selected as a ward of ex-servicemen- writ petition was filed challenging his appointment- Writ Court dismissed the writ petition- contention of the petitioner that respondent no. 3 ceased to be a dependent ward of ex-servicemen on appointment as ad-hoc lecturer is not acceptable, as advertisement specifically provided that a person given appointment on ad-hoc/volunteer/daily wages/contract or tenure basis shall be considered as dependent- further, merely because father of the respondent No. 3 had taken benefit of reservation made in favour of ex-servicemen is not sufficient to deprive the dependent of seeking employment- appeal dismissed. (Para-7 to 9)

For the Appellant : Mr. Ajay Sharma, Advocate.

For the Respondents : Mr. V.S.Chauhan, Addl. A.G., with Mr. J.K.Verma, Dy. A.G. and Mr. Ramesh Thakur, Asstt. A.G., for respondent No.1.

Mr. D.K. Khanna, Advocate, for respondent No.2.

Mr. Vijay Kumar Verma, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This Letters Patent Appeal has been filed by the writ petitioner/appellant against the judgment passed by learned writ Court on 27.11.2009 whereby the petition filed by the appellant came to be dismissed.

The facts, in brief, may be noticed.

2. An advertisement inviting applications for filling up of some posts of Lecturers (College Cadre) in the subject of Music (Vocal) was published in the newspaper on 1.11.1994. One post of Lecturer in the subject of Music (Vocal) was reserved for ex-servicemen candidate and if suitable ex-servicemen candidates were not available, then the dependent sons/daughters of ex-servicemen were also eligible for the same.

3. It was the respondent No.3, who was selected against the post, being a ward of ex-servicemen. This appointment of respondent No.3 was assailed by the appellant by filing a writ petition on the grounds taken therein.

4. The respondents opposed the petition by filing their separate replies wherein they justified the selection of respondent No.3.

5. The learned writ Court vide a detailed judgment dismissed the petition against which the petitioner has filed the instant appeal.

6. Notably, the appellant has again raised in this appeal the same very grounds as were raised before the learned writ Court. Firstly, it was alleged that respondent No.3 was ineligible for being considered as dependent ward of ex-servicemen since the respondent No.3 was earlier employed as adhoc Lecturer Music (Vocal) and had therefore ceased to be a 'dependent ward' and secondly, on the ground that the father of respondent No.3 had already availed the benefit of ex-servicemen by getting re-employed as a driver against a vacancy reserved for ex-servicemen and in terms of the Rules occupying the field, on such re-employment of the ex-servicemen, his dependents were not entitled to the benefit of reservation.

We have considered the rival submissions of the parties and have gone through the records of the case carefully and meticulously.

7. Insofar as the first contention of the appellant that respondent No.3 ceased to be a dependent ward of an ex-servicemen in view of his being employed as adhoc Music (Vocal) Lecturer is concerned, this contention deserves to be out-rightly rejected in view of the specific clause contained in the advertisement (Annexure A-1) wherein it was clearly stipulated that the employed on adhoc/ volunteer/daily wages/contract or tenure basis wards of ex-servicemen shall also be considered as dependent sons/daughters of ex-servicemen. The relevant extract of the advertisement reads thus:

> *"If suitable Ex-servicemen candidates are not available, dependent sons/daughters of ex-servicemen will be considered for the posts reserved for ex-servicemen and if suitable dependent sons/ daughters of ex-servicemen are also not available, general candidates will be considered for these reserved posts. <u>However, the sons/daughters of ex-servicemen who are employed on adhoc/volunteer/daily wages/ contract/tenure basis will also be considered as dependent sons/daughters of ex-servicemen.</u> Further, if suitable OBC and*

handicapped (blind) candidates are not available, general candidates will be considered for the posts reserved for such category of candidates."

8. Indisputably, the appellant/petitioner has not assailed the advertisement vide which sons/daughters of ex-servicemen serving as adhoc /contract employees were also considered to be eligible as dependent wards of ex-servicemen. It is, therefore, not open for the appellant to assail the appointment of respondent No.3 on this ground.

9. Now, coming to the second contention of the appellant to the effect that since an ex-servicemen i.e. father of the respondent No.3 had already availed of the benefit of ex-servicemen by getting employment as driver against a vacancy reserved for ex-servicemen is concerned, suffice it to say that initially in note below Rule 3 (1) of the Demobilized Armed Forces Personnel (Reservation of Vacancies in Himachal State Non-Technical Services) Rules, 1972, did provide that for the purpose of the said rule an ex-serviceman or a release army person shall cease to be so as soon as he joins the first civil employment under the State Government. However, this note was deleted by Rule 2 of the Demobilized Armed Forces Personnel (Reservation of Vacancies in Himachal State Non-Technical Services) (8th amendment), Rules, 1985. That being the position, it can safely be concluded that the father of respondent No.3 by virtue of his re-employment in the civil service did not cease to be an ex-servicemen or that the respondent No.3 never ceased to be a dependent ward of an ex-servicemen even if his father had availed the benefit of an ex-servicemen by getting employment as a driver.

10. No other point was urged.

11. In view of the aforesaid discussion, we find no merit in this appeal and 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.

LPA No. 133 of 2009 along with LPA Nos. 121, 134 to 136 of 2009, 77 of 2010 and CWPOA No. 7854 of 2008
Judgment reserved on: 5.10.2015
Date of decision: November 3, 2015

1. LPA No. 133 of 2009

State of H.P. .....Appellant.
Vs.
Sanjay Gupta .....Respondent.

For the Appellant : Mr. Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals with Mr.J.K. Verma, Deputy Advocate General.

For the Respondent : Mr. Ajay Mohan Goel, Advocate.

2. LPA No. 121 of 2009

Ram Krishan Bhardwaj .....Appellant
Vs.
State of H.P. & others ...Respondents.

For the appellant : Mr. Dilip Sharma, Senior Advocate with Ms.Nishi Goel, Advocate.

For the respondents : Mr.Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals with Mr.J.K. Verma, Deputy Advocate General, for respondent No. 1.
Mr. N.S. Chandel, Advocate, for respondents No. 2 to 5.

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3. LPA No. 134 of 2009

State of H.P. .....Appellant
Vs.
Surjeet Singh Katoch & Another ...Respondents.

For the appellant : Mr.Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals with Mr.J.K. Verma, Deputy Advocate General.
For the respondents : Mr.N.S. Chandel, Advocate, for respondents No. 1 to 4.
Mr. Dilip Sharma, Senior Advocate with Ms.Nishi Goel, Advocate, for respondent No. 8.

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4. LPA No. 135 of 2009

State of H.P. .....Appellant
Vs.
Amba Dutt & another. .....Respondents.

For the appellant : Mr.Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals with Mr.J.K. Verma, Deputy Advocate General.
For the respondent : Mr.Ajay Mohan Goel, Advocate, for respondent No. 1.
Respondent No. 2 ex parte.

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5. LPA No. 136 of 2009

State of H.P. .....Appellant
Vs.
Bikram Singh Mehta & Others .....Respondents.

For the appellant : Mr.Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals with Mr.J.K. Verma, Deputy Advocate General.
For the respondents : Mr.S.R. Sharma, Advocate, for respondent No. 1.
Respondents No. 2 and 3 ex parte.

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6. LPA No. 77 of 2010

State of H.P. & Another .....Appellants
Vs.
Naresh Kumar Gupta & Another ...Respondents.

For the appellants : Mr.Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals with Mr.J.K. Verma, Deputy Advocate General.
For the respondents : Ms. Ranjana Parmar, Senior Advocate with Ms.Komal Kumari, Advocate.

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7. CWPOA No. 7854 of 2008

Jyoti Singh Negi. .....Petitioner
Vs.
State of H.P. & Another .....Respondents.

For the Petitioner : Ms. Sunita Sharma, Advocate.
For the respondents : Mr..Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals with Mr.J.K. Verma, Deputy Advocate General, for respondent No. 1.

Mr. Dilip Sharma, Senior Advocate with Ms.Nishi Goel, Advocate, for respondent No. 2.

Constitution of India, 1950- Article 226- Writ petitioners were working as Junior Engineers in HP PWD- they had completed more than five years of service and had passed departmental examination- they alone were entitled to be considered for promotion to the higher post of Assistant Engineers- writ Court held that any person who had been conferred with gazetted status was required to pass the departmental examination enabling him to seek promotion to the higher post and allowed the writ petition- appellants contended that mere conferment of gazetted status would not attract the applicability of H.P. Departmental Examination Rules- unless Service Rules were modified- held, that the executive instructions can fill up the gaps not covered by the Rules, but they cannot be in derogation of statutory rules- however, State cannot amend or supersede the statutory rules or add something therein by the administrative instructions- there was no provision for passing departmental examination in the statutory rules- Department Examination Rules have been framed for conducting the departmental examination and did not substitute/supplement the Service Rules- mere fact that post is declared as gazetted will not attract the provision of H.P. Departmental Examination Rules- appeal allowed and the writ petition ordered to be dismissed. (Para-5 to 32)

Cases referred:

State of Haryana vs. Shamsher Jang Shukla AIR 1972 SC 1546
Dr. Rajinder Singh vs. State of Punjab and others AIR 2001 SC 1769
Union of India and others vs. Sh. Somasundaram Viswanath and others AIR 1988 SC 2255
Paluru Ramkrishnaiah and others vs. Union of India and another, AIR 1990 SC 166
Union of India and another vs. Central Electrical and Mechanical Engineering Service Group A (Direct Recruits) Association, CPWD and others AIR 2008 SC 3
Sant Ram Sharma vs. State of Rajasthan and others AIR 1967 SC 1910
Sitaram Jivyabhai Gavali vs. Ramjibhai Potiyabhai Mahala and others (1987) 2 SCC 262
State of Sikkim vs. Dorjee Tshering Bhutia and others (1991) 4 SCC 243
Chandigarh Administration through the Director Public Instructions (colleges), Chandigarh vs. Usha Kheterpal Waie and others (2011) 9 SCC 645
Union of India and others vs. Sh. Somasundaram Viswanath and others AIR 1988 SC 2255
Union of India and another vs. Central Electrical and Mechanical Engineering Service Group A (Direct Recruits) Association, CPWD and others AIR 2008 SC 3,
Chandigarh Administration through the Director Public Instructions (colleges), Chandigarh vs. Usha Kheterpal Waie and others (2011) 9 SCC 645

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

CWP Nos. 9485 of 2012 and 6870 of 2014

The issue involved in these petitions is in no way connected with the subject matter involved in these appeals, therefore, delinked and be listed separately.

LPA No. 133 of 2009 along with LPA Nos. 121, 134 to 136 of 2009, 77 of 2010 and CWPOA No. 7854 of 2008

Since common question of law and facts arise for consideration in these appeals, therefore, they are taken up together for disposal.

2. The moot question involved in these appeals and writ petition are:

(i) Whether by conferment of the gazetted status alone, the Junior Engineers, who had put in five years of service, were required to qualify the departmental examination prescribed under the Departmental Examination Rules, 1976 despite there being no corresponding provision or amendment carried out in the statutory service Rules framed under Article 309 of the Constitution of India to this effect?

3. The writ petitioners who are the private respondents in these appeals were working as Junior Engineers in the Himachal Pradesh Public Works Department (for short 'HPPWD') and had assailed the notification dated 25.4.1992 whereby the earlier notification dated 5.7.1989 confirming gazetted status on the Junior Engineers who had put in five years of service, was ordered to be withdrawn.

4. The precise case of the writ petitioners was that since they had put in more than five years of service and had even passed the departmental examination as per the Departmental Examination Rules, 1976 (for short Rules of 1976), they alone were entitled to be considered for promotion to the next higher post of Assistant Engineers which had fallen vacant between 5.6.1989 to 24.4.1992.

5. The learned writ Court on the basis of the amendment carried out in the Departmental Examination Rules on 17.8.1989 concluded that any person who had been conferred with Gazetted status was essentially required to pass the departmental examination to enable him to seek promotion to the next higher post. Having held so, the petitions filed by the private respondents came to be allowed and consequently, the promotions of the appellants came to be quashed and set-aside for want of their having passed the Departmental Examination.

6. It is vehemently argued by the learned counsel for the appellants that the mere conformant of "gazetted status" would not attract the applicability of the Himachal Pradesh Departmental Examination Rules, unless the service rules were amended incorporating therein the requirement of passing the departmental examination, as per the H.P. Departmental Examination Rules, in order to attain promotion to the higher post. In support of the aforesaid contention, reliance has been placed upon the following judgments of the Hon'ble Supreme Court.

State of Haryana vs. Shamsher Jang Shukla AIR 1972 SC 1546, Dr. Rajinder Singh vs. State of Punjab and others AIR 2001 SC 1769, Union of India and others vs. Sh. Somasundaram Viswanath and others AIR 1988 SC 2255, Paluru Ramkrishnaiah and others vs. Union of India and another, AIR 1990 SC 166 and ***Union of India and another vs. Central Electrical and Mechanical Engineering Service Group A (Direct Recruits) Association, CPWD and others AIR 2008 SC 3.***

7. On the other hand, learned counsel for the respondents, would argue that a person, who has been conferred with gazetted status is required to pass the departmental examination as provided for in the Himachal Pradesh Departmental Examination Rules, 1976 and mere fact that no amendment has been carried out in the statutory Rules, would have no effect, as the Departmental Examination Rules, 1976 would apply independently. In support of the aforesaid contention, the respondents have placed reliance upon the following judgments of the Hon'ble Supreme Court.

Sant Ram Sharma vs. State of Rajasthan and others AIR 1967 SC 1910, Sitaram Jivyabhai Gavali vs. Ramjibhai Potiyabhai Mahala and others (1987)

2 SCC 262, State of Sikkim vs. Dorjee Tshering Bhutia and others (1991) 4 SCC 243 and ***Chandigarh Administration through the Director Public Instructions (colleges), Chandigarh vs. Usha Kheterpal Waie and others (2011) 9 SCC 645.***

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

8. Before proceeding further, we deem it proper to first discuss the judgments, as relied upon by the parties to the lis.

Judgments relied upon by the Appellants:

9. In ***State of Haryana vs. Shamsher Jang Shukla AIR 1972 SC 1546,*** the Hon'ble Supreme Court observed that where the administrative instructions issued by the Government add to the qualification already prescribed by rules relating to the promotion framed under Article 309, then the same would undoubtedly effect the promotion of the concerned officers and they would thus relate to and impinge upon the conditions of service and in such situation, the respondents-State was not competent to alter by means of administrative instructions the conditions of service prescribed by the Rules. It was held:

> *"7. It may be noted that herein we are dealing only with those who were promoted from the cadre of clerks in the Secretariat. The first question arising for decision is whether the Government was competent to add by means of administrative instructions to the qualifications prescribed under the Rules framed under, Art. 309. The High Court and the courts below have come to the conclusion that the Government was incompetent to do so. This Court has ruled in Sant Ram Sharma v. State of Rajasthan and anr. (1) that while the Government cannot amend or supersede the statutory rules by administrative instructions, if the rules are silent on any particular point, the Government can fill. up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed. Hence we have to see whether the instructions with which we are concerned, so far as they relate to (1) [1968] S.C.R. 111. the clerks in the Secretariat amend or alter the conditions of service prescribed by the rules framed under Art. 309. Undoubtedly the instructions issued by the Government add to those qualifications. By adding to the qualifications already prescribed by the rules, the Government has really altered the existing conditions of service. The instructions issued by the Government undoubtedly affect the promotion of concerned officials and therefore they relate to their conditions of service. The Government is not competent to alter the rules framed under Art. 309 by means of administrative instructions. We are unable to agree with the contention of the State that by issuing the instructions in question, the Government had merely filled up a gap in the rules. The rules can be implemented without any difficulty. We see no gap in the rules.*
>
> *8. There is a further difficulty in the way of the Government. The additional qualification prescribed under the administrative instructions referred to earlier undoubtedly relates to the conditions of service of the Government servants. As laid down by this Court in Mohammad Bhakar and ors. v. Y. Krishna Reddy and Ors. (1), any rule which affects the promotion of a person relates to his conditions of service and therefore unless the same is approved by the Central Government in terms of*

proviso, to sub-s. (7) of s. 115 of the States Reorganization Act, 1956, it is invalid as it violates sub-s. (7) of s. 115 of the States Re- organization Act. Admittedly the approval of the Central Government had not been obtained for issuing those instructions. But reliance was sought to be placed on the letter of the Central Government dated March 27, 1957 wherein the Central Government accorded advance approval to the State Governments regarding the change in the conditions of service obtaining immediately before November 1, 1956 in the matter of traveling allowance, discipline, control, classification, appeal, conduct, probation and departmental promotion. The scope of that letter has been considered by this Court in Mohammad Bhakar's case (supra). Therein this Court held that the letter in question cannot be considered as permitting the State Governments to alter any conditions of service relating to promotion of the affected Government servants.

10. In ***Dr. Rajinder Singh vs. State of Punjab and others AIR 2001 SC 1769***, the Hon'ble Supreme Court observed that no government order, notification or circular can substitute the statutory rules framed with the authority of law. It was held:

"5. It has not been disputed before us that at the relevant date when the respondent No.3 was recommended for promotion, he had not completed 10 years of service within the meaning of Rule 9A read with Rule 2(2) of the PCMS Class 1 Rules. As the respondent No.3 was not possessing the requisite qualifications on the relevant date, he could not be considered for promotion to the post of Deputy Director, Health Services.

6. We do not agree with the High Court that even without amending the rules, the respondent-State could have declared the PCMS Class II as PCMS Class I. The notification dated 9th April, 1989 reads as:

"In pursuance of the recommendations of the Committee for the removal of anomalies in the Revised Scales of pay of Punjab Civil Medical Services, the President of India is pleased to declare the PCMS (Class II) as PCMS (Class I). There will be only one service with the nomenclature of PCMS (Class I) with effect from 1.1.1986.

The necessary amendments in the service rules of PCMS (Class II) and PCMS (Class I) will be made separately.

This issue with the concurrence of the Finance Department conveyed vide their I.D. No.l0/27/89-FPI, dated 20.3.89."

(Emphasis Supplied)

A perusal of the notification clearly indicates that the Government itself was aware that the two classes of service cannot be equated or treated alike without amending the rules. There is no dispute that the rules have not been amended so far. The Departmental Promotion Committee, therefore, erred in recommending the promotion of respondent No.3, ignoring the rules and only relying upon a notification.

7. The settled position of law is that no Government Order, Notification or Circular can be a substitute of the statutory rules framed with the authority of law. Following any other course would be disastrous inasmuch as it would deprive the security of tenure and right of equality

conferred upon the civil servants under the constitutional scheme. It would be negating the so far accepted service jurisprudence. We are of the firm view that the High Court was not justified in observing that even without the amendment of the rules, the Class II of the service can be treated as Class I only by way of notification. Following such a course in effect amounts to amending the rules by a Government Order and ignoring the mandate of Article 309 of the Constitution.

8. As respondent No.3 was not eligible for consideration to the post of Deputy Director, Health Services, the Departmental Promotion Committee committed a mistake in recommending him. Consequent promotion of respondent No.3 on the basis of recommendation of the Departmental Promotion Committee being contrary to law is liable to be set aside"

11. In ***Union of India and others vs. Sh. Somasundaram Viswanath and others AIR 1988 SC 2255***, the Hon'ble Supreme Court observed that as per the settled law the law the norms regarding recruitment and promotion of an employee can be laid down either by a law made by the appropriate Legislature or by rules made under the proviso to Article 309 or by means of executive instructions issued under Article 73 in the case of Civil Services under the Union of India and under Article 162 in the case of Civil Services under the State Government. If there is a conflict between the executive instructions and the rules made under proviso to Article 309, then the rules made under proviso to Article 309 would prevail, and if there is a conflict between the rules made under the proviso to Article 309 of the Constitution of India and the law made by the appropriate Legislature the law made by the appropriate Legislature prevails.

12. In ***Paluru Ramkrishnaiah and others vs. Union of India and another, AIR 1990 SC 166***, three Judges of Hon'ble Supreme Court held that an executive instruction could make a provision only with regard to a matter which was not covered by the Rules and that such executive instruction could not override any provision of the Rule framed under Article 309.

13. In ***Union of India and another vs. Central Electrical and Mechanical Engineering Service Group A (Direct Recruits) Association, CPWD and others AIR 2008 SC 3***, the Hon'ble Supreme Court held that executive instructions can only fill in gaps not covered by Rules, but the same cannot be in derogation of statutory rules.

Judgments relied upon by the Respondents:

14. In ***Sant Ram Sharma vs. State of Rajasthan and others AIR 1967 SC 1910***, the Constitution Bench of Hon'ble Supreme Court held that even in absence of statutory rules governing promotions framed by the Government it can always issue administrative instructions regarding the principles to be followed.

15. In ***Sitaram Jivyabhai Gavali vs. Ramjibhai Potiyabhai Mahala and others (1987) 2 SCC 262***, it was held by the Hon'ble Supreme Court that new conditions of service can always be introduced by executive order which remain operative till its express or implied repeal by a subsequent order or regulation or statute.

16. In ***State of Sikkim vs. Dorjee Tshering Bhutia and others (1991) 4 SCC 243***, the Hon'ble Supreme Court observed that where the statutory provision of the rule is unworkable and inoperative for the time being due to any reasons, in that event, power under Article 162 can always be invoked and exercised by the State Government.

17. In ***Chandigarh Administration through the Director Public Instructions (colleges), Chandigarh vs. Usha Kheterpal Waie and others (2011) 9 SCC 645***, the Hon'ble Supreme Court observed that even in absence of valid rules, executive instructions can always issued by the Government.

CONCLUSION:

18. From the conspectus of the case law indicated above, the following broad principles are clearly discernable:

(i) The executive instructions cannot override the statutory provisions.

(ii) If there is a statutory Rule or an Act on the matter, the executive must abide by the Act or Rule and it cannot in exercise of its executive powers ignore or act contrary to the Rule or Act.

(iii) The State cannot amend or supersede the statutory Rules or add something therein by administrative instruction, but if the Rules are silent on any particular point, the State can fill-up the gap and supplement the rule and issue instructions not inconsistent with the Rules already framed.

(iv) The State cannot issue orders/office memorandum/executive instructions in contravention of the statutory Rules. However, instructions can be issued only to supplement the statutory rules but not to supplant it. Such instructions should be subservient to the statutory provisions.

(v) The executive instructions are binding, provided the same are issued to fill up the gap between the statutory provisions and are not inconsistent with the said provisions.

(vi) The administrative instructions are not statutory rules nor do have any force of law, whereas the statutory rules have the force of law.

(vii) Statutory rules create an enforceable right, which cannot be taken away by executive instructions.

(viii) A law having occupied the field, it is not open for the State in exercise of its executive power to prescribe the same field by an executive order.

(ix) Executive power of the State cannot be repugnant to the enactment of the legislature or the statutory rules.

(x) Subordinate legislation cannot override the statutory rules nor it can curtail the content and scope of the substantive provision for and under which it has been made.

19. Now in case the arguments of the respective parties are tested on the principles enunciated above, it is admitted case of both the parties that there was no provision for passing of departmental examination in the statutory Rules and what was introduced by way of executive instructions is that the post of Junior Engineers who had completed five years of service was made "gazetted".

20. The next question which, therefore, arises is as to whether in absence of any provision in the statutory Rules, could the provisions of another Rule, i.e. the Departmental Examination Rules, 1976 be resorted to, so as to make the passing of departmental examination mandatory, only because the post had been made "gazetted".

21. The learned writ Court upheld the contention of the writ petitioners by according the following reasons:

> *"The contention of the learned counsel appearing on behalf of the respondents that no corresponding amendment was carried out in the Recruitment and Promotion Rules for the post of Assistant Engineer after the conferment of the Gazetted status on 5.7.1989, merits rejection. The Departmental Examination Rules, 1976, as noticed above apply independently. These were not required to be incorporated in the Recruitment and Promotion Rules for the post of Assistant Engineer. A bare perusal of the Departmental Examination Rules, 1976 suggests that only those persons, who qualified the departmental examination, are eligible for further promotion. The notification dated 5.7.1989 was issued with the consultation of the Finance Department. However, the same has been withdrawn on 25.4.1989 without any consultation with the Finance Department. There must be consistency in every administrative action of the State which has civil/administrative consequences. The consistency is one of the requisite of the principle of rule of law. The State Government cannot permit itself to be pressurized by one section of employees to reverse a particular decision. The persons who had not qualified the departmental examination though given the opportunity have succeeded in the present case to pressurize the State Government to reverse the earlier decision. The persons, who had passed the departmental examination, were on better footing vis-à-vis who had not passed the departmental examination despite repeated opportunities granted to them."*

22. It would be noticed that even the H.P. Department Examination Rules, 1976 have been framed in exercise of powers conferred by mandate of Article 309 of the Constitution of India, that too in consultation with the Himachal Pradesh Public Service Commission, but then these Rules have been specifically framed for the "conduct of departmental examinations for the various categories of service in Himachal Pradesh." That being so, then the same cannot be read into the statutory service Rules, as the dominant purpose of these Rules is only to conduct the departmental examinations for various categories of service as specified in these Rules and not to govern the conditions of service which are regulated and governed by the statutory service rules .

23. The gazette notification, notifying therein the Himachal Pradesh Departmental Examination Rules, 1976 reads thus:-

> *"**No. HIPA (Exam) 12/75**.--- In exercise of the powers conferred by the In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India and all other powers in this behalf, the Governor, Himachal Pradesh in consultation with the Himachal Pradesh Public Service Commission and with the prior approval of the Central Government as required under section 82 of the Punjab Re-organization Act, 1966, and section 42 of the State of Himachal Pradesh Act, 1970, is pleased to make the following Rules regarding conduct of Departmental Examinations for the various categories of Services in Himachal Pradesh."*

It is evidently clear from the aforesaid notification that the Departmental Examination Rules were promulgated only with regard to the "conduct of the departmental examination for the various categories of service in Himachal Pradesh." This would further be evident from the perusal of Rule 7 of the Rules, which clearly stipulates that an Officer eligible in accordance with these rules and desiring to appear in the departmental examination "prescribed for his

service" shall intimate on the prescribed form his intention of appearing in the departmental examination after the notification of the date of commencement of examination in the Himachal Pradesh Rajpatra. It is apt to reproduce Rule 7, which reads thus:-

> *"7. **Applications for Departmental Examination**—(1) An officer/official eligible in accordance with these rules and desiring to appear in the departmental examination prescribed for his service, shall intimate on the prescribed form his intention of appearing in the departmental examination after the notification of the date of commencement of examination in the Himachal Pradesh Rajpatra.*
>
> *The application should be submitted to the Secretary through the head of department concerned which should reach him before the date prescribed in this behalf.*
>
> *(2) An officer who fails to intimate his intention to appear in the departmental examination in the manner mentioned in sub-rule (1) above will not be permitted to appear in that examination. Similarly if an officer fails to include any paper of examination in the list of papers intimated in the form prescribed, he may be precluded from the examination in that paper even if he may subsequently desire to be examined in it:*
>
> *Provided that if the facilities are available, the Secretary may permit such officer to appear in that paper as a special case."*

24. Evidently, the expression used in Rule 7 supra is "prescribed for his service". Now in so far as the "service" is concerned, the same has been defined in Rule 3 ((ix) in the following terms:-

> *"(ix) "service" means service or services to which these rules are applicable or are made applicable from time to time."*

25. A conjoint reading of the aforesaid rules clearly indicates and rather stipulates that the departmental rules must be prescribed in the service Rules and cannot be simply inferred only because the post has now been made gazetted.

26. Admittedly, these rules i.e. passing of departmental exams as per the H.P. Departmental Examination Rules were neither applicable nor till date have been made applicable to the service. As already observed earlier, the only change brought up by the respondents by introducing the notification dated 5.7.1989 was conferring the gazetted status on the Junior Engineers, who had put in five years of service. But that itself by no means can be said to have made the Departmental Examination Rules applicable to the service, that too only because the gazetted officers was one of the categories which would be governed by the Departmental Examination Rules.

27. Even the official respondents while notifying the Himachal Pradesh Departmental Examination Rules, 1976 were well aware of the fact that till and so long the service Rules were not amended, the requirement of passing of departmental examination in terms of the Rules of 1976 cannot be insisted upon. This is evidently clear from the contents of letter issued by the Department of Personnel (Training) O.M. No.: HIPA (Exam)-12/75, dated 23.3.1976 addressed to all the Secretaries, Heads of Departments etc and reads thus:-

> *"Subject: Departmental Examination for all gazetted services of Himachal Pradesh Amendment of Service Rules.*

The question of prescribing a departmental examination for all gazetted officers of the state has been under the active consideration of Government of Himachal Pradesh for some time past. It has now been decided by the Government that every gazetted officer working in connection with the affairs of the State shall pass a departmental examination as prescribed in the Departmental Examination Rules atleast once during his service career.

2. For implementing this decision of the Government, it is essential to make necessary provision in various service rules relating to the recruitment and promotion of gazetted officers in the State, if such a provision does not already exist. The study of various service rules indicates that the provisions already contained in Himachal Pradesh Administrative Service Rules, 1973. Himachal Pradesh Tehsildari Service Rules and Himachal Pradesh Naib Tehsildari Service Rules are adequate and change in them is called for.

*3. With the view to have an uniform provision in various service rules, a draft rule has been prepared which is *enclosed as Annexure 'A' to this office Memorandum. The Government of Himachal Pradesh has decided that this draft rule may be incorporated in all service rules governing the recruitment and promotion of various gazetted services in the State.*

4. Normally before introducing any amendment in the service rules, the Himachal Pradesh Public Service Commission, Law Department, Appointment Department and Finance Department are consulted and the matter is placed before the Council of Ministers for their approval. With a view to expedite the matter and to avoid references by each department, the draft rule (Annexure 'A') has been vetted by the Himachal Pradesh Public Service Commission and various other Government departments.

This rule has also received the approval of the Central Government as envisaged under section 82 of the Punjab Re-organization Act, 1966 and Section 42 of the State of Himachal Pradesh Act, 1970 and finally, the same has been approved by the Council of Ministers.

5. It has accordingly been decided that the amendment to the various service rules as per Annexure 'A' be issued straightway by all Departments without observing the procedure as outlined above.

6. While issuing the aforesaid amendment to the service rules, the factum of prior approval of this rule by the Central Government and consultation of Himachal Pradesh Public Service Commission as mentioned in para-4 above may please be indicated.

7. The Departmental Examination Rules laying down the detailed procedure for the conduct of the departmental examinations including the papers and the syllabi for each category of officers are being issued separately by this Department.

Please acknowledge receipt."

"Annexure-A

(To be incorporated in various Service Rules)

Even member of the service shall pass a departmental examination as prescribed in the H.P. Departmental Examination Rules 1976 as amended from time to time failing which he shall not be eligible to:-

(1) Cross the efficiency bar next due;

(2) Confirmation in the service; and

(3) Promotion to the next higher post.

Provided that an officer who had qualified the departmental examination in whole or in part prescribed under any other rules, before the notification of these rules shall not be required to qualify the whole or part of the examination as the case may be.

Provided further that an officer for whom no departmental examination was prescribed prior to the notification of these rules and who has attained the age of 45 years on the 1st of March, 1976 shall not be required to qualify the departmental examination prescribed under these rules.

Provided further that an officer for whom no departmental examinations was prescribed prior to the notification of these rules and who had not attained the age of 45 years on 1-3-1976, shall not be required to qualify the departmental examination prescribed under these rules after attaining the age of 50 years for the purposes of (i) Crossing the efficiency bar next due and (ii) confirmation in the service after completion of probationary period.

2. An officer on promotion to a higher post in his direct line of promotion shall not be required to pass the aforesaid examination if he has already passed the same in the lower gazetted post.

3. The Government may in consultation with the Himachal Pradesh Public Service Commission, grant in exceptional circumstance and for reasons to be reduced to writing, exemption in accordance with the Departmental Examination Rules to any class or category of persons from the departmental examination in whole or in part."

28. Even after carrying out amendment in the Departmental Rules, the respondent-State was well aware that unless until the amendments were carried out in various service Rules, the amended provision of the Departmental Examination Rules could not be implemented and that is why it again on 17.8.1984 issued Memo No. HIPA (Exam)12/75-VII, which reads as follows:-

"Subject: Departmental Examination for all gazetted services of Himachal Pradesh- Amendment of Service Rules.

Consequent upon certain amendments having been carried out to the Himachal Pradesh Departmental Examination Rules, 1976, it has become necessary to bring about uniformity in the service rules of various services/posts (except Indian Administrative Service, HP Administrative Service, Himachal Pradesh Tehsildari and Naib Tehsildari Service Rules) connected with the affairs of the State of Himachal Pradesh. Accordingly in partial modification of this department office memorandum No. HIPA (Exam)12/75, dated 23-3-1976, the Annexure 'A' attached thereto is hereby amended as per Annexure 'A' to this memorandum.

It has further been decided that amendment to the Annexure be carried out in the various service rules straightway by all the Departments without referring the matter to the Departments of Personnel, Law, Finance and H.P. Public Service Commission as well as the Council of Ministers.

While issuing the amendment to the Service rules, the factum of prior approval of this amendment by the Personnel (Appointment), Law, Finance Departments and consultation of H.P. Public Service Commission may please be indicated.

Please acknowledge receipt."

29. Now on the basis of what has been observed herein above, it can safely be concluded that the mere fact that the post was declared as gazetted would not in itself attract the applicability of the Himachal Pradesh Departmental Examination Rules, 1976, unless and until the service Rules were amended to this effect by specifically incorporating the provisions of Himachal Pradesh Departmental Rules as set out in Annexure 'A' in terms of letters issued by the respondents dated 23.3.1976 and 17.8.1984 (supra).

30. Further in case the Junior Engineers were required to pass Departmental Examination in terms of the Examination Rules, 1976, then it was incumbent upon the official respondents to have made these rules applicable to their 'service' in terms of rule 3 (ix) of the Rules, because till and so long the Departmental Examinations were not prescribed in the 'service', the same could not have been made applicable or enforced against the Junior Engineers that too, merely on the strength of their post having been declared gazetted on completion of five years of service. One cannot, therefore, fall back on these Rules to hold that the passing of departmental examination was mandatory for any class or category of employees, simply because the post they are holding has been declared to be gazetted, that too on the premise that these Rules even apply and govern the departmental examination in respect of all gazetted officers working in connection with the affairs of State of Himachal Pradesh.

31. The matter can be looked into from another angle. It is not in dispute that all the Junior Engineers only by virtue of having put in five years of service had become eligible for being considered for promotion to the higher post of Assistant Engineers, therefore, by declaring the post as gazetted by executive instructions and thereafter making it imperative for them to qualify the departmental examination as per the provisions of Rules of 1976, that too without amending the statutory service Rules, clearly amounts to substituting the statutory Rules framed under the authority of law. This would indisputably effect the promotion of the concerned officers and impinge upon the condition of service and in such circumstances the respondents-State was not competent to alter by means of administrative instructions the condition of service prescribed by Rules.

32. Moreover, in absence of any amendment having been carried out in the statutory service Rules in accordance with Annexure 'A' annexed with the letters issued by the respondents-State on 23.3.1976 and 17.8.1984 (supra), the provisions of Himachal Pradesh Departmental Examination Rules did not apply to the 'service' of Junior Engineers.

In view of the aforesaid discussion, we find merit in these appeals and resultantly all the appeals are allowed and the judgment(s) passed by the learned writ Court are ordered to be set aside and consequently the petitions filed by the writ petitioners before the learned writ Court are ordered to be dismissed, leaving the parties to bear their costs.

CWPOA No. 7854 of 2008

33. Since the relief claimed in this petition is the same, as was claimed by the petitioner before the learned writ Court, therefore, there is no merit in this petition and the same for the reasons set out hereinabove is ordered to be dismissed, leaving the parties to bear their costs.

****

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

Tikka Brijendra Singh ...Appellant
Vs.
Commissioner of Income Tax, Shimla ...Respondent

ITAs No.7 of 2014 a/w Ors.
Reserved on: 7.10.2015
Decided on: 3.11.2015

Income Tax Act, 1961- Section 153(2)- **Wealth Tax Act, 1951-** Section 17-A- Assessment order was passed on 16.3.1990- - it was contended by the assessee that proceedings were barred by limitation- contention was rejected on the ground that conflicting claims of legal representatives were pending adjudication and, therefore, there was no bar of limitation- held, that the time limit is not applicable where assessment, re-assessment or completion is to be made in consequence of, or to give effect to any finding or direction contained in the order- initially, assessment was made on the legal heirs of the assessee- further, assessment was made to give effect to the judgment of the High Court that properties owned by the assessee were self acquired property and were not held by him as a member of Hindu Undivided Family- issue regarding the status of legal representatives is pending before the Court and, therefore, assessment could not have been completed- there is no infirmity in the order passed by the Income Tax Appellate Tribunal holding the proceedings to be within the limitation. (Para-7 to 28)

Cases referred:
Gulab Chand Moti Lal Vs. Commissioner of Income Tax (1988) 174 ITR 117 (MP);
Peeru Lal Mohan Lal Vs Commissioner of Income Tax (2002) 257 ITR 198 (Raj);
Commissioner of Income Tax Vs Jodhana Real Estate Development Corporation (P) Ltd; (2005) 273 ITR 195 (Raj);
Bhatia Motor Stores Vs. Commissioner of Income Tax (2007) 288 ITR 31 (MP);
Bharti Engg. Corpn Vs. Union of India & ors (2008) 289 ITR 400 (P&H);
Commissioner of Income Tax Vs. Orissa Forest Development Corporation Ltd (2007) 290 ITR 543 (Ori);
Commissioner of Income Tax Vs. Bhan Textile (P) Ltd (2008) 300 ITR 176 (Del);
Manik Chand Burman Vs. Income Tax Officer (1998) 229 ITR 90 (All);
Spice Infotainment Ltd Vs. Commissioner of Income Tax (2012) 247 CTR (Del) 500.

For the Appellant(s): Mr. Deepak Agrawal, Mr.Amit Singh Chandel and Mr. Satbir Singh, Advocates.
For the Respondent(s): Mr. Vinay Kuthiala, Senior Advocate with Ms. Vandana Kuthiala, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge:

Since common questions of law and facts arise for consideration in these appeals, so they are taken up together and are being disposed of by a common judgment.

2. Out of 20 appeals before the ITAT, 9 appeals were filed by the assesses against the consolidated order of the Commissioner of Wealth Tax (Appeals), Shimla dated 31.12.2009 relating to assessment years 1971-72 to 1979-80 against the order passed under Section 16(3) of Wealth Tax Act, 1951. Further eight appeals were filed by the assessee against the consolidated order of the Commissioner of Income Tax (Appeals), Shimla dated 18.1.2010 relating to assessment years 1973-74 to 1980-81 against the order passed u/s 143(3) of Income Tax Act, 1961 and three appeals were filed by the assess against the consolidated order of the Commissioner of Wealth Tax (Appeals), Shimla dated 12.1.2010 relating to assessment years 1994-95 to 1996-97 against the order passed u/s 16(3) of Income Tax Act, 1961.

3. Three appeals under the Wealth Tax Act were allowed, whereas remaining appeals under the Income Tax Act as also Wealth Tax Act were partly allowed against which the assessee has filed the present appeals.

4. All these appeals were admitted on the following questions of law:

i) Whether in the present facts and circumstances of the case the Ld. ITAT was justified in holding that the assessment order passed on 7.2.2007 is within the limitation period and hence a valid return ?

ii) Whether under the present facts and circumstances of the case, the findings recorded by the Ld. ITAT is perverse in upholding the assessment order as valid and not barred by limitation?.

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

5. Sh. Deepak Agrawal, learned counsel for the appellants has strenuously argued that the ITAT was not justified in rejecting the issue of limitation without appreciating the provisions of Section 153(2) of Income Tax Act (for short the 'Act'), wherein it was provided that if the order is passed setting aside or cancelling an assessment on or after 1.4.1999, but before 1.4.2000, then such an order of fresh assessment was required to be made at any time upto 31.3.2002 whereas in the present assessment, the order was passed much beyond the stipulated period on 8.2.2007 and was thus clearly time barred. In other words, the assessment in all events was required to be completed by 31.2.2002 whereas the same was barred by limitation.

6. On the other hand, Sh.Vinay Kuthiala, learned Senior Advocate, assisted by Mrs. Vandana Kuthiala, Advocate has vehemently argued that it settled law that the period in which the proceedings remained pending in the court, have to be excluded while computing limitation and in case such period is excluded, then no exception to the proceedings could be taken as the same was well within the prescribed period of limitation.

7. In order to appreciate the rival contentions of the parties, it is imperative that we give the seriatim list of events in relation to the proceedings completed by various authorities in the case of the assessee and as has been correctly noted in the impugned order and are reproduced as under:

16.3.1990	Assessment order under Section 16(5) at assessed Wealth of Rs.1,50,000/- was passed
22.2.1993	CWT(A), Patiala vide order under Section 25 of the Wealth Tax Act set aside the assessment order and directed the Assessing Officer to make assessment de-novo and determine the correct status of the assessee. The Assessing Officer was also directed

	to keep in view the finding of CIT (Appeals) given in order dated 29.7.1985 in appeal No. 134/84-85 in the Wealth Tax case of assessee itself relating to assessment year 1978-79.
30.3.1995	The assessment order under Section 16(3) of the Wealth Tax Act was passed
7.1.1997	CWT (A), Patiala passed an order under section 25(2) vide which the order passed on 30.3.1995 was cancelled with the directions to compute the wealth afresh.
6.6.1997	Fresh assessment order was passed under Section 16(5) of the Wealth Tax Act.
17.1.2000	CWT(A),Patiala set aside the assessment made to be framed de-novo.
23.5.2000	Date of demise of Raja Harmohinder Singh, assessee
1.9.2003	Civil suit between legal heirs of assessee and other persons was decreed by Ld. ADJ in favour of four claimants and also status of legal heirs decided.
20.4.2004	The Tribunal in the appeal filed by the Revenue upheld the order passed by CWT(A), Patiala and dismissed the appeal of the Revenue as the case was taken up for re-assessment as per the direction of CWT(A), Patiala.
1.12.2005	Interim order was passed by Hon'ble High Court staying the proceedings before WTO/ITO in Civil Writ Petition filed by the assessee.
8.3.2006	The Hon'ble High Court of HP stayed the assessment proceedings in view of the civil proceedings pending before them concerning status of various claimants as legal representatives of late Raja Harmohinder Singh.
8.3.2006	The assessment proceedings were kept in abeyance
26.7.2006	Judgment delivered by the Hon'ble High Court in appeal in CS between legal heirs of the assessee.
11.12.2006	The interim order of the Hon'ble High Court of Himachal Pradesh was vacated
8.2.2007	Assessment completed in the hands of legal heir of late Raja Harmohinder Singh.

8. In so far as the Wealth Tax Assessments initially made are concerned, these were either vacated or set aside by the Commissioner of Wealth Tax (Appeals), Patiala and even the income tax assessment were set aside by the CITA (Appeal), Patiala on 17.1.2000.

9. It is also not in dispute that in the year 1995, a civil suit was filed for partition and rendition of accounts and injunction against the predecessor in interest of assessee, i.e. Raja Harmohinder Singh and others wherein the interim stay order was passed on 2.8.1995, whereby Raja Harmohinder Singh was restrained from alienating the property and at the same time, Land Acquisition Officer was directed not to disburse any compensation amount to any person. Raja Harmohinder Singh in the meanwhile expired on 23.5.2000 and thereafter the suit was ultimately decreed in favour of asessee on 1.9.2003. The assessee and his four other L.Rs i.e. Smt.Saroj Devi, Rajiv Kumar, Ragina Singh and Vijay Singh were declared entitled to the property left by Raja Harmohinder Singh.

10. In these proceedings, learned Addl. District Judge (1), Kangra held Bali Ram Sharma, Sneh Lata Sharma and Anil Kumar Shama to be the bonafide purchasers of 47% of re-determined compensation. It was also ordered that the remaining amount of determined compensation would be equally apportioned between L.Rs of Raja Harmohinder Singh. The claim set up by Ajay Singh and his mother Rani Bhagyawati as being son and wife of Raja Harmohinder Singh was not accepted. This led to the filing of appeal at the instance of Ajay Singh before this court and the decree passed by learned Addl. District Judge, Kangra dated 1.9.2013 was ordered to be stayed. At the same time, the assessee also filed an appeal before this court being RFA No.310/2003 for modification of the aforesaid judgment and decree.

11. Before the aforesaid appeals could come up for final hearing, both the parties to the appeal settled the dispute amicably outside the court themselves and stated that they have no objection in case the suit was fully decreed in favour of assessee herein. In the suit, filed between the L.Rs of Raja Harmohinder Singh, three persons Sh.,Bali Ram, Sneh Lata Sharma and Anil Kumar Sharma, made application for becoming parties for their claim for assignment/sale of 47% share . The assessee conceded to the fact that the said property was not co-parcenary property. This court accordingly held that the property was to be treated as self acquired property of Raja Harmohinder Singh vide its judgment dated 25.7.2006.

12. As observed earlier, the issue involved in RFA No. 271 of 2003 was the claim raised by Sh.Ajay Singh, wherein he claimed to be the son of Raja Harmohinder Singh which was negated by the trial court and even this court held that Ajay Singh had no right, title and interest to the assets of Raja Harmohinder Singh. The second issue which was decided in RFA No. 271 of 2003 was that three persons aforesaid were held entitled to 47% share of re-determined compensation under Section 28A of the Land Acquisition Act. It was thus held that the plaintiff in RFA No.310/2003 i.e. the assessee alone to the exclusion of the aforesaid three person was not entitled to succeed to the estate of Raja Harmohinder Singh by way of succession, whereas three purchasers were held entitled to 47% share in the re-determined compensation amount. This court further noted as under:

> "In RFA No.310 of 2003 Income Tax Department has filed an application for impleadment, being CMP No. 145 of 2005. Thereafter, it filed a second application, being CMP No. 372 of 2005 for amendment of the aforesaid earlier application on the ground that the tax liability of Raja Harmohindera Singh has been reduced in appeal from Rs.Two crores to Rs.Twelve lacs. Reply to this application has been filed by the appellant in which the appellant has disputed his tax liability. Because of the pending litigation between the parties before the Tax Authorities and the fact that the tax liability of Raja Harmohindra Singh has been disputed, I am not inclined to pass any order on the aforesaid application of the Revenue. The application

accordingly is dismissed. However, the revenue is at liberty to take such teps for recovery of tax due as are available to it under the law.

13. It was on 25.7.2006 that the judgment in RFA No.271 of 2003 and RFA No. 310 of 2003 was passed by this Court under which the status of the assets of Raja Harmohinder Singh, i.e. the assessee were held to be self acquired assets and not part of HUF. It was further held that 47% share of re-determined compensation awarded amount did not belong to the assessee but was to be distributed amongst three claimants to whom the assessee had sold his rights. Lastly, the issue of contradictory claims of L.Rs of original assessee, i.e. Raja Harmohinder Singh was also finally decided which laid to rest by this court vide aforesaid judgments.

14. Earlier to this, the assessee filed CWP No. 1251 of 2005 wherein he pointed out that his predecessor-in-interest, i.e. Raja Harmohinder Singh was the Karta of Joint Hindu Family and had received different awards under the Land Acquisition Act and certain awards had also been received by Smt. Suraj Devi in the capacity of Power of Attorney. It was further claimed that the award/compensation of HUF property were reflected in the returns filed by Raja Harmohinder Singh, i.e. with the wealth tax and income tax authorities and through the nature of properties were correctly described as HUF in the wealth tax returns, but Raja Harmohinder Singh had shown Suraj Devi as his wife and Tikka Vijay Singh as his son and as members of HUF which was factually incorrect as per the findings earlier recorded by the Addl. District Judge, Kangra. It was further prayed that till the final status of late Raja Harmohinder Singh is decided, the matter be not carried forward by the tax authorities.

15. On 1.12.2005, this court directed the Assessing Officer and Chief CIT, Palampur not to take decision on the notices issued to the assessee.

16. The Income Tax department, through the ACIT, filed an application in CWP No.1251 of 2005, wherein it was pointed out that pursuant to the directions issued by CIT (Appeals) on 17.1.2000, the assessment proceedings would come time barred on 31.3.2006 and, therefore, they should be permitted to proceed with the assessment. On 8.3.2005, the interim order earlier passed on 1.12.2005 was modified and further proceedings before the respondent, i.e. Income Tax department in regard to the assessment of Raja Harmohinder Singh were directed to be stayed till the time, status of L.Rs is decided.

17. However, on 11.12.2006, this order was also vacated by observing as under:

> "In the present writ petition, the main dispute was with regard to the status of the legal representatives of Raja Harmohinder Singh father of the petitioner which was to be adjudicated upon in RFA No. 271 of 2003 and RFA No. 310 of 2003. Admittedly, these two appeals have been decided and the status of the parties has also been decided by this Court. We have been informed that Special Leave Petition against the judgment of this Court is pending before the Apex Court.
>
> In view of the aforesaid subsequent development, the writ petition has become infructuous. Same is accordingly dismissed as infructuous.
>
> Interim order is vacated and all the pending applications are dismissed in view of the dismissal of the writ petition."

18. It was on 8.2.2007 that the assessment order finally came to be passed. As observed earlier, these proceedings were challenged before ITAT as being barred by time. This contention of the assessee was rejected on the ground that till and so long conflicting claims of the L.Rs of the assessee were pending adjudication before the competent court of

jurisdiction, issue of service of notice on the L.Rs would also be open to debate and the proceedings cannot be thus concluded. ITAT also referred to in its order various interim orders passed initially by the Addl. District Judge, Kangra and thereafter this court to reject the contention of the assessee. The plea of the assess was also rejected on the ground that once it had not chosen to question and challenge the validity of the notice issued to him before this court, the said ground was hardly open to challenge before it.

19. Having set out the factual background, it is now necessary that we refer to the provisions of law that provide for the time limit for completion of assessments and re-assessments. Section 17-A of the Wealth Tax Act and Section 153 of the Income Tax Act provides time limit for completion of assessment and reassessment and read thus:

> "*17A* ***Time-limit for completion of assessment and reassessment***.--- *(1) No order of assessment shall be made under section 16 at any time after the expiry of two years from the end of the assessment year in which the net wealth was first assessable:*
>
> *[Provided that,*
>
> *(a) where the net wealth was first assessable in the assessment year commencing on the 1st day of April, 1987, or any earlier assessment year, such assessment may be made on or before the 31st day of March, 1991;*
>
> *(b) where the net wealth was first assessable in the assessment year commencing on the 1st day of April, 1988, such assessment may be made on or before the 31st day of March, 1992.]*
>
> *[Provided further that in case the assessment year in which the net wealth was first assessable is the assessment year commencing on the 1st day of April, 2004 or any subsequent year, the provisions of this sub-section shall have effect as if for the words "two years", the words "twenty-one months" had been substituted]*
>
> *(2) No order of assessment or reassessment shall be made under section 17 after the expiry of [one year] from the end of the financial year in which the notice under sub-section (1) of that section was served:*
>
> *[Provided that where the notice under sub-section (1) of section 17 was served on or after the 1st day of April, 1999 but before the 1st day of April, 2000, such assessment or reassessment may be made at any time up to the 31st day of March, 2002:]*
>
> *[Provided further that where the notice under sub-section (1) of section 17 was served on or after the 1st day of April, 2005, the provisions of this sub-section shall have effect as if for the words "one year", the words "nine months" had been substituted.]*
>
> *(3) Notwithstanding anything contained in sub-sections (1) and (2), an order of fresh assessment in pursuance of an order passed on or after the 1st day of April, 1975, under section [23A], section 24 or section 25, setting aside or cancelling an assessment, may be made at any time before the expiry of [one year] from the end of the financial year in which the order under section [23A] or section 24 is received by the [Chief Commissioner or Commissioner] or, as the case may be, the order under section 25 is passed by the Commissioner:*
>
> *[Provided that where the order under section 23A or section 24 is received by the Chief Commissioner or Commissioner or, as the case may be, the order under section 25 is passed by the Commissioner, on or after the 1st day of*

April, 1999 but before the 1st day of April, 2000, such an order of fresh assessment may be made at any time up to the 31st day of March, 2002:]

[Provided further that where the order under section 23A or section 24 is received by the Chief Commissioner or Commissioner or, as the case may be, the order under section 25 is passed by the Commissioner, on or after the 1st day of April, 2005, the provisions of this sub-section shall have effect as if for the words "one year", the words "nine months" had been substituted.]

(4) The provisions of sub-sections (1) and (2) shall not apply to the assessment or reassessment made on the assessee or any other person in consequence of, or to give effect to, any finding or direction contained in an order under section 23, section 24, section 25, section 27 or section 29 or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act, and such assessment or reassessment may, subject to the provisions of sub-section (3), be completed at any time.

Explanation 1.—In computing the period of limitation for the purposes of this section—

(i) the time taken in reopening the whole or any part of the proceeding or in giving an opportunity to the assessee to be reheard under the proviso to section 39, or

(ii) the period during which the assessment proceeding is stayed by an order or injunction of any court, or

[(iia) the period (not exceeding sixty days) commencing from the date on which the [187] [Assessing Officer] received the declaration under sub-section (1) of section 18C and ending with the date on which the order under sub-section (3) of that section is made by him, or]

(iii) in a case where an application made before the Wealth-tax Settlement Commissioner under section 22C is rejected by it or is not allowed to be proceeded with by it, the period commencing from the date on which such application is made and ending with the date on which the order under sub-section (1) of section 22D is received by the [188] Chief Commissioner or Commissioner] under sub-section (2) of that section, shall be excluded:

[Provided that where immediately after the exclusion of the aforesaid time or period, the period of limitation referred to in sub-sections (1), (2) and (3) available to the Assessing Officer, for making an order of assessment or reassessment, as the case may be, is less than sixty days, such remaining period shall be extended to sixty days and the aforesaid period of limitation shall be deemed to be extended accordingly:]

[Provided further that where a proceeding before the Settlement Commission abates under section 22HA, the period of limitation referred to in this section available to the Assessing Officer for making an order of assessment or reassessment, as the case may be, shall, after the exclusion of the period under sub-section (4) of section 22HA, be not less than one year; and where such period of limitation is less than one year, it shall be deemed to be extended to one year.]

Explanation 2. —Where, by an order referred to in sub-section (4), any asset is excluded from the net wealth of one person and held to be the asset of another person, then, an assessment in respect of such asset on such other person shall, for the purposes of sub-section (2) of section 17 and this section, be deemed to be one made in consequence of, or to give effect to, any finding or

direction contained in the said order, provided such other person was given an opportunity of being heard before the said order was passed.]"

"Section 153 of Income Tax Act

Time limit for completion of assessments and reassessments.

153. *(1) No order of assessment shall be made under section 143 or section 144 at any time after the expiry of—*

(a) two years from the end of the assessment year in which the income was first assessable ; or

(b) one year from the end of the financial year in which a return or a revised return relating to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year, is filed under sub-section (4) or sub-section (5) of section 139,

whichever is later :

(2) No order of assessment, reassessment or recomputation shall be made under section 147 after the expiry of one year from the end of the financial year in which the notice under section 148 was served :

Provided *that where the notice under section 148 was served on or after the 1st day of April, 1999 but before the 1st day of April, 2000, such assessment, reassessment or recomputation may be made at any time up to the 31st day of March, 2002 :*

(2A) Notwithstanding anything contained in sub-sections (1) and (2), in relation to the assessment year commencing on the 1st day of April, 1971, and any subsequent assessment year, an order of fresh assessment in pursuance of an order under section 250 or section 254 or section 263 or section 264, setting aside or cancelling an assessment, may be made at any time before the expiry of one year from the end of the financial year in which the order under section 250 or section 254 is received by the [Principal Chief Commissioner or] Chief Commissioner or [Principal Commissioner or] Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Chief Commissioner or Commissioner.

Provided *that where the order under section 250 or section 254 is received by the Chief Commissioner or Commissioner or as the case may be, the order under section 263 or section 264 is passed by the Chief Commissioner or Commissioner on or after the 1st day of April, 1999 but before the 1st day of April, 2000, such an order of fresh assessment may be made at any time up to the 31st day of March, 2002.*

(3) The provisions of sub sections (1) and (2) shall not apply to the following classes of assessment, reassessment and recomputations which may, (subject to the provisions of sub section (2A) be completed at any time-

(i) (***)

(iI) where the assessment, reassessment or recomputation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 250, 254, 260, 262, 263, or 264 (or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act ;

(iii) where, in the case of a firm, an assessment is made on a partner of the firm in consequence of an assessment made on the firm under section 147.

Explanation1- In computing the period of limitation for the purposes of this Section-

(i) the time taken in reopening the whole or any part of the proceeding or in giving an opportunity to the assessee to be re-heard under the proviso to section 129, or

(ii) the period during which the assessment proceeding is stayed by an order or injunction of any court, or

*(iia) the period commencing from the date on which the Assessing Officer intimates the Central Government or the prescribed authority, the contravention of the provisions of clause (21) or clause (22B) or clause (23A) or clause (23B) or sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) of clause (23C) of section 10, under clause (i) of the proviso to sub-section (3) of section 143 and ending with the date on which the copy of the order withdrawing the approval or rescinding the notification, as the case may be, under those clauses is received by the Assessing Officer, or**

[(iii) the period commencing from the date on which the Assessing Officer directs the assessee to get his accounts audited under sub-section (2A) of section 142 and ending with the last date on which the assessee is required to furnish a report of such audit under that sub-section; or

(iv) [***]

(iva) the period (not exceeding sixty days) commencing from the date on which the Assessing Officer received the declaration under sub-section (1) of section 158A and ending with the date on which the order under sub-section (3) of that section is made by him, or

(v) in a case where an application made before the Income-tax Settlement Commission under section 245C is rejected by it or is not allowed to be proceeded with by it, the period commencing from the date on which such application is made and ending with the date on which the order under sub-section (1) of section 245D is received by the Commissioner under sub-section (2) of that section, or

(vi) the period commencing from the date on which an application is made before the Authority for Advance Rulings under sub-section (1) of section 245Q and ending with the date on which the order rejecting the application is received by the Commissioner under sub-section (3) of section 245R, or

(vii) the period commencing from the date on which an application is made before the Authority for Advance Rulings under sub-section (1) of section 245Q and ending with the date on which the advance ruling pronounced by it is received by the Commissioner under sub-section (7) of section 245R,

shall be excluded:

***Provided** that where immediately after the exclusion of the aforesaid time or period, the period of limitation referred to in sub-sections (1), (2*

and (2A) available to the Assessing Officer for making an order of assessment, reassessment or recomputation, as the case may be, is less than sixty days, such remaining period shall be extended to sixty days and the aforesaid period of limitation shall be deemed to be extended accordingly:

Explanation 2.—Where, by an order referred to in clause (ii) of sub-section (3), any income is excluded from the total income of the assessee for an assessment year, then, an assessment of such income for another assessment year shall, for the purposes of section 150 and this section, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order.

Explanation 3.—Where, by an order referred to in clause (ii) of sub-section (3), any income is excluded from the total income of one person and held to be the income of another person, then, an assessment of such income on such other person shall, for the purposes of section 150 and this section, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order, provided such other person was given an opportunity of being heard before the said order was passed."

20. On a careful reading of Section 153, we find that there is fine distinction between the application of Section 153 (2A) and 153(3) (ii) of the Act. Section 153 (2A) of the Act would apply to those cases where fresh assessment is required to be made in pursuance of an order of the appellate authorities passed under section 250 or 254 or 263 of 264 of the Act setting aside or canceling an assessment, meaning thereby wherever assessment order is cancelled or set aside by the appellate authority and the Assessment Officer is required to pass a fresh assessment order pursuant to the directions of the appellate authorities within the prescribed period under sub section (2A) of Section 153 of the Act.

21. But, wherever an assessment, reassessment or computation is to be made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under Sections 250, 254, 260, 262, 263 or 264 of the Act or in an order of any court in a proceedings otherwise than by way of appeal or reference under this Act, then no time limit is prescribed for passing such order by the Assessing Officer.

22. Keeping in view the aforesaid legal position, we now proceed to examine as to whether it is the provisions as contained in sub section (2A) of Section 153 of the Act which would be attracted to the present case as is contended by the learned counsel for the assessee or it would be sub section 3(ii) of Section 153 which would be applicable as per the contention of the learned Senior counsel for the revenue.

23. It would be noticed that assessment in the instant case was made on legal heir of late assessee who alone was declared to be the only legal heir by this court pursuant to dispute between different parties claiming to be legal heir of the assessee. Further assessment has been framed by the Assessing Officer to give effect to the conclusion of the Hon'ble High Court in RFA NO. 310 of 2003 that the properties owned by the assessee were his self acquired property and not owned by him in his HUF status. The said order of assessment giving effect to the orders passed by this court were passed under Section 17A(4) of Wealth Tax Act/153(3) of the Income Tax Act and could be passed at any time and the provisions of sub section (1), (1A), (1B) and (2) of the said section, had no application to the facts of the instant case and, therefore, the assessment proceedings can definitely be held to have been completed within the prescribed time frame.

24. The matter can be looked at from a different angle. It is not in dispute that till and so long conflicting claims of the legal heirs of the original assessee were pending adjudication before the courts, the issue of service of notice on the said L.Rs was open to debate and, therefore, could not have been concluded. As per the admitted case of the parties, all these questions regarding L.Rs and other controversies came to be set at knot only when CWP No. 1251 of 2005 was disposed of on 11.12.2006 and immediately thereafter the assessment order was passed by the Assessing Officer on 7.2.2007.

25. Notably, it was the assessee himself who had filed CWP No. 1251 of 2005 challenging therein the notice issued by the Assessing Officer dated 27.10.2005 for finalization of the assessment proceedings relating to various orders under the Wealth Tax Act and Income Tax Act. It is also pertinent to observe here that though the assessee made extensive pleadings before this court, but, no where did he question the validity of the notice of hearing issued by the Assessing Officer and further did not even raise the plea that the notice issued by the Assessing Officer was time barred. The assessee infact obtained an advantage from this court by having the proceedings stayed before the revenue department and, therefore, at this stage is now estopped from challenging and questioning the proceedings as being time barred especially when all these proceedings were initiated by the assessee himself.

26. To be fair to the learned counsel for the assessee, he in support of his submissions has placed reliance on the following judgments:-

1. **Gulab Chand Moti Lal** Vs. **Commissioner of Income Tax (1988) 174 ITR 117 (MP);**
2. **Peeru Lal Mohan Lal** Vs **Commissioner of Income Tax (2002) 257 ITR 198 (Raj);**
3. **Commissioner of Income Tax** Vs **Jodhana Real Estate Development Corporation (P) Ltd; (2005) 273 ITR 195 (Raj);**
4. **Bhatia Motor Stores** Vs**. Commissioner of Income Tax (2007) 288 ITR 31 (MP);**
5. **Bharti Engg. Corpn** Vs. **Union of India & ors (2008) 289 ITR 400 (P&H);**
6. **Commissioner of Income Tax** Vs. **Orissa Forest Development Corporation Ltd (2007) 290 ITR 543 (Ori);**
7. **Commissioner of Income Tax Vs. Bhan Textile (P) Ltd (2008) 300 ITR 176 (Del);**
8. **Manik Chand Burman** Vs. **Income Tax Officer (1998) 229 ITR 90 (All);**
9. **Spice Infotainment Ltd** Vs. **Commissioner of Income Tax (2012) 247 CTR (Del) 500.**

27. Notably, all the aforesaid judgments relate to the provision of sub section (2A) to Section153, which provision, as discussed above, is not at all applicable to the facts of the instant case.

28. In view of the aforesaid discussion, we hold that the order passed by ITAT, holding that the assessment order passed on 7.2.2007 was within limitation period is factually and legally correct and the said order does not suffer form any irregularity, illegality or perversity. Accordingly, both the questions of law are answered against the assessee.

29. Resultantly, there are no merits in all these appeals and the same are accordingly dismissed. Registry is directed to place the copy of this judgment in each connected files.

****

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

Ujjagar Singh .....Appellant.
Versus
Mohinder Singh & ors. .....Respondents.

RSA No. 212 of 2004.
Reserved on: 2.11.2015.
Decided on: 3.11.2015.

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit claiming that they are owners in possession of the suit land- defendant No. 1 had got himself recorded as owner over the suit land and this entry was void- held that plaintiffs had not approached the Patwari regarding the acquisition of title by way of exchange- Patwari had not noted the date of making entry nor had he got the entries attested from the Lambardar, Pradhan or Up-Pradhan- cuttings were not attested by Patwari or Kanungo- plaintiffs were not present at the time of passing of the order- held that mutations are not in conformity with law and do not confer any title. (Para-13 to 15)

For the appellant(s): Mr. Karan Singh Kanwar, Advocate.
For the respondents: Mr. K.D.Sood, Sr. Advocate, with Mr. Rajnish K. Lall, Advocate, for respondents No. 1,4 to 6, 2(d), 2(e), 2(f), 3(a) to 3(f) and 2(c) (i) and 2(c) (ii).

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, Sirmaur, District at Nahan, H.P. dated 27.2.2004, passed in Civil Appeal No. 43-N/13 of 2001/2000.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the respondents-plaintiffs (hereinafter referred to as the plaintiffs) have filed a suit for declaration against the appellant-defendant No. 1 and proforma defendants No. 5 & 6 (hereinafter referred to as the defendants) to the effect that they are owners-in-possession of land comprised in Kh. No. 129/19, measuring 4-10 bighas, Khewat No. 9, Khatauni No. 13, as entered in copy of jamabandi for the year 1990-91, situated at village Nihal Garh, Tehsil Paonta Sahib (hereinafter referred to as the suit land) and the entries in favour of the defendants to the contrary are illegal and void. In the alternative, the plaintiffs also sought a decree for possession. The suit land was a part of Kh. No. 19 measuring 24 bighas 19 biswas as entered in the jamabandi for the year 1970-71. However, when the plaintiffs tried to cultivate a part of the land in Kh. No. 19, they were obstructed and defendant No. 1, namely, Ujjagar Singh declared that the plaintiffs were not the owners. They obtained the

revenue record. The plaintiffs discovered that defendant No. 1 has got himself recorded over the suit land which entry was void. They also discovered that defendant No.1 in connivance with the revenue staff had got sanctioned mutation of exchange on 15.7.1975 No. 334 based upon some imaginary transaction in lieu of some land at Village Amarkot. The mutation was sanctioned behind the back of the plaintiffs. However, the plaintiffs had no land at Village Amarkot on 15.7.1975 and land in Khewat No. 18, Khatauni No. 47, Kh. No. 152/31 measuring 4-10 bighas as entered in jamabandi for the year 1991-92 at Amarkot was not in their ownership and possession and as such the entries have been manipulated by defendant No. 1.

3. The suit was contested by defendant No. 1. According to the averments made in the written statement, the plaintiffs were not in possession of the suit land. The plaintiffs were well aware of the entries in the record made in the year 1975. They were in possession of the land measuring 4-10 bighas at Village Amarkot comprised in Kh. No. 31, which now is the land comprised in Kh. No. 152/31 which was given to them by him in exchange vide mutation No. 200 dated 28.7.1975 in lieu of suit land comprised in Kh. No. 129/19 given to him by the plaintiffs vide mutation No. 334 dated 28.7.1975. Both the mutations No. 334 and 200 were attested by the revenue officer Sh. C.M. Rewal, in presence of parties and thus the suit was barred by limitation. They have also become owners of the suit land by way of adverse possession. The defendant No. 2 filed separate written statement. According to the averments made in the written statement, the suit land in the name of defendant No. 1 was illegal and void which was not binding on the plaintiffs or upon him.

4. The replication was filed by the plaintiffs to the written statements of defendants No.1 & 2. The learned Sub Judge Ist Class, (2), Paonta Sahib, Distt. Sirmaur, H.P. framed the issues. The suit was partly allowed vide judgment dated 24.3.2000. The plaintiff Mohinder Singh, feeling aggrieved, preferred an appeal against the judgment and decree dated 24.3.2000. The learned Addl. District Judge, Sirmaur at Nahan, dismissed the same on 27.2.2004. Hence, this regular second appeal.

5. The regular second appeal was admitted on the following substantial questions of law on 4.8.2004:

> "1. Whether defect, if any, while attesting Mutation No. 334 Ext. AX and Mutation No. 200 Ext. D-10 for exchange of lands, would nullify the actual exchange of two sets of lands including the suit land in favour of defendant No. 1?
>
> 2. Whether pursuant to exchange of lands covered in Mutation No. 334 Ex. AX and Mutation No. 200 Ext. D-10, the parties acted thereon and, therefore, the plaintiffs are estopped from filing the suit?"

6. Mr. Karan Singh Kanwar, Advocate, on the basis of the substantial questions of law framed, has vehemently argued that both the Courts below have not correctly appreciated the documentary as well as the oral evidence, more particularly mutations No. 200 Ext. D-10 and No. 334 Ext. AX. He has also raised the plea of estoppel. On the other hand, Mr. K.D.Sood, Sr. Advocate, has supported the judgments and decrees passed by both the Courts below.

7. Since all the substantial questions of law are inter-connected, hence are taken up together for discussion to avoid repetition of evidence.

8. I have heard learned counsel for both the sides have also gone through the judgments and records of the case carefully.

9. PW-1 Mohinder Singh deposed that the total area measuring 24 bighas of land comprised in Kh. No. 19 was in their possession, they being the owners. He never exchanged any land nor he has land at Amarkot. He never gave any land from the disputed khasra number to the defendants nor did they took any land in return. He lives at village Nihal Garh. He specifically denied that the land measuring 4-10 bighas was given to defendants in exchange and mutation thereof was attested in their presence and that he was identified by his father and Numberdar. He also denied that 4-10 bighas of land was given to him at Amarkot. He denied that they are owners in possession of land measuring 4-10 bighas at Amarkot.

10. PW-2 Kewal Singh also stated that the defendants never came in possession of the suit land. In his cross-examination, he denied that the land measuring 4 ½ bighas at Amarkot was owned by the plaintiffs. He also denied that the plaintiffs had exchanged the land with the defendants.

11. DW-1 Ujjagar Singh deposed that the exchange was effected by Didar Singh and again improved it by saying that these were the plaintiffs who had given the land in exchange to him and he had given his land measuring 4 ½ bighas at Amarkot to them. These exchanges were effected in the year 1975 by the Revenue Officer.

12. DW-2 Sarwan Singh deposed in examination-in-chief that exchange was effected between the plaintiffs and defendant No. 1 qua land at Nihalgarh and Amarkot. But, in his cross-examination, he simply deposed that such exchanges were not effected in his presence nor he knew the khasra numbers of the exchanged land.

13. The dispute, primarily revolves around mutation No. 200 Ext. D-10 and mutation No. 334 Ext. AX. There is a detailed procedure, as noticed by the learned first Appellate Court, for preparation of revenue record, as laid down in Sections 35 to 46 of the H.P. Land Revenue Act, 1954. The learned first Appellate Court has also referred to clause 'b', sub para (4) of para 8 of the Himachal Pradesh Land Records Manual. It is evident from column No. 15 of the mutation No. 200 Ext. D-10 that the plaintiffs have not approached the Patwari with regard to acquisition by them of title by way of exchange. The parties allegedly, who exchanged their lands, are shown to be Rattan Singh, Ujjagar Singh (defendant No. 1) and Charan Singh on the one hand and Didar Singh, father of the plaintiffs, on the other. There is no evidence, as discussed hereinabove, to prove that the plaintiffs have approached Patwari qua exchange of land. In column No. 15, the Patwari did not note the date of making entries therein nor did he get the entries attested from the Lambardar concerned or Pradhan or Up-Pradhan of the concerned Gram Panchayat. In column No. 10 of mutation No. 200 Ext. D-10, the authors of the exchange, Rattan Singh, Ujjagar Singh (defendant No. 1) and Charan Singh are shown to have exchanged their land with that of Didar Singh. The names of plaintiffs, Mohinder Singh, Partap Singh and Darshan Singh were written alongside the cutting. Neither the cuttings nor the incorporation of the names of the plaintiffs has been attested by the Patwari or the Kanungo or the Revenue Officer, who has attested the mutation. It is also evident from order dated 15.7.1975 that plaintiffs were not present at the time of making of the order. The order is purportedly made at Paonta Sahib and not at village Amarkot.

14. The plaintiffs' case throughout was that they have never appeared before the Revenue Officer at Paonta Sahib. The Patwari could not overlook the cuttings made in the revenue record while attesting the mutation. The defendants have not produced the mutation No. 334 before the trial Court but it was adduced in evidence at appellate stage vide Ext. AX, dated 28.7.1975. This mutation pertains to the exchange of suit land in Nihal Garh village with land of defendant No.1 in Amarkot village. In column No. 15, the parties

who allegedly exchanged their land are plaintiff Mohinder Singh on the one hand and Ujjagar Singh (defendant No. 1) on the other. The entries in column No. 4 have not been attested by the Lumbardar or Pradhan or Up-Pradhan of the concerned Gram Panchayat. There are also cuttings in the Patwari's report and the name of defendant No.1 appears to have been incorporated alongside the cuttings. In column No. 9 of mutation No. 334, Ext. AX, the names originally written were Rattan Singh, Ujjagar Singh and Gurcharan Singh. The names of Rattan Singh and Gurcharan Singh were scored out. Didar Singh, who in column No. 15 of the mutation No. 200 is stated to have exchanged his land, is not shown to have given the suit land in exchange to defendant No. 1 in mutation No. 334. The persons, who are alleged to have given the suit land in exchange, are stated to be two of the plaintiffs, Partap Singh and Darshan Singh, vide mutation order dated 28.7.1975 Ext. AX. In the proceedings that allegedly took place on a previous date, i.e. 15.7.1975, only Amrik Singh and defendant Ujjagar Singh are stated to have admitted the exchange. They were allegedly identified by one Dasonda Singh, who has not been examined by the contesting defendant. The plaintiff has categorically stated in his statement while appearing as PW-1 that he has never exchanged any land. He was resident of Nihal Garh. There was o occasion for him to exchange the land at Amarkot without any justification.

15. The mutation Nos. 200 Ext. D-10 and 334 Ext. AX are not in conformity with law. Mutation does not confer any title.

16. Now, as far as the plea of adverse possession is concerned, the defendants have failed to prove the *sine-qua-non* of the same. The defendant No. 1 was required to prove that he was in possession of the suit property openly and to the knowledge of the plaintiffs. It cannot be gathered from the statement of DW-1 that he has acquired the title by way of adverse possession. It is evident from the evidence discussed hereinabove, that the plaintiffs cannot be estopped to file the present lis by act and conduct. The defendant No. 1 has failed to prove that he has exchanged his land at Amarkot with that of the plaintiffs at Nihal Garh. The independent witness DW-2 Sarwan Singh, in his cross-examination, has stated that the exchanges were not effected in his presence nor he knew the khasra numbers of the land involved in mutation Nos. 200 and 334. The substantial questions of law are answered accordingly.

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

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

Deepika Kumari ...Petitioner.

VERSUS

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

CWP No.3633 of 2015.
Decided on: November 04, 2015.

Constitution of India, 1950- Article 226- Father of the petitioner was working as Class-I employee who died while in service- petitioner filed many representations for appointment on compassionate grounds which were rejected on the ground that family income of the petitioner exceeded the ceiling fixed by the government- held, that grant of terminal benefits

and income from the family pension cannot be equated with the employment assistance on compassionate ground- no maximum income slab has been provided in the Scheme and the claim cannot be rejected on that ground- respondent directed to examine the case of the petitioner in the light of judgment titled **Surinder Kumar Vs. State of H.P. and others, ILR, 2015 (V) H.P. 842 (D.B.).**

Case referred:
Surinder Kumar vs. State of H.P. and others, ILR 2015 (V) H.P. 842

For the petitioner: Mr. Surender Sharma, Advocate.
For the Respondents: Mr.Anup Rattan and Mr. Romesh Verma,, Additional Advocate Generals with Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Issue notice. Mr.J.K. Verma, learned Deputy Advocate General, waives notice for the respondents.

2. The grievance projected in this writ petition, by the petitioner, is that the father of the petitioner, who was working as Class-IV employee in IGMC Shimla, died on 29.5.2011, while in service, constraining the petitioner to file many representations for appointment on compassionate ground, which were rejected on the ground that the family income of the petitioner exceeds the ceiling fixed by the Government.

3. This Court in the latest decision, dated 6th October, 2015, passed in **CWP No.9094 of 2013, titled Surinder Kumar vs. State of H.P. and others, and other connected matters**, while dealing with the issue of compassionate appointment, after referring to various decisions of the Apex Court, has held that grant of terminal benefits and income from family pension cannot be equated with the employment assistance on compassionate ground. It has further been held that once there is no maximum income slab provided in the Scheme, the claim of the applicant cannot be rejected on that score. It is apt to reproduce paragraphs 46 to 55 of the said decision hereunder:

> *"46. Clause 10(c) of the Policy mandates that while making appointment on compassionate ground, the competent Authority has to keep in mind the benefits received by the family on account of ad hoc ex-gratia grant, improved family pension and death gratuity. Therefore, we may place on record at the outset that no maximum income ceiling has been prescribed in the Policy. Only what has been prescribed is that the competent Authority has to keep in mind the benefits received by the family after the death of the employee, as detailed above.*
>
> *47. The aim and object of granting compassionate appointment is to enable the family of the deceased employee to tide over the sudden financial crisis which the family has met on the death of its breadwinner. Though, appointment on compassionate ground is inimical to the right of equality guaranteed under the Constitution, however, at the same time, we cannot be oblivious to the fact that the concept of granting appointment on compassionate ground is an exception to the general rule, which concept has been evolved in the interest of justice, by way of Policy framed in this regard by the employer. The object sought to be achieved by making such an exception is to provide immediate assistance to the destitute family, which comes to the level of zero after the*

death of its bread-earner. Thus, we are of the considered view that the amount of family pension and other retiral benefits cannot be equated with the employment assistance on compassionate ground.

48. While reaching at this conclusion, we are supported by the decision of the Apex Court in ***Govind Prakash Verma vs. Life Insurance Corporation of India and others, (2005) 10 Supreme Court Cases 289,*** *wherein it was held that scheme for providing employment assistance on compassionate ground was over and above the service benefits received by the family of an employee after his death. It is apt to reproduce the relevant portion of paragraph 6 of the said decision hereunder:*

> *"6. In our view, it was wholly irrelevant for the departmental authorities and the learned Single Judge to take into consideration the amount which was being paid as family pension to the widow of the deceased (which amount, according to the appellant, has now been reduced to half) and other amounts paid on account of terminal benefits under the Rules. The scheme of compassionate appointment is over and above whatever is admissible to the legal representatives of the deceased employee as benefits of service which one gets on the death of the employee. Therefore, compassionate appointment cannot be refused on the ground that any member of the family received the amounts admissible under the Rules……".*

49. The Apex Court in ***A.P.S.R.T.C., Musheerabad & Ors. vs. Sarvarunnisa Begum, 2008 AIR SCW 1946,*** *while discussing the aim and object of granting compassionate appointment, has held that the widow, who was paid additional monetary benefits for not claiming appointment, was not entitled to compassionate appointment. It is apt to reproduce paragraphs 3 and 4 of the said decision hereunder:*

> *"3. This Court time and again has held that the compassionate appointment would be given to the dependent of the deceased who died in harness to get over the difficulties on the death of the bread- earner. In Umesh Kumar Nagpal vs. State of Haryana and Others, (1994) 4 SCC 138, this Court has held as under:*
>
> > *"The whole object of granting compassionate employment is to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest post in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency.*
>
> *Offering compassionate employment as a matter of course irrespective of the financial condition of the family of the deceased and making compassionate appointments in posts above Classes III and IV, is legally impermissible."*
>
> *4. In the present case, the additional monetary benefit has been given to the widow apart from the benefits available to the widow after the death of her*

husband to get over the financial constraints on account of sudden death of her husband and, thus, as a matter of right, she was not entitled to claim the compassionate appointment and that too when it had not been brought to the notice of the Court that any vacancy was available where the respondent could have been accommodated by giving her a compassionate appointment. That apart, the Division Bench of the High Court has committed an error in modifying the direction of the Single Judge by directing the Corporation to appoint the respondent when no appeal was preferred by the respondent challenging order of the Single Judge."

50. Coming to the Policy in hand, there is nothing on the record to show that the writ respondents have ever made a provision for additional monetary benefit, as a substitute to the employment assistance on compassionate ground, except the terminal benefits to which the family of the deceased-employee is otherwise entitled to.

51. The Apex Court in its latest decision in ***Canara Bank & Anr. vs. M. Mahesh Kumar, 2015 AIR SCW 3212,*** *while relying upon its earlier decision in Balbir Kaur and another vs. Steel Authority of India Ltd. and others, (supra), has restated the similar position, and held that grant of family pension or payment of terminal benefits, cannot be treated as substitute for providing employment assistance on compassionate ground. It is apt to reproduce paragraphs 15 and 16 of the said decision hereunder:*

> *"15. Insofar as the contention of the appellant-bank that since the respondent's family is getting family pension and also obtained the terminal benefits, in our view, is of no consequence in considering the application for compassionate appointment. Clause 3.2 of 1993 Scheme says that in case the dependant of deceased employee to be offered appointment is a minor, the bank may keep the offer of appointment open till the minor attains the age of majority. This would indicate that granting of terminal benefits is of no consequence because even if terminal benefit is given, if the applicant is a minor, the bank would keep the appointment open till the minor attains the majority.*
>
> *16. In* ***Balbir Kaur & Anr. vs. Steel Authority of India Ltd. & Ors., 2000 6 SCC 493****, while dealing with the application made by the widow for employment on compassionate ground applicable to the Steel Authority of India, contention raised was that since she is entitled to get the benefit under Family Benefit Scheme assuring monthly payment to the family of the deceased employee, the request for compassionate appointment cannot be acceded to. Rejecting that contention in paragraph (13), this Court held as under:-*
>
> > *"13. .But in our view this Family Benefit Scheme cannot in any way be equated with the benefit of compassionate appointments. The sudden jerk in the family by reason of the death of the breadearner can only be absorbed by some lump-sum amount being made available to the family this is rather unfortunate but this is a reality. The feeling of security drops to zero on the death of the breadearner and insecurity thereafter reigns and it is at that juncture if some lump-sum amount is made available with a compassionate appointment, the grief-stricken family may find some solace to the mental agony and manage its affairs in the normal course of events. It is not that monetary benefit would be the replacement of the*

breadearner, but that would undoubtedly bring some solace to the situation."

Referring to Steel Authority of India Ltd.'s case, High Court has rightly held that the grant of family pension or payment of terminal benefits cannot be treated as a substitute for providing employment assistance. The High Court also observed that it is not the case of the bank that the respondents' family is having any other income to negate their claim for appointment on compassionate ground."

Emphasis applied.

52. The Clauses contained in the Policy in hand are similar to the Scheme, which was the subject matter before the Apex Court in ***Canara Bank's case (supra).*** *Therefore, the mandate of the said judgment of the Apex Court is squarely applicable to the cases in hand.*

53. From the facts of the cases in hand, another moot question, which arises for consideration, is - Whether instructions contained in letters/communications, made by one Department of the Government to another, can be said to be amendment in the Policy? The answer is in the negative for the following reasons.

54. In order to show that the maximum income ceiling was prescribed by the competent Authority, the respondents have relied upon the letter, dated 1st November, 2008, written by the Secretary (PW) to the Government of H.P., to the Engineer-in-Chief, HP PWD, referred to above, wherein it was mentioned that the income ceiling fixed by the Finance Department, for a family of four members, was Rs.1.00 lac. A perusal of this letter shows that it has been mentioned therein that "the Income Criteria fixed by the Finance Department takes into consideration maximum family income ceiling fixed by the finance Deptt. for a family of 4 members as Rs.1.00 lac." It is nowhere mentioned in the said letter that the income ceiling was fixed by the competent Authority by making amendment in the Policy. Moreover, the said amendment, if any, has not been placed on record and has not seen the light of the day. Therefore, the letters/communications issued by a Department to another Department cannot be said to be amendment in the Policy unless the said amendment has got the approval of the competent Authority i.e. the Cabinet.

55. Having regard to the above discussion, we are of the considered view that the action of the respondents of denying employment assistance to the dependant of a deceased employee by taking into account the family pension and other terminal benefits is not tenable in the eyes of law……."

4. Having said so, the writ petition is allowed, impugned order Annexures PG and PK are quashed and set aside, and the respondents are directed to examine the case of the petitioner in light of the judgment referred to above and pass appropriate order within a period of six weeks from today.

5. The writ petition stands disposed of accordingly, so also the pending CMPs, if any.

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

Rattani Devi (dead through LRs) & ors. .....Appellants.

Versus

Rasila Ram (dead through LRs) & ors. .....Respondents.

RSA No. 182 of 2003.
Reserved on: 3.11.2015.
Decided on: 4.11.2015.

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit pleading that defendant was recorded in possession as Chakotadar- he was never inducted as Chakotadar- defendant pleaded that tenancy was created in his favour- he was paying Rs. 50/- as rent - however, no documentary evidence was produced to prove the induction- no rent receipt regarding the payment of the rent was produced- entry appeared for the first time in the jamabandi for the year 1951-52, it was not explained as to how the entry was changed - no rapat roznamcha or order passed by the Competent Authority was placed on record- order of conferment of proprietary rights was passed without following the fundamental procedure and in violation of the mandatory provision of H.P. Tenancy and Land Reforms Act.

(Para-11 to 14)

Case referred:

Chuniya Devi Vrs. Jindu Ram, 1991 SLC (1) 223

For the appellant(s): Mr. Ajay Kumar, Sr. Advocate, with Mr. Dheeraj K. Vashishta, Advocate.

For the respondents: Mr. K.D.Sood, Sr. Advocate, with Mr. Rajnish K. Lall, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned Addl. District Judge (II), Kangra at Dharamshala, H.P., dated 26.8.2002, passed in Civil Appeal No. 9-G/2000.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the predecessor-in-interest of respondents No. 1 & 2, Draumpti Devi (hereinafter referred to as the plaintiff), has instituted suit for possession against the predecessor-in-interest of appellants-defendants (hereinafter referred to as the defendant), namely, Purshotam Chand. The suit land was purchased by the plaintiff from its previous owner Smt. Kunti Devi vide sale deed dated 28.7.1960. Kunti challenged the sale on the grounds of fraud, misrepresentation and for want of consideration. It was dismissed. After the sale, Kunti continued in possession of the suit land. The plaintiff was constrained to file suit for possession which was decreed by the Sub Judge Ist Class, Kangra on 12.8.1984 on payment of Rs. 5000/-. The plaintiff obtained possession of the suit land after payment. However, in the revenue record, the defendant Purshotam Chand (since deceased) was recorded in possession as Chakotadar over the land measuring 360 kanals 4 marlas land owned by Smt. Kunti, including the suit land. Kunti never inducted the defendant as Chakotadar over the suit land. In the garb of managing her properties, the defendant fraudulently and by misrepresentation in collusion with the revenue staff started getting himself recorded in

possession of land in a phased manner. Initially, he got himself recorded in possession over 30 kanals and 6 marlas of land, without payment of any rent to Kunti Devi. Thereafter, he got himself recorded as Chakotadar on payment of Rs. 50/-, firstly, over 130 kanals 11 marlas and then over 210 kanals 11 marlas and ultimately over the entire 360 kanals 4 marlas on payment of the same rent of Rs. 50/-. The entries made in favour of defendant were only paper entries. Smt. Kunti also discovered this fraud when she filed suit No. 206/75 in the Court of Sub Judge, Kangra, challenging the entries wrongly recording defendant as Chakotadar over the entire land measuring 360 kanals 4 marlas, which include the suit land. The defendant instead of contesting the suit purchased the land of Smt. Kunti minus the land which was already sold by her to the plaintiff and filed application under Order 23 Rule 3 CPC stating therein that he had purchased the suit land on 16.12.1978. In view of this, the suit filed by Kunti had become infructuous. The defendant did not contest his tenancy rights over 133 kanals of land which the plaintiff had purchased from Smt. Kunti out of the 360 kanals 4 marlas for which suit was filed. Thereafter, the defendant instead of getting mutation of sale pertaining to 227 kanals 4 marlas of land purchased by him from Smt. Kunti got mutation of entire 360 kanals 4 marlas sanctioned and attested in his favour on the strength of wrong entries under Section 104 of the H.P. Tenancy and Land Reforms Act (hereinafter referred to as the Act) and Rules framed thereunder by suppressing the factum of purchasing 227 kanals 4 marlas of land out of this land. The mutation was sanctioned by AC IInd Grade, who was not competent to do so under the Act and Rules framed thereunder.

3. The suit was contested by the predecessor-in-interest of the defendants, namely, Purshotam Chand. He has denied that plaintiff was owner of the suit land. According to him, he has been coming in possession of the suit land alongwith other land as tenant at will on payment of Chakota of Rs. 50/- per year prior to the sale of the suit land in favour of the plaintiff and with the enforcement of H.P. Tenancy and Land Reforms Act and Rules made thereunder. The defendant has become full owner of the suit land and mutation to this effect was also sanctioned and attested in his favour in the presence of the plaintiff by the Revenue Officer after due enquiry. He has made alternative prayer that in case he was not held tenant over the suit land, in that eventuality, he has become owner by way of adverse possession. He has shown his complete ignorance about any suit filed by Kunti against the plaintiff but denied that suit land was ever delivered to the plaintiff.

4. The replication was filed. The learned Sub Judge Ist Class, Dehra, framed the issues. The suit was decreed vide judgment dated 29.11.1999. The defendants, feeling aggrieved, preferred an appeal against the judgment and decree dated 29.11.1999. The learned Addl. District Judge, Kangra (II), dismissed the same on 26.8.2002. Hence, this regular second appeal.

5. The regular second appeal was admitted on the following substantial questions of law on 16.10.2003:

> "1. Whether the statement of PW-3 Smt. Kunti Devi amounts to admission of tenancy to the effect that rent was settled but was not paid?
>
> 2. Whether the Civil Courts had jurisdiction in the matter to decide the case in view of the point of tenancy and relationship of tenants and landlord involved in the case with respect to agricultural land?"

6. Mr. Ajay Kumar, Sr. Advocate, appearing on behalf of the appellants with Mr. Dheeraj K. Vashishat, Advocate, on the basis of the substantial questions of law framed, has vehemently argued that PW-4 Smt. Kunti Devi has made admission of tenancy to the effect that rent was settled but not paid. He also argued that the Civil Court had no jurisdiction to

entertain the suit in view of Section 112 of the H.P. Tenancy and Land Reforms Act. On the other hand, Mr. K..D.Sood, Sr. Advocate, appearing with Mr. Rajnish K. Lall, Advocate, has supported the judgments and decrees passed by both the Courts below.

7. Since all the substantial questions of law are inter-connected, hence are taken up together for discussion to avoid repetition of evidence.

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

9. PW-1 Rasila Ram has appeared as General Power of Attorney of Draumpti Devi. He has proved General Power of Attorney Ext. P-1. According to him, he has purchased land in the name of his wife in the year 1960. Kanungo, Patwari and Chowkidar were present on the spot when he took over the possession of the land. PW-3 Uttam Chand deposed that he knew the parties. Smt. Kunti used to cultivate the land herself. The defendant was not tenant of Kunti Devi. PW-4 Kunti Devi deposed that Purshotam has never paid any *galla* to her. Her mother-in-law used to cultivate the land. He died 20 years back. She was thrown out of the house. She denied the suggestion in cross-examination that she was paid *galla*. No cash was paid to her though admitted that chakotta was agreed upon but never paid. She did not know even what was the chakotta. PW-5 Khem Raj deposed in his examination-in-chief that Kunti Devi has never given any land to Purshotam on chakotta.

10. DW-1 Purshotam deposed that he used to pay Rs. 50/- towards chakotta. Now, he has become owner of the suit land. In his cross-examination, he has categorically admitted that he has got no agreement qua chakotta. No agreement was prepared qua chakotta. He did not know whether any entry was made in the *roznamcha* or *girdawari*. He did not know about the total measurement of the land. DW-2 Nikka Ram deposed that he has seen the suit land. He had seen the possession of Purshotam since his childhood. DW-3 Prem Chand deposed that he had also seen the suit land. Earlier Kunti Devi was in possession of the same. She used to get the land cultivated through Purshotam. Purshotam was tenant and thereafter he became owner. He also admitted in his cross-examination that Purshotam has now ploughed the land. Kunti Devi used to get the land cultivated through them. DW-4 Sumant deposed that they were in possession of the suit land. Earlier, they used to cultivate the land after paying chakotta. The total land was 360 kanals. There was no custom of obtaining receipt. He was not aware that Purshotam was ever inducted as tenant by Kunti Devi.

11. The case of the defendant, precisely, before the Courts below was that tenancy was created in his favour by Smt. Kunti Devi. According to him, he was paying chakotta of Rs. 50/- since the year 1945. However, the fact of the matter is that he has not produced any documentary evidence, the terms of the agreement, whereby he was inducted as tenant in the year 1945. There is no contemporaneous material available on record except the bald statement made by defendant as DW-1 to this effect. The defendant has not produced any rent receipt or any other documentary evidence showing payment of rent. The statement made by DW-4 Sumant to the effect that there was no custom of obtaining the receipt in the area, cannot be accepted. Kunti Devi has categorically denied that defendant has ever paid any chakotta. No suggestion was put to her that she has inducted defendant as tenant over the suit land on payment of chakotta of Rs. 50/- in the year 1945. Kunti Devi has challenged the revenue entries showing defendant as chakotadar in Civil Suit No. 206/1975. The defendant instead of contesting the suit has purchased the entire land and suit became infructuous. No suggestion was put to her while she appeared as PW-4 about the stand taken by her in Civil Suit No. 206 of 1975 was not correct. The entire oral as well

as documentary evidence is required to be seen as to whether Kunti Devi has created any tenancy in favour of defendant. The stray admission made by Smt. Kunti in her cross-examination is not conclusive proof of the creation of tenancy in favour of the defendant.

12. The learned counsel for the defendant has argued that tenancy of suit land was created in the year 1945 on payment of rent of Rs. 50/-. In jamabandi prior to the year 1951-52, Kunti Devi has been recorded to be self cultivating the suit land. The first entry in favour of the defendant over land measuring 30 kanals 6 marlas, out of total 360 kanals 5 marlas, without payment of any rent, had appeared in the jamabandi for the year 1951-52 (Ext. P-15). How this entry was changed has not been explained. No rapat roznamcha or order passed by the competent revenue officer has been placed on record. The defendant, while appearing as DW-1 has admitted that no entry was made in rapat roznamcha or in girdawari. In the next jamabandi for the year 1954-55, Ext. P-16, the area under the cultivatory possession has been increased from 30 kanals 6 marlas to 210 kanals 11 marlas on payment of chakotta of Rs. 50/-. These entries have been repeated in the jamabandi for the year 1959-60 (Ext. P-17). However, in the subsequent jamabandi for the year 1963-64, Ext. P-18, the area under the cultivation of the defendant has been increased from 210 kanals 11 marlas to the entire land measuring 360 kanals 4 marlas on the payment of Rs. 50/- per year. There is no explanation in the jamabandi for the year 1954-55, Ext. P-16 and for the year 1963-64, Ext. P-18 as to how and under what circumstances the previous entries were changed and the area under the cultivatory possession of the defendant kept on increasing. In case he had been inducted as tenant over 360 kanals 4 marlas, he should have reported the matter to the revenue officers instead of getting the revenue entries changed without any authority of law from time to time. The entry was required to be made in rapat roznamcha and orders were also required to be passed by the competent revenue officer. These entries are thus doubtful and have rightly been discarded by the Courts below.

13. Smt. Kunti Devi had become widow at very young age. She was issueless. The defendant was the first cousin of her husband. He has taken the advantage of his close relationship. Infact, the defendant has manipulated the revenue entries in his favour without the consent and knowledge of Kunti Devi. The entries made after jamabandi for the year 1951-52 have been rebutted by the evidence placed on record.

14. Mr. Ajay Kumar, Sr. Advocate has vehemently argued that the proprietary rights were conferred vide order dated 7.5.1979 Ext. DY. However, the fact of the matter is that no proprietary rights could be conferred upon the defendant since he could not prove creation of tenancy in his favour by Kunti Devi. The orders passed by A.C. Ist Grade, were without jurisdiction. Though, he has relied upon the Full Bench decision of this Court in the case of ***Chuniya Devi Vrs. Jindu Ram,*** reported in ***1991 SLC (1) 223,*** however, the fact remains that the orders passed by AC Ist Grade on 7.5.1979, Ext. DY were without following the fundamental procedure prescribed and also in violation of the mandatory provisions of H.P. Tenancy and Land Reforms Act. Even in copy of Missal Haquiat Ext. D-9, prepared during settlement in the year 1976, in the column of rent, no rent is shown payable in respect of the suit land. The Civil Court had the jurisdiction and Section 112 of the Act is not attracted in the present case, as argued by Mr. Ajay Kumar, Sr. Advocate. The plea of adverse possession, though taken, but no evidence was led to prove the ingredients of adverse possession. The substantial questions of law are answered accordingly.

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

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

Ravinder alias Raju son of Shri Amar Singh .....Appellant.

Vs.

State of Himachal Pradesh ...Respondent.

Cr. Appeal No. 4118 of 2013
Judgment reserved on: 10th September,2015
Date of Judgment: 4th November, 2015

Indian Penal Code, 1860- Sections 307 and 506- Accused and the prosecutrix attended a ceremony in the house of 'J'- accused sent the cousin of prosecutrix with the direction to bring 'S' and asked the prosecutrix to wait till their arrival- he took her away to forest and raped her- he also threatened to kill the prosecutrix in case of disclosure of incident to any person- prosecutrix deposed about the incident in the Court- Medical Officer found injuries on her person and opined that sexual intercourse was committed within 72 hours- testimony of the prosecutrix was also corroborated by the report of FSL and other prosecution witnesses- merely because DNA test was not conduced is not sufficient to doubt the testimony of the prosecutrix- held, that in these circumstances, prosecution case was duly proved- accused was rightly convicted. (Para-13 to 30)

Cases referred:

Shyam Narain vs. State (NCT of Delhi), (2013)7 SCC 77 (Apex Court)
Narender vs. State (NCT of Delhi), (2012)7 SCC 171
Munna vs. State of M.P., (2014)10 SCC 254
Datta vs. State of Maharashtra, (2013)14 SCC 588
Prithi vs. State, (1989)1 SCC 432
Ravinder vs. State of M.P., (2015)4 SCC 491
Mukesh vs. State of Chattisgarh, (2014)10 SCC 327
State of Haryana vs. Basti Ram, (2013)4 SCC 200
O.M. Baby through LRs vs. State of Kerala, (2012)11 SCC 362
State of U.P. vs. Chhoteylal, (2011)2 SCC 550
Mohd. Iqbal vs. State of Jharkhand, (2013)14 SCC 481
State of Punjab vs. Gurmit Singh and others, (1996)2 SCC 384
State of Rajasthan vs. N.K. the accused, (2000)5 SCC 30
State vs. Lekh Raj and another, (2000)1 SCC 247
Madan Gopal Kakkad versus Naval Dubey and another, (1992)3 SCC 204
Bhe Ram Vs. State of Haryana, AIR 1980 S.C.957
Rai Singh Vs. The State of Haryana, AIR 1971 S.C. 2505
Rai Sandeep @ Deepu vs. State (NCT) of Delhi, (2012)8 SCC 21
Narender Kumar vs. State (NCT) of Delhi, (2012)7 SCC 171
Abbas Ahman Choudhary vs. State of Assam, (2010)12 SCC 115
Dinesh Jaiswal vs. State of M.P., (2010)3 SCC 232
Tameezuddin alias Tammu v. State of NCT of Delhi, (2009) 15 SCC 566
Rajoo vs. State of M.P., AIR 2009 SC 858
Radhu vs. State of Madhya Pradesh, (2007)12 SCC 57
Vimal Suresh Kamble vs. Chaluverapinaka Apal, (2003)3 SCC 175
Pratap Misra & others vs. State of Orissa, (1997)3 SCC 41

For the Appellant: Mr. Anoop Chitkara, Advocate.
For the Respondent: 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, J.

Present appeal is filed against the judgment and sentence passed by learned Additional Sessions Judge Chamba in Sessions Trial No. 55 of 2012 titled State of H.P. vs. Ravinder @ Raju decided on 25.7.2013.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that on 1.7.2012 late in the evening there was ceremony in the house or Jaram Singh in village Ghangar which continued till next morning. It is alleged by prosecution that accused attended the ceremony in the house of Jaram Singh in village Ghangar and prosecutrix was also present there along with her cousins. It is alleged by prosecution that prosecutrix also attended the ceremony till midnight and thereafter returned back to her home with her cousins namely Manish PW9, Rakesh Kumar PW10 and Trilok PW2. It is alleged by prosecution that accused asked Manish PW9, Rakesh PW10 and Trilok PW2 to go back to the house of Jaram Singh with direction to bring Sunil. It is alleged by prosecution that accused asked the prosecutrix to wait till their arrival. It is alleged by prosecution that thereafter accused took the prosecutrix towards forest area and also gagged the mouth of prosecutrix. It is alleged by prosecution that thereafter accused committed sexual intercourse with prosecutrix without her consent. It is alleged by prosecution that thereafter accused threatened the prosecutrix that in case she would disclose the incident to anyone then she would be killed. It is alleged by prosecution that thereafter prosecutrix was took by her father to the residence of Smt. Geeta Devi PW4 Pardhan of Gram Panchayat and incident was reported to Pardhan Gram Panchayat. It is alleged by prosecution that thereafter prosecutrix along with her father Rangeel Singh PW12 visited Tehsil office Chowari and filed complaint Ext.PW11/A before SDM Chowari who advised the prosecutrix and her father to report the matter in police station. It is alleged by prosecution that on the basis of complaint Ext.PW11/A FIR Ext.PW17/A was registered at P.S. Chowari and thereafter medical examination of prosecutrix was conducted at Civil Hospital Nurpur vide MLC Ext.PW1/B. It is alleged by prosecution that as per MLC sexual intercourse upon prosecutrix was committed and prosecutrix also sustained simple injuries. It is alleged by prosecution that during medical examination of prosecutrix her vaginal swab, vaginal slides and pubic hairs were preserved and were sealed in a parcel and sent for forensic examination. It is alleged by prosecution that as per chemical examination report semen was detected on vaginal swab of prosecutrix. It is alleged by prosecution that place where offence of sexual assault was committed was shown by prosecutrix to investigating agency and site plan Ext.PW17/F was prepared and photographs Ext.PW17/F-1 to Ext.PW17/F-4 also obtained from official camera. It is alleged by prosecution that salwar Ext.P2, underwear Ext.P3 and blood stained towel Ext.P4 were took into possession and sealed in cloth parcel. It is alleged by prosecution that disclosure statement of accused was also recorded. It is alleged by prosecution that two CDs also prepared and on 13.7.2012 five sealed parcels containing clothes, pubic hair and vaginal swab of prosecutrix were handed over to MHC Rajpal vide RC No. 46 of 2012 with direction to deposit in the office of RFSL Dharamshala for forensic examination. It is alleged by prosecution that forensic report Ext.PW17/A was received.

3. Charge was framed by learned Additional Sessions Judge Chamba (H.P.) against appellant Ravinder Kumar under Sections 376 and 506 IPC. Accused did not plead guilty and claimed trial.

4. Prosecution examined seventeen oral witnesses in support of its case and also tendered documentary evidence.

5. Learned trial Court convicted appellant under Sections 376(1) and 506 IPC on 25.7.2013 and learned trial Court sentenced the appellant to undergo rigorous imprisonment for a period of seven years and also imposed fine to the tune of Rs.50,000/- (Rupees fifty thousand only). Learned trial Court further directed that in default of payment of fine appellant shall further undergo one year rigorous imprisonment. Learned trial Court further sentenced the appellant to undergo rigorous imprisonment for three years for offence under Section 506 IPC and also sentenced the appellant to pay fine to the tune of Rs.5000/- (Rupees five thousand only). Learned trial Court further directed that in default of payment of fine the appellant shall further undergo six months rigorous imprisonment. Both sentences were ordered to run concurrently. Learned trial Court further directed that period of detention undergone by appellant w.e.f. 04.07.2012 onwards shall be set off under Section 428 Cr.P.C. Leanred trial Court further directed that Rs.15,000/- (Rupees fifteen thousand only) of fine will be spent in defraying the expenses incurred in prosecution of this case and rest of fine i.e. Rs.40,000/- (Rupees forty thousand only) will be paid to prosecutrix as compensation.

6. Feeling aggrieved against the judgment and sentence passed by learned Trial Court appellant filed present appeal.

7. Court heard learned Advocate appearing on behalf of the appellant and learned Additional Advocate General appearing on behalf of the respondent and also perused the entire record carefully.

8. Following points arises for determination in the present appeal:-

Point No. 1

Whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court caused miscarriage of justice to the appellant as mentioned in memorandum of grounds of appeal?

Point No. 2

Final Order**.**

9. ***Reasons for findings on point No.1:***

9.1. PW1 Dr. Mini Sharma has stated that she was posted as medical officer in the year 2012 in Civil Hospital Nurpur and she received application Ext.PW1/A from police for medical examination of prosecutrix. She has stated that prosecutrix was identified by her father Rangeel Singh. She has stated that prosecutrix was calm, conscious and well oriented to time place and person. She has stated that there was abrasion of 0.5 cm in size on left scapula reddish in colour. She has stated that there was joint abrasion on right scapula reddish in colour. All injuries were of same duration. She has stated that there was abrasion upon inner surface of labia minora reddish in colour and hymen was torn. She has stated that pubic hair preserved and all packed samples sent for forensic examination. She has stated that prosecutrix was advised X-ray for age determination and was also advised urine test for pregnancy test. She has stated that sexual intercourse of recent duration less than 72 hours could not be ruled out. She has stated that three injuries were present. He has

stated that as per FSL report human semen was detected on vaginal slides of prosecutrix and further stated that she issued MLC Ext.PW1/B which bears her signatures. She has denied suggestion that possibility of rape could be ruled out on the ground that no injuries were observed on cheeks, breast of prosecutrix.

9.2 PW2 Trilok Singh has stated that he is student of 9th class. He has stated that on 1.7.2012 he along with Rakesh and Manish had gone to house of Jaram Singh. He has stated that he returned back on 2.7.2012 in the morning at 7.30 AM. He has stated that none accompanied him when he came back from the function. The witness was declared hostile.

9.3 PW3 Arjun Singh has stated that he is agriculturist by profession. He has stated that he was associated by police during investigation. He has stated that accused is also known to him. He has stated that on 5.7.2012 when he was associated by police accused was not present. He has stated that police came to his reisdence to obtain his signatures. Witness was declared hostile by prosecution.

9.4 PW4 Geeta Devi has stated she is President of G.P. Chowari. She has stated that on 3.7.2012 prosecutrix along with her father came to her residence in the morning and disclosed that on 1.7.2012 prosecutrix had gone to attend some function and while returning back in night on way accused met her and picked up and quarrelled with her and torn her clothes. She has stated that prosecutrix also disclosed that accused had committed forcible sexual intercourse with her. She has denied suggestion that prosecutrix along with her father did not visit her. She has denied suggestion that prosecutrix did not disclose to her that accused had torn her clothes.

9.5 PW5 Ramesh Kumar has stated that he is Secretary of G.P. Kathed. He has stated that application was filed by investigating officer for supply of family register of Rangeel Singh Ext.PW5/A. He has stated that he issued copy of family register Ext.PW5/B and also issued birth certificate of prosecutrix Ext.PW5/C which is written and signed by him. He has brought original record in Court.

9.6 PW6 Rakesh Kumar has stated that on 4.7.2012 he was associated in investigation by police. He has stated that in his presence prosecutrix handed over her torn salwar, underwear and blood stained towel which she kept in forest where prosecutrix was raped by accused present in Court. He has stated that prosecutrix located the place of incident in his presence. He has stated that prosecutrix had told the investigating agency that accused had torn her salwar while committing rape. He has stated that seizure memo Ext.PW6/A was prepared in his presence which bears his signatures. He has stated that salwar Ext.P2, underwear Ext.P3 and blood stained towel Ext.P4 are same. He has denied suggestion that prosecutrix did not produce the clothes in his presence. He has denied suggestion that prosecutrix did not disclose the place of incident in his presence relating to commission of rape. He has denied suggestion that no blood stained towel produced by prosecutrix in his presence.

9.7 PW7 C.Sushil Kumar has stated that on 5.7.2012 accused had given disclosure statement Ext.PW7/A in custody of police officials. He has stated that accused had shown the place of incident where he committed the rape with prosecutrix and further stated that prosecutrix has also identified the place of incident in his presence. He has stated that memo Ext.PW7/B was prepared. He has stated that accused had also handed over his lower and underwear to police officials which he was wearing at the time of commission of rape with prosecutrix. He has stated that lower of accused is Ext.P6 and underwear of accused is Ext.P7. He has stated that I.O. had also sealed CDs in the parcel in

his presence and also took photographs Ext.PW7/F-1 to Ext.PW7/F-4. He has denied suggestion that accused did not make any disclosure statement and also denied suggestion that accused did not deliver his clothes in his presence. He has denied suggestion that he was not present at the spot. He has denied suggestion that all memos were prepared in police station.

9.8 PW8 C.Sudarshan has stated that he is posted as Constable at P.S. Chowari. He has stated that on 13.7.2012 MHC Rajpal P.S. Chowari handed over to him two sealed parcels duly sealed with five seal impressions of CH Nurpur and one enveope addressed to RFSL Dharamshala and one container sealed with seal impression FRU Chowari and also handed over one envelope addressed to RFSL Dharamshala vide RC No. 46 of 2012. He has stated that another two sealed parcels having impressions 'T' and 'H' were also handed over to him and he deposited the case property at RFSL Dharamshala on 13.7.2012. He has stated that property remained safe in his possession. He has denied suggestion that no case property was handed over to him. He has stated that he did not deliver the case property in office of RFSL Dharamshala.

9.9 PW9 Manish Kumar has stated that he is student of 10th standard in Government Senior Secondary School Sahla Tehsil Bhattiyat and on 1.7.2012 he had gone to house of Jaram Singh in village Ghanghar to join religious function. He has stated that Trilok and Rakesh were also with him. He has stated that he had gone to attend the function in the evening at 7 PM and remained there till morning. He has stated that during night they did not go anywhere and on the next morning he returned along with Rakesh and Trilok. Witness was declared hostile. He has denied suggestion that on 1.7.2012 in the midnight he along with Trilok, Rakesh and prosecutrix left the ceremony. He has denied suggestion that while returning back accused Ravinder met them in Ghugar forest and questioned about Sunil. He has denied suggestion that accused Ravinder sent him back along with Trilok and Rakesh to bring Sunil and also denied suggestion that prosecutrix remained with accused in Ghugar forest. He has denied suggestion that when he came back with Sunil then accused and prosecutrix were not present. He has denied suggestion that on 3.7.2012 prosecutrix disclosed to her father in his presence and in presence of Trilok and Rakesh that on previous night accused took prosecutrix to secluded place at Ghugar forest and committed sexual intercourse upon her without her consent.

9.10 PW10 Rakesh Kumar has stated that he is student of 9th class in GSSS Sahla, Tehsil Bhattiyat and on 1.7.2012 he had gone to house of Jaram Singh to attend the religious function. He has stated that Trilok and Manish also accompanied him. He has stated that he had gone to see religious ceremony at 7 PM in the evening and remained in function till morning. He has stated that during night they did not go anywhere. He has stated that in the morning he returned back along with Manish and Trilok. Witness was declared hostile. He has denied suggestion that on 1.7.2012 in midnight he along with Trilok, Manish and prosecutrix left the religious function in midnight. He has denied suggestion that when they were returning back accused Ravinder met them at Gughar forest and questioned about Sunil. He has stated that accused Ravinder did not meet him in Ghugar forest. He has denied suggestion that accused Ravinder Singh sent him back along with Trilok and Manish to bring Sunil. He has denied suggestion that prosecutrix stayed with accused in Ghugar forest. He has denied suggestion that when they returned back with Sunil then accused and prosecutrix were not present. He has denied suggestion that on 3.7.2012 prosecutrix disclosed to her father in his presence and in presence of Trilok and Manish that on previous night accused at secluded place had committed sexual intercourse with prosecutrix without her consent. He has denied suggestion that he has resiled from his statement in order to save accused because accused is his uncle.

9.11 PW11 prosecutrix has stated that she is housewife and presently residing at Amritsar with her husband. She has stated that her husband is goldsmith and deals in gold. She has stated that on 1.7.2012 in evening at 7.15 PM she alongwith her aunt Kanta Devi had gone to attend ceremony in house of Jaram Singh at village Ghangar. She has stated that till 12.45 AM she witnessed the ceremony and after having feast she returned back to her house with her cousins Manish Rakesh and Trilok. She has stated that her aunt Kanta opted to stay back to witness religious ceremony till next morning. She has stated that she along with Manish, Rakesh and Trilok walked for about half K.m. and in the meanwhile accused Ravinder @ Raju present in Court called them to stop. She has stated that accused inquired about Sunil. She has further stated that accused also asked her cousins namely Manish, Rakesh and Trilok to go back to the house of Jaram Singh and bring Sunil. She has stated that accused asked her to wait till Manish, Rakesh and Trilok did not come back along with Sunil. She has stated that thereafter accused forcibly took her towards forest area and further stated that accused gagged her mouth and committed sexual intercourse with her without her consent. She has stated that accused put off her clothes forcibly and gagged her mouth. She has stated that after committing sexual intercouse she told accused that she would disclose the incident to her father and his family members. She has stated that thereafter accused threatened her that in case she would disclose this incident to anyone she would be killed. She has stated that she reached her house in wee hours on 2.7.2012 at 3 AM. She has stated that she was nervous and did not disclose the incident to any family member because accused had threatened her to kill her. She has stated that on 3.7.2012 she disclosed the incident to her father when she was questioned by her father. She has stated that thereafter her father took her to residence of Geeta Devi Pardhan of local Gram Panchayat and she disclosed the entire incident to Geeta Devi Pardhan of Gram Panchayat upon which she advised to go to Tehsil office and prepared criminal complaint and thereafter filed the same in police station. She has stated that thereafter she along with her father visited Tehsil office and got drafted criminal complaint Ext.PW11/A which bears her signatures in red encircle at point A. She has stated that she dictated application Ext.PW11/A and thereafter presented the same before SDM Chowari. She has stated that thereafter SDM Chowari advised her and her father to report the matter in police station Chowari and thereafter matter was reported to police station Chowari. She has stated that report was lodged at P.S. Chowari and thereafter she was took for her medical examination in Chowari hospital but since no lady doctor was available therefore she was took to Civil Hospital Nurpur for her medical examination. She has stated that she was medically examined in Civil Hospital Nurpur by lady medical officer on 3.7.2012. She has stated that thereafter she located the place of incident where accused had committed sexual intercourse in Ghugar forest. She has stated that photographs were obtained and videography was also conducted. She has stated that photographs are Ext.PW7/F-1 to Ext.PW7/F-4. She has stated that thereafter she produced her clothes i.e. salwar Ext.P2, underwear Ext.PW3 and cotton cloth Ext.P4 which she was wearing at the time of incident. She has stated that her mother had deserted her father about 10-12 years back. She has stated that when sexual intercourse was committed upon her then bleeding came out which was wiped with cotton cloth. She has stated that her X-ray was also conducted. She has stated that when she was dragged forcibly she sustained scratches upon her feet. She has denied suggestion that she did not accompany her cousins during night hours. She has denied suggestion that accused did not meet her during midnight in forest area. She has denied suggestion that her husband Anil was also present in ceremony. She has denied suggestion that she had called him to forest area during night. She has denied suggestion that when she came back from ceremony she was along with Anil Sharma with whom she was married later on. She has denied suggestion that when her meeting with Anil during night hours in forest became open she fled away from her native place and solemnized marriage with Anil at Nurpur. She

has denied suggestion that her cousins were aware that she was eloped in forest with Anil with whom she subsequently married. She has denied suggestion that after solemnisation of marriage with Anil she implicated the accused in false case in order to save her honour.

9.12 PW12 Rangeel Singh has stated that he is agriculturist by profession and he has two children i.e. one daughter and one son. He has stated that his wife deserted him about 16 years back leaving behind children with him. He has stated that on 1.7.2012 there was ceremony in the house of Jaram Singh in village Ghangar. He has stated that prosecutrix had gone to attend the ceremony. He has stated that he also attended the ceremony but he came back at 1.30 AM during night. He has stated that he found prosecutrix nervous and he questioned the prosecutrix about cause of her nervousness and thereafter prosecutrix disclosed that on 1.7.2012 during midnight when she was returning to home with cousins the accused stopped them and asked her cousins to bring Sunil. He has stated that prosecutrix also disclosed that thereafter accused took prosecutrix to nearby forest and committed sexual intercourse with prosecutrix against her consent. He has stated that thereafter he took the prosecutrix to Pardhan of local Panchayat and Pardhan advised him to report the matter in police station. He has stated that thereafter he went to Tehsil office Chowari along with prosecutrix and complaint Ext.PW11/A was dictated by prosecutrix. He has stated that thereafter complaint was presented before SDM Chowari who appended his signatures and advised him and prosecutrix to visit police station. He has stated that thereafter complaint Ext.PW11/A was filed in police station. He has stated that his daughter was brought by police for her medical examination to Chowari hospital but no medical officer was present and therefore prosecutrix was took to civil hospital Nurpur for her medical examination. He has stated that MLC of prosecutrix is Ext.PW1/B. He has stated that prosecutrix produced her clothes before police and clothes were sealed in parcel. He has denied suggestion that in ceremony his son-in-law Anil was also present. He has denied suggestion that prosecutrix was alongwith Anil during midnight.

9.13 PW13 LC Anjna Kumari has stated that she was posted as General Duty Constable in P.S. Chowari. She has stated that on 3.7.2012 she took prosecutrix to medical officer FRU Chowari for her medical examination. She has stated that no lady medical officer was available at Chowari and thereafter prosecutrix was referred for her medical examination to civil hospital Nurpur. She has stated that prosecutrix was medically examined at civil hospital Nurpur and after medical examination medical officer delivered her two sealed parcels containing clothes of prosecutrix along with envelope addressed to RFSL Dharamshala. She has stated that she also collected MLC of prosecutrix along with X-ray film from concerned doctor. She has stated that she handed over the parcels and envelope to MHC Rajpal and handed over the X-ray film and MLC to investigating officer. She has stated that sealed parcels remained intact in her custody.

9.14 PW14 HC Man Singh has stated that he performed temporary duty as MHC in P.S. Chowari. He has stated that on 4.7.2012 LC Anjna Kumari handed over to him two sealed parcels containing clothes of prosecutrix along with one envelope. He has stated that on receipt of same he made entry in malkhana register 19 at Sr. No. 119 on the same day. He has stated that ASI Parvesh Kumar on aforesaid date handed over to him two sealed parcels and one envelope and entry to this effect was made by him immediately in malkhana register No. 19 at Sr. No. 120. He has stated that on next day i.e. 5.7.2012 ASI Parvesh Kumar handed over to him one sealed parcel which was recorded in record at Sr. No. 121. He has stated that extract of malkhana register is Ext.PW14/A containing two leaves and further stated that case property remained safe in his custody.

9.15 PW15 HC Rajpal has stated that he was posted as MHC in P.S. Chowari. He has stated that w.e.f. 3.7.2012 to 7.7.2012 he was on leave and during his leave period HC

Man Singh had performed his duty in his absence. He has stated that on 13.7.2012 he handed over two sealed parcels containing clothes, pubic hairs, vaginal swab of prosecutrix and clothes of accused along with two envelopes to C. Sudarshan Kumar vide RC No. 46 of 2012 with direction to deposit the same in RFSL Dharamshala. He has stated that he brought original record and stated that case property remained safe in his custody.

9.16 PW16 Kanta has stated that she is housewife and prosecutrix is her niece. She has stated that she does not know anything about case. Witness was declared hostile. She has denied suggestion that on 1.7.2012 she had gone to village of Jaram Singh to attend ceremony along with prosecutrix. She has stated that she went alone to attend ceremony. She has denied suggestion that prosecutrix along with her cousins Trilok, Rakesh Kumar and Manish Kumar returned back from function during midnight. She has denied suggestion that during intervening night of 1.7.2012 and 2.7.2012 at about 1 AM accused Ravinder had committed indecent act with prosecutrix. She has denied suggestion that she came to know from father of prosecutrix that accused took prosecutrix to forest and committed rape with prosecutrix. She has denied suggestion that she came to know from father of prosecutrix that accused had criminally intimidated the prosecutrix. She has admitted that in her presence prosecutrix produced her clothes i.e. salwar Ext.P2, underwear Ext.P3 and blood stained towel Ext.P4. She has also admitted that clothes were sealed in parcel. She has admitted that accused is known to her. She has stated that accused is resident of her village. She has stated that prosecutrix was eloped with a boy thereafter she advised prosecutrix to solemnise marriage with him. She has stated that marriage of prosecutrix was solemnised at Nurpur.

9.17 PW17 ASI Parvesh Kumar has stated that he is posted as investigating officer in P.S. Chowari. He has stated that on 3.7.2012 on receipt of application Ext.PW11/A from prosecutrix he registered FIR Ext.PW7/A. He has stated that he moved application Ext.PW1/A for medical examination of prosecutrix before medical officer Chowari. He has stated that no lady medical officer was available at Chowari and therefore prosecutrix was took to civil hospital Nurpur for her medical examination. He has stated that after medical examination of prosecutrix in civil hospital Nurpur medical officer handed over two sealed parcels containing clothes of prosecutrix and also handed over one envelope addressed to RFSL Dharamshala and thereafter case property was deposited with MHC P.S. Chowari. He has stated that MLC and X-ray film also obtained. He has stated that ossification test of prosecutrix was also conducted. He has stated that X-ray films of prosecutrix Ext.PW17/C-1 to Ext.PW17/C-7 also obtained. He has stated that he recorded statements of prosecution witnesses. He has stated that he also filed application Ext.PW17/E for medical examination of accused and obtained MLC of accused. As per MLC accused was capable for performing sexual intercourse. He has stated that he also located place of occurrence at the instance of prosecutrix and prepared site plan Ext.PW17/F and marginal notes of same are in his hands. He has stated that he also took photogrpahs Ext.PW17/F-1 to Ext.PW17/F-14 and further stated that prosecutrix had also produced her clothes salwar Ext.P2, underwear Ext.P3, blood stained towel Ext.P4 and sealed the same in cloth parcel. He has stated that he also prepared seizure memo. He has stated that disclosure statement of accused was also recorded. He has stated that he also prepared spot map Ext.PW7/A. He has stated that accused produced his clothes i.e. lower and underwear which were took into possession vide seizure memo Ext.PW7/D. He has stated that he also collected birth certificate Ext.PW5/C and also collected extract of family register Ext.PW5/D from Secretary Gram Panchayat. He has stated that as per investigation it was found that on intervening night of 1.7.2012 and 2.7.2012 accused committed sexual intercourse with prosecutrix against her consent after taking her in nearby forest when prosecutrix was returning back from village Ghangar after attending religious ceremony. He has stated that on 10.7.2012 C. Susheel Kumar produced

before him photographs and two CDs with regard to proceedings of case. He has stated that he sealed CDs in parcel Ext.PW17/L and on 13.7.2012 MHC Rajpal handed over five sealed parcels containing clothes of prosecutrix and accused along with vaginal swab, pubic hair of prosecutrix and accused, two sealed envelopes to C.Sudarshan Kumar vide RC No. 46 of 2012. He has stated that report from RFSL Dharamshala Ext.PW17/M also received and thereafter final report was submitted before Judicial Magistrate. He has stated that disclosure statement of accused was also recorded. He has denied suggestion that accused remained in ceremony till morning. He has stated that during interrogation accused disclosed that after committing sexual intercourse with prosecutrix he returned back to ceremony. He has denied suggestion that prosecutrix did not return along with Manish, Rakesh and Trilok during midnight. He has denied suggestion that Manish, Rakesh and Trilok came next morning from religious ceremony. He has denied suggestion that accused did not follow prosecutrix and also denied suggestion that accused did not commit sexual intercourse with prosecutrix against her will and consent. He has stated that he does not know whether Anil had visiting terms with prosecutrix.

10. Statement of accused recorded under Section 313 Cr.P.C. Accused has stated that few days prior to the incident father of prosecutrix got a grant from Panchayat for construction of house. He has stated that father of prosecutrix asked his father to sell the land adjoining to his house but his father refused to sell the same. He has stated that he is innocent and he has been falsely implicated in present case. One witness was examined in defence by accused.

11. DW1 Jaram Singh has stated that on 1.7.2012 there was function in his residence and he had called four persons namely Ravinder who is accused in present case, Pirthi Singh, Raju and Bhushan. He has stated that he has entrusted the job of collecting utensils, fuel wood and cleaning of kitchen to accused Ravinder. He has stated that he had given tea material to accused Ravinder to entertain the guests during ceremony. He has stated that Ravinder left his home next morning i.e. 2.7.2012 at about 8 AM. He has stated that while preparing tea accused Ravinder did not go anywhere and remained confined to job entrusted to him. He has denied suggestion that accused Ravinder took prosecutrix to nearby forest and committed sexual intercourse. He has denied suggestion that he offered drinks to persons who participated in function. He has also denied suggestion that accused Ravinder is his relative.

12. Prosecution produced following documentaries evidence. (1) Ext.PW1/A Copy of application to medical officer for medical examination of prosecutrix. (2) Ext.PW1/B MLC of prosecutrix aged 18 years. (3) Ext.PW5/A Application to Panchayat Secretary to supply copy of family register. (4) Ext.PW5/B Copy of family register kept by Panchayat. (5) Ext.PW5/C age certificate of prosecutrix. Prosecutrix was born on dated 03-03-1992. (6) Ext.PW6/A seizure memo regarding recovery of salwar, underwar and blood stained towel. (7) Ext.PW7/A and Ext.PW7/B statements of accused recorded under Section 27 of Indian Evidence Act 1872. (8) Ext.PW7/C sample of seal. (9) Ext.PW7/D seizure memo regarding recovery of lower and underwear of accused. (10) Ext.PW7/E memo regarding recovery of CDs. (11) Ext.PW7/F-1 to Ext.PW7/F-4 photographs of place of incident. (12) Ext.PW7/G sample seal upon plain cloth. (13) Ext.PW11/A Copy of criminal complaint filed by prosecutrix. (14) Ext.PW14/A Extract of malkhana register. (15) Ext.PW15/A Copy of RC. (16) Ext.PW17/A Copy of FIR. (17) Ext.PW17/C-1 to Ext.PW17/C-7 copies of X-rays. (18) Ext.PW17/C-8 X-ray form of prosecutrix. (19) Application to medical officer for medical examination of accused Ravinder. (20) Ext.PW17/F Spot map of incident. (21) Ext.PW17/G Sample seal upon plain cloth. (22) Ext.PW7/K Site plan. (23) Ext.PW17/L CD. (24) Ext.PW17/M RFSL report Dharamshala H.P. (25) Ext.PY MLC of accused Ravinder.

13. Submission of learned Advocate appearing on behalf of the appellant that testimony of prosecutrix is wholly unreliable due to conduct of prosecutrix and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the testimony of prosecutrix. Prosecutrix has stated in positive manner that on 1.7.2012 in the evening at about 7.15 PM she along with her aunt Kanta Devi had gone to attend the ceremony in house of Jaram Singh in village Ghangar. Prosecutrix has stated in positive manner that till 12.45 AM midnight she witnessed the ceremony and thereafter she returned back to her house along with her cousins Manish, Rakesh and Trilok. Prosecutrix has stated in positive manner that accused Ravinder @ Raju stopped them and inquired about Sunil. Prosecutrix has specifically stated in positive manner that accused directed her cousins Manish, Rakesh and Trilok to bring Sunil and asked her to wait till they returned back with Sunil. Prosecutrix has stated that when Manish, Rakesh and Trilok went to bring Sunil thereafter accused forcibly took prosecutrix towards forest area and she raised cries but her mouth was gagged by accused. Prosecutrix has stated in positive manner that thereafter accused committed sexual intercourse with prosecutrix without her consent. Prosecutrix has stated in positive manner that accused put off her clothes forcibly after gagging her mouth. Prosecutrix has further stated that after committing sexual intercourse accused told prosecutrix that if she would disclose the incident to any family members including wife of accused then she would be killed. Testimony of prosecutrix is corroborated by testimony of PW1 medical officer who has specifically stated that prosecutrix had sustained following injuries upon her body i.e. (1) Scratch marks on left side of back which was less 72 hours in duration about 1 cm in length. (2) There was abrasion about 0.5 cm in size linear on left scapula reddish in colour of same duration. (3) There was abrasion on right scapula reddish in colour. (4) There was abrasion on inner surface of labia minora reddish in colour in inflammed nature. (5) Hymen of unmarried prosecutrix aged 18 years was torn at 7 O'clock position. PW1 medical officer has corroborated the testimony of prosecutrix that sexual intercourse was committed within 72 hours. PW1 has stated in positive manner that human semen was detected on vaginal slides of prosecutrix which was suggestive of sexual intercourse. Testimony of prosecutrix is further corroborated by MLC Ext.PW1/B placed on record. Testimony of prosecutrix is further corroborated by report submitted by RFSL Ext.PW17/M wherein it is specifically mentioned that human semen was detected on vaginal slides of prosecutrix and underwear of accused.

14. Testimony of prosecutrix is further corroborated by PW4 who has specifically stated that on 3.7.2012 prosecutrix along with her father came to her residence and disclosed that on 1.7.2012 accused torn the clothes of prosecutrix and committed forcibly sexual intercourse with prosecutrix. Even PW4 has specifically stated in positive manner that on earlier occation also Kanta aunt of prosecutrix came to her and complained that accused present in Court after consuming liquor had forcibly entered into the room of prosecutrix and thereafter he was taken out forcibly.

15. Testimony of prosecutrix is further corroborated by testimony of PW12 Rangeel Singh father of prosecutrix. PW12 Rangeel Singh father of prosecutrix has specifically stated that he found that prosecutrix was nervous and prosecutrix has narrated the entire incident of rape to him. In view of the fact that testimony of prosecutrix is corroborated by PW1 medical officer, PW4 Pardhan of Gram Panchayat and PW13 father of prosecutrix and in view of the fact that testimony of prosecutrix is corroborated by MLC Ext.PW1/B and FSL report Ext.PW17/M it is held that testimony of prosecutrix is trustworthy reliable and inspires confidence of Court. ***See (2013)7 SCC 77 (Apex Court) titled Shyam Narain vs. State (NCT of Delhi). See (2012)7 SCC 171 titled Narender vs. State (NCT of Delhi). See (2014)10 SCC 254 titled Munna vs. State of M.P. See***

(2013)14 SCC 588 titled Datta vs. State of Maharashtra. See (1989)1 SCC 432 titled Prithi vs. State. See (2015)4 SCC 491 titled Ravinder vs. State of M.P. See (2014)10 SCC 327 titled Mukesh vs. State of Chattisgarh. See (2013)4 SCC 200 titled State of Haryana vs. Basti Ram. See (2012)11 SCC 362 titled O.M. Baby through LRs vs. State of Kerala. See (2011)2 SCC 550 titled State of U.P. vs. Chhoteylal. See (2013)14 SCC 481 titled Mohd. Iqbal vs. State of Jharkhand.

16. It is well settled law that in rape cases direct evidence is not avaiable. It is well settled law that testimony of victim in sexual offence is vital and unless there are compelling reasons looking for corroboration of her statement Court should find no difficulty to act upon testimony of victim of sexual assault alone to convict the accused where testimony of prosecutrix inspires confidence and is found to be reliable. It is well settled law that corroborative evidence is not an imperative component of judicial credence in every rape case. It is well settled law that corroboration as a condition for judicial reliance on the testimony of prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It is well settled law that a woman or girl subjected to sexual assault is not an accomplice to the crime but is victim of another persons lust and it is improper and undesirable to test her evidence with suspicion treating her as if she was an accomplice. It is well settled law that normally no woman would come forward to make a humiliating statement against her honour of having been raped unless it was true. It is well settled law that testimony of prosecutrix must be appreciated in the background of entire case and Court must be alive to its responsibility and should be sensitive while dealing with cases involving sexual molestation. ***(See: (1996)2 SCC 384, titled State of Punjab vs. Gurmit Singh and others. Also see (2000)5 SCC 30 titled State of Rajasthan vs. N.K. the accused. Also see (2000)1 SCC 247 titled State vs. Lekh Raj and another. Also see (1992)3 SCC 204 titled Madan Gopal Kakkad versus Naval Dubey and another).***

17. Another submission of learned Advocate appearing on behalf of appellant that in view of testimonies of Manish, Trilok and Rakesh appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the testimonies of Manish, Rakesh and Trilok. Manish, Rakesh and Trilok have been declared hostile by prosecution. Testimony of prosecutrix is corroborated by (1) Medical evidence, (2) Testimony of father of prosecutrix. (3) Testimony of Pardhan. On contrary at the time of commission of rape PW2, PW9 and PW10 were not present and at the time of rape prosecutrix and accused were only present because rape was committed in forest during midnight by accused. Hence it is held that testimonies of PW2, PW9 and PW10 are not sufficient to disbelieve the testimony of prosecutrix which is corroborated by medical evidence, RFSL report, testimony of father of prosecutrix and testimony of Pardhan of Gram Panchayat. Even concept *falsus in uno falsus in omnibus* is not applicable in criminal proceedings. ***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.***

18. Submission of learned Advocate appearing on behalf of appellant that Sunil material witness was not examined by prosecution and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that Sunil is not eye witness of rape and Court is of the opinion that no application was filed by appellant before learned trial Court for examination of Sunil. Even Sunil was not produced as defence witness in order to contradict the testimony of prosecutrix which was corroborated by medical officer, RFSL report and which is also corroborated by father of prosecutrix and Pardhan of Gram Panchayat.

19. Submission of learned Advocate appearing on behalf of appellant that two views are possible in present case and on the basis of two views benefit of doubt be given to

accused is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that theory of two views is possible only when there are contradictory statements in testimonies of eye witnesses of incident. In present case there is no independent eye witness of rape except the prosecutrix because offence of rape was committed during midnight after 1 AM in forest. PW2, PW9, PW10 and DW1 Jaram Singh are not eye witnesses of incident and they were not present when rape was committed by accused upon prosecutrix during midnight in forest who was unmarried aged 18 years at the time of commission of criminal offence of rape. Hence it is held that concept of two views is not proved in present case.

20. Submission of learned Advocate appearing on behalf of appellant that injuries on body of prosecutrx are not linked with commission of rape is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that prosecutrix had sustained three injuries i.e. (1) There was scratch mark on left side of back, three parallel lines, reddish with brown scab which was less than 72 hours in duration about 1 cm in length. (2) There was abrasion about 0.5 cm in size linear on left scapula reddish in colour of same duration. (3) There was abrasion on right scapula reddish in colour. (4) There was abrasion in labia minora. (5) Hymen was torn at 7 O'clock position. Incident took place between intervening night of 1.7.2012 and 2.7.2012 at 1 AM during midnight in forest and medical examination of prosecutrix was conducted on 3.7.2012 within 72 hours of incident and medical officer has specifically stated in positive manner that injury sustained by prosecutrix upon her body occurred within duration of less than 72 hours. Hence it is held that injuries sustained by prosecutrix are directly linked with criminal offence of rape committed upon prosecutrix by accused.

21. Submission of learned Advocate appearing on behalf of appellant that prosecutrix did not state that accused had removed her salwar for committing the offence of rape and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Prosecutrix has stated in positive manner when she appeared in witness box that accused put off her clothes forcibly and gagged her mouth and thereafter committed sexual intercourse with her and also threatened not to disclose the incident to anybody. Above stated testimony of prosecutrix is trusworthy reliable and inspire confidence of Court. There is no reason to disbelieve the testimony of prosecutrix.

22. Submission of learned Advocate appearing on behalf of the appellant that DNA of accused was not conducted and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that DNA test is not mandatory requirement in law. It is well settled law that accused can be convicted simply on testimony of prosecutrix if testimony of prosecutrix is trustworthy reliable and inspire confidence of Court. Even in present case accused did not file any application before learned trial Court for his DNA test.

23. Submission of learned Advocate appearing on behalf of appellant that prosecutrix had love affairs with Anil to whom she later on married and on this ground appeal be accepted 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 Anil had committed sexual intercourse with prosecutrix in the midnight of 1.7.2012 and 2.7.2012. Even appellant did not file any application for examination of Anil when learned trial Court had given opportunity to appellant to lead defence evidence. Plea of appellant that Anil had committed sexual intercourse with prosecutrix during midnight of 1.7.2012 and 2.7.2012 is defeated on the concept of *ipse dixit* (An assertion made by person without proof.)

24. Submission of learned Advocate appearing on behalf of appellant that testimony of PW4 Geeta Devi is not reliable is rejected being devoid of any force for the reasons hereinafter mentioned. PW4 Geeta Devi was Pardhan of Gram Panchayat and matter was reported to Pardhan of Gram Panchayat by prosecutrix along with her father and PW4 Geeta Devi has specifically stated that prosecutrix had informed her that she was raped by accused in forest during midnight of 1.7.2012 and 2.7.2012 and PW4 has further stated that on earlier occasion also accused had entered into the residential room of prosecutrix and he was forcibly turned out by relatives.

25. Even criminal offence of rape against appellant is also proved beyond reasonable doubt as per disclosure statement given by accused under Section 27 of Indian Evidence Act 1872. PW7 Sushil Kumar has specifically stated in positive manner that accused had given disclosure statement and as per disclosure statement accused had handed over his underwear which was worn by accused at the time of commission of offence. Disclosure statement given by accused is proved beyond reasonable doubt as per testimony of PW7 Sushil Kumar. Even semen was found upon underwear of accused as per chemical analyst report placed on record.

26. Facts of case cited by learned Advocate appearing on behalf of appellant i.e. ***(2012)8 SCC 21*** titled ***Rai Sandeep @ Deepu vs. State (NCT) of Delhi***, ***(2012)7 SCC 171*** titled ***Narender Kumar vs. State (NCT) of Delhi, (2010)12 SCC 115*** titled ***Abbas Ahman Choudhary vs. State of Assam***, ***(2010)3 SCC 232*** titled ***Dinesh Jaiswal vs. State of M.P., (2009) 15 SCC 566*** titled ***Tameezuddin alias Tammu v. State of NCT of Delhi***, ***AIR 2009 SC 858*** titled ***Rajoo vs. State of M.P.***, ***(2007)12 SCC 57*** titled ***Radhu vs. State of Madhya Pradesh*** and ***(2003)3 SCC 175*** titled ***Vimal Suresh Kamble vs. Chaluverapinaka Apal (1997)3 SCC 41*** titled ***Pratap Misra & others vs. State of Orissa*** and facts of present case are entirely different. Hence case law cited by learned Advocate appearing on behalf of appellant are not applicable in facts of present case because facts of cases cited by learned Advocate appearing on behalf of appellant did not relate to criminal offence of rape committed during midnight at 1 AM in forest and there are no similar reports of medical evidence, FSL report, testimony of father of prosecutrix and Pardhan of Gram Panchayat.

27. In present case accused committed rape upon prosecutrix at that time when accused was a married person aged 32 years and prosecutrix was unmarried girl aged 18 years. Court is of the opinion that murder destroys the body of victim but rapist degrades the soul of unmarried girl. Court is of the opinion that anarchy will prevail in society if married man aged 32 years is allowed to commit rape upon unmarried girl aged 18 years. In order to maintain majesty of law and in order to maintain honour of unmarried girl Court is of the opinion that it would be expedient in the ends of justice to maintain the sentence passed by learned trial Court.

28. Submission of learned Advocate appearing on behalf of appellant that few days prior to alleged incident father of prosecutrix obtained grant from Panchayat for construction of house and thereafter father of prosecutrix asked father of accused to sell the land adjoining to his house but father of accused refused and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Plea of appellant that father of prosecutrix had requested the father of accused to sell the land adjoining to his house is defeated on the concept of *ipse dixit* (An assertion made by person without proof.) Accused did not examine his father in defence evidence in order to prove his version.

29. Even Section 114 (a) of Indian Evidence Act 1872 came into operation w.ef. 20.12.1989. There is presumption as to absence of consent in rape cases when prosecutrix stated in evidence before the Court that she did not consent. In present case prosecutrix did not state that she consented for sexual intercourse to accused. Section 114(a) of Indian Evidence Act 1872 is quoted in toto:-

> *"114A-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 (45 of 1860), 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 when she stated in her evidence before the Court that she did not consent then Court shall presume that she did not consent."*

30. Submission of learned Advocate appearing on behalf of appellant that alternatively appellant be acquitted on the ground of consent theory is also rejected being devoid of any force for the reasons hereinafter mentioned. Accused did not cross-examine the prosecutrix upon consent theory before learned trial Court. Even accused did not put his defence before learned trial Court on the consent theory. Hence it is held that it is not expedient in the ends of justice to allow the appellant to raise the plea of consent theory at appellate stage of case for the first time. No suggestion has been given by appellant at any point of time to prosecutrix that present case was a case of consent. Every girl or woman has fundamental constitutional right to live in society with dignity and honour and sexual assault indirect attacked upon dignity and honour of girl or woman which should be controlled in order to maintain majesty of law and in order to maintain harmony in society. In view of above stated facts point No.1 is answered in negative against the appellant.

Point No. 2 (Final Order)

31. In view of above stated facts and case law cited supra appeal filed by appellant is dismissed. Judgment and sentence passed by learned trial Court affirmed. It is held that learned trial Court has properly appreciated oral as well as documentary evidence placed on record. It is held that no miscarriage of justice is caused to appellant. File of learned trial Court along with ceritified copy of this judgment be sent back forthwith. Appeal stands disposed of. Pending miscellaneous application(s) if any also stands disposed of.

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

Roshan Lal son of Ratti Ram. .....Appellant.

Vs.

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

Cr. Appeal No. 4175 of 2013.
Judgment reserved on: 23.9.2015
Date of Judgment: November 4, 2015.

N.D.P.S. Act, 1985- Section 20- Accused was found carrying a bag on his left shoulder- he tried to run away on seeing the police- he was apprehended on the basis of suspicion, search of his bag was conducted, and 850 grams of charas was recovered- one independent witnesses did not support the prosecution version and the other independent person was not examined- PW-3 had not signed the seizure memo- it was not mentioned in the report of FSL, Junga that seals were intact and were tallied with the specimen seal- PW-6 stated that

samples were not taken homogeneously – official witnesses had given contradictory versions- original seal was not produced before the Court- held, that in these circumstances, prosecution version was not proved beyond reasonable doubt – accused acquitted.

(Para-10 to 20)

Cases referred:

Yomeshbhai Pranshankar Bhatt Vs. State of Gujarat, 2011 (6) SCC 312
State of UP Vs. Chet Ram, AIR 1989 SC 1543
Khujji alias Surendra Tiwari Vs. Stat of M.P., AIR 1991 S.C 1853
Bhajju alias Karan Singh Vs. State of Madhya Pradesh, 2012 (4) SCC 327
Koli Lakhmanbhai Chanabhai Vs. State of Gujarat, 1999 (8) SCC 624
Prithi Vs. State of Haryana, 2010 (8) SCC 536
Sidhartha Vashisht Vs. State (NCT of Delhi), 2010 (6) SSC 1
Ramkrushna Vs. State of Maharashtra, 2007 (13) SCC 525
Ramesh Harijan Vs. State of Uttar Pradesh, 2012 (5) SCC 77
Bhagwan Singh Vs. State of Haryana, AIR 1976 SC 202
Ravindra Kumar Dey Vs. State of Orissa, 1977 SC 170
Syad Akbar Vs. State of Karnataka, AIR 1979 SC 1848
State of HP Vs. Hanacho alias Stewart, Latest HLJ 2004 (HP) 642
Shashi Pal and others Vs. State of HP, 1998 (2) SLJ 1408
State of HP Vs. Sudarshan Singh, 1993 (1) SLJ 405
State of HP Vs. Inder Jeet and others, 1995 (3) SLJ 1819
Anjlus Dungdung Vs. State of Jharkhand, 2005 (9) SCC 765
Nanhar Vs. State of Haryana, 2010 (11) SCC 423
Charan Singh Vs. 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
Sharad Birdhichand Sarda Vs. State of Maharashtra, AIR 1984 SC 1622
Bhugdomal Gangaram and others Vs. State of Gujarat, 1983 SC 906
State of UP Vs. Sukhbasi and others, AIR 1985 SC 1224

For the appellant: Mr.Anoop Chitkara, Advocate.
For the respondent: Mr.M.L. Chauhan, Addl. A.G and Mr. J.S.Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed against the judgment and sentence passed by learned Special Judge Mandi HP in Session Trial No. 8 of 2009 titled State of HP Vs. Roshan Lal decided on 1.8.2013.

Brief facts of prosecution case.

2. It is alleged by prosecution that on dated 29.8.2008 PW7 Om Parkash along with Inspector Shamsher Singh, PW6 Constable Pankaj Kumar, PW3 HC Rajesh Kumar, Constable Brijesh Kumar and Constable Jeet Ram were present at Shilla sward on Ghatashani Joginder Nagar road for traffic checking. It is further alleged by prosecution that at about 7.30 AM a maruti car came there in which PW2 Ramesh Kumar and one Manjeet Singh were sitting. It is further alleged by prosecution that vehicle was signalled to stop by

police officials for the purpose of checking. It is further alleged by prosecution that in the meantime accused came from Barot side carrying bag on his left shoulder. It is further alleged by prosecution that when accused saw police officials he tried to run back and he was apprehended on suspicion. It is further alleged by prosecution that consent for search was obtained vide memo Ext PW6/A. It is further alleged by prosecution that all members of police party and witnesses have given their personal search vide memo Ext PW3/A but no incriminating substance was found from possession of police officials and witnesses. It is further alleged by prosecution that thereafter bag was searched which was in the possession of accused. It is further alleged by prosecution that in bag another polythene bag was kept containing charas in the shape of sticks. It is further alleged by prosecution that 850 grams charas was found from exclusive and conscious possession of accused. It is further alleged by prosecution that two samples each weighing 25 grams were separated from charas and thereafter sealed in separate parcel. It is further alleged by prosecution that specimen of seal Ext PW6/B was obtained vide memo Ext PW2/B. It is further alleged by prosecution that NCB form Ext PW7/A was filled in triplicate and seal after use was handed over to Manjeet Singh. It is further alleged by prosecution that rukka Ext PW7/B was prepared and was sent to police station through constable Rajesh Kumar and on receipt of rukka FIR Ext PW5/B was registered. It is further alleged by prosecution that spot map Ext PW7/C was prepared. It is further alleged by prosecution that case property along with sample seal, NCB form and seizure memo were produced before Inspector Shamsher Singh who resealed each parcels. It is further alleged by prosecution that resealing certificate Ext PW7/E was issued by SHO. It is further alleged by prosecution that thereafter case property along with sample of seal, NCB form and seizure memo were deposited with ASI Kuldeep Singh who recorded entry in malkhana register. It is further alleged by prosecution that abstract of malkhana register is Ext PW5/E. It is further alleged by prosecution that on dated 3.9.2008 sample parcel along with sample seal, NCB form in triplicate and seizure memo were forwarded to FSL Junga through constable Rajinder Singh vide RC Ext PW1/A. It is further alleged by prosecution that report of chemical examiner Ext PW7/F was obtained. It is further alleged by prosecution that special report Ext PW6/C was prepared and was forwarded to S.P SV &ACB Mandi through constable Pankaj Kumar. Charge was framed by learned Special Judge Mandi on dated 1.11.2011 under Section 20 of Narcotic Drugs and Psychotropic Substance Act 1985. Accused did not plead guilty and claimed trial.

3. Prosecution examined seven oral witnesses in support of its case and also produced documentaries evidence.

4. Statement of accused under Section 313 Cr.PC was also recorded. Accused did not lead any defence evidence. Learned trial Court convicted appellant to undergo rigorous imprisonment for a period of five years and to pay fine to the tune of Rs.50,000/- (Fifty thousand). Learned trial Court further directed that in default of payment of fine appellant shall further undergo simple imprisonment for a period of one year. Learned trial Court further directed that period of detention undergone by convict during investigation and trial will be set off as provided under Section 428 Cr.PC.

5. Feeling aggrieved against the judgment and sentence passed by learned Special Judge Mandi appellant filed present appeal.

6. Court heard learned Advocate appearing on behalf of appellant and learned Additional Advocate General appearing on behalf of respondent and also perused entire record carefully.

7. Following points arise for determination in the present criminal appeal:

1. Whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court caused miscarriage of justice to appellant as alleged in memorandum of grounds of appeal?

2. Final order.

8. Findings upon point No.1 with reasons.

8.1 PW1 Constable Rajinder Singh has stated that he was posted at police station SV&ACB Mandi since 2005. He has stated that on dated 3.9.2008 MHC police station SV & ACB Mandi Kuldeep Singh handed over him one parcel which was marked as mark 'A' containing 25 grams charas. He has stated that parcel was sealed with six seals. He has stated that along with parcel, MHC also handed over to him specimen seal impressions of seal 'S' and 'K', copy of FIR, one NCB form vide RC No. 20/2008 with direction to deposit same in the office of Directorate FSL Junga. He has stated that he deposited case property in the office of FSL Junga on dated 3.9.2008. He has stated that copy of RC is Ext PW1/A, copy of receipt of FSL Junga is Ext PW1/B which are correct as per original RC brought by him in Court. He has stated that case property remained intact in his custody. He has denied suggestion that no case property was given to him. He has denied suggestion that he did not deposit sample in the office of FSL Junga.

8.2 PW2 Ramesh Kumar independent witness has stated that he is taxi driver by profession. He has stated that in the month of August 2008 he was in possession of maruti car having registration No. HP 58-1929. He has stated that on dated 29.8.2008 he along with his friend Manjeet Singh was going towards Barot from Joginder Nagar. He has stated that they stayed at Joginder Nagar and when they proceeded to Barot police officials met them at place Ghatasani. He has stated that his vehicle was stopped by police officials. He has stated that police officials told them that they had recovered charas and they directed them to sign some papers. Independent witness was declared hostile by prosecution. He has denied suggestion that when accused saw police officials he turned back and tried to run away. He has denied suggestion that accused was nabbed by police officials. He has denied suggestion that police officials have given their personal search to accused. He has denied suggestion that bag of accused was searched in his presence. He has denied suggestion that polythene bag was found from the possession of accused. He has denied suggestion that charas was found from possession of accused. He has denied suggestion that seal was handed over to witness Manjeet Singh. He has denied suggestion that he had signed consent memo. He has denied suggestion that investigating officer prepared rukka and sent the same to police station. He has denied suggestion that whole proceedings conducted by police officials in his presence. He has stated that all papers as well as parcels were prepared by police officials in a hotel. He has stated that no proceeding was conducted at the spot in his presence.

8.3. PW3 Rajesh Kumar official witness has stated that he was posted as constable general duty in police station SV & ACB Mandi in the year 2008. He has stated that on dated 29.8.2008 police officials under the leadership of Inspector Samsher Singh consisting him, constable Pankaj Kumar, Constable Jeet Ram and constable Brijesh Kumar were present at place known as Shilla Shayad. He has stated that at about 7.30 AM maruti car No. HP 58-1929 came there. He has stated that two persons were sitting in maruti car. He has stated that Manjeet Singh was the driver of vehicle and second person travelling in the vehicle was Ramesh Kumar. He has stated that when vehicle No. HP 58-1929 was searched they noticed a person came from Jhatingri side. He has stated that said person was carrying black bag on his left shoulder. He has stated that when accused saw police officials he at once turned back and tried to run away. He has stated that said person was

chased by police officials and was nabbed at a distance of about 50 meters. He has stated that accused disclosed his name as Roshan Lal. He has stated that thereafter investigating officer had given option to accused whether he wanted his search in the presence of some gazetted officer or magistrate. He has stated that accused had given consent that he should be searched in the presence of police officials. He has stated that memo was prepared and thereafter police officials have given their personal search. He has stated that independent witnesses also given their personal search. He has stated that no incriminating article was found from the possession of police officials and independent witnesses. He has stated that bag which was in possession of accused was searched and said bag was found containing polythene envelope. He has stated that when the same was opened it was found containing black coloured substance in the shape of sticks. He has stated that substance was found to be contraband i.e. charas. He has stated that memo Ext PW2/C was prepared. He has stated that when contraband was weighed same was found to be 850 grams. He has stated that thereafter investigating officer separated two samples of 25 grams each for chemical analysis. He has stated that thereafter samples were sealed in a cloth parcel and remaining charas was also sealed. He has stated that seal after use was handed over to Manjeet Singh. He has stated that thereafter investigating officer prepared rukka. He has stated that after registration of FIR case file was given to him and he handed over the same to investigating officer. He has stated that parcels Ext P1, Ext P2 and Ext P4 and specimen seal Ext P4 are the same which were prepared by investigating officer at the spot. He has stated that outer polythene envelope is Ext P5 and inner polythene envelope is Ext P6 and charas is Ext P7. He has stated that black coloured bag is Ext P8. He has stated that charas Ext P7 was found from bag Ext P8. He has denied suggestion that accused was not nabbed. He has denied suggestion that no contraband was recovered from accused. He has denied suggestion that no rukka was given to him. He has denied suggestion that accused did not flee away from the spot. He has denied suggestion that accused had not given his consent for his personal search. He has denied suggestion that no proceedings took place at the spot.

8.4 PW4 Inspector Vinod kumar has stated that he was posted as SHO in police station SV & ACB Mandi. He has stated that after completion of investigation file was produced before him and he found prima facie case under Section 20 of ND&PS Act. He has stated that he prepared challan and submitted the same in Court.

8.5. PW5 ASI Kuldeep Singh has stated that he remained posted as MHC in police station SV&ACB Mandi from April 2007 to December 2009. He has stated that on dated 28.8.2008 Inspector Shamsher Singh got recorded his departure report along with other police officials. He has stated that on dated 29.8.2008 constable Rajesh Kumar brought rukka mark 'X' to police station which was sent by SI Om Parkash. He has stated that he recorded FIR on the direction of Inspector Shamsher Singh. He has stated that FIR is Ext PW5/B. He has stated that thereafter on dated 29.8.2008 Inspector Shamsher Singh recorded arrival report vide rapat No.8 copy of which is Ext PW5/D which is correct as per record. He has stated that Inspector Shamsher Singh deposited three parcels with him two were sample parcels and one was bulk parcel. He has stated that he also deposited specimen of seal. He has stated that in addition to sample parcels black coloured bag was also deposited and entered same at serial No.42 in register No.19. He has stated that abstract of the same is Ext PW5/E. He has stated that on dated 3.9.2008 he sent one sample parcel to FSL Junga through constable Rajinder Singh and also sent copy of FIR, copy of recovery memo, NCB form and sample seals vide R.C No. 20/2008. He has stated that copy of RC is Ext PW1/A. He has stated that constable Rajinder Singh deposited case property in the office of FSL Junga vide receipt Ext PW1/B. He has stated that thereafter he returned RC and receipt to him. He has stated that case property remained intact in his custody. He has denied suggestion that all rapat rojnamcha were recorded later on. He has

denied suggestion that no case property was deposited with him. He has denied suggestion that he did not sent case property to the office of FSL Junga. He has denied suggestion that case property was tampered by him.

8.6. PW6 Pankaj Kumar has stated that he was posted as HHC in police station SV&ACB Mandi. He has stated that on dated 29.8.2008 he along with constable Rajesh Kumar, constable Brijesh Kumar, constable Jeet Ram, SI Om Parkash and Inspector Shamsher Singh went to Ghatashani for traffic checking in vehicle No. HP 33A-8793. He has stated that at about 7.30 AM maruti car of white colour having registration No. HP 58-1929 came from Ghatashani side in which two persons were sitting. He has stated that said car was stopped for checking. He has stated that occupants of car disclosed their names Manjeet Singh and Ramesh Kumar. He has stated that in the mean time a person came from Jhatingri side who was in possession of bag on his left shoulder. He has stated that when accused saw police officials he tried to run backward side. He has stated that accused was caught with the help of police officials in the presence of two independent witnesses namely Manjeet Singh and Ramesh Kumar. He has stated that accused disclosed his name as Roshan Lal son of Ratti Ram. He has stated that investigating officer has given his introduction to accused and obtained his consent regarding his personal search. He has stated that investigating officer told him that he could get his personal search in the presence of magistrate or gazetted officer. He has stated that thereafter investigating officer, police officials and witnesses gave their personal search to accused. He has stated that during personal search of witnesses and police officials by accused no incriminating article was recovered. He has stated that thereafter search of accused was carried out. He has stated that during search when bag of accused was checked it was containing a polythene envelope. He has stated that charas in the shape of sticks was found in the polythene envelope. He has stated that charas was weighed and on weighment it was found 850 grams. He has stated that thereafter investigating officer mixed recovered charas and took two homogeneous samples of 25 grams each. He has stated that thereafter samples were put in two separate polythene envelopes and were sealed in a parcel. He has stated that remaining bulk charas weighing 800 grams was put into same parcel and parcel was sealed. He has stated that seal after use was handed over to witness Manjeet Singh. He has stated that investigating officer filled NCB forms in triplicate and thereafter recovered charas was taken into possession vide seizure memo Ext PW2/A. He has stated that thereafter investigating officer handed over special report Ext PW6/C to him. He has stated that thereafter he handed over special report to SP Vigilance. He has stated that charas Ext P7 is the same which was recovered from possession of accused. He has stated that sample was not made homogeneous. He has stated that he does not know how investigating officer drew sample. He has denied suggestion that accused was not apprehended. He has denied suggestion that no charas was found from the possession of accused. He has denied suggestion that all proceedings conducted in police station. He has denied suggestion that false case filed against accused. He has denied suggestion that case property was tampered.

8.7. PW7 Om Parkash has stated that he remained posted as investigating officer in police station SV&ACB Mandi during the year 2008. He has stated that on dated 29.8.2008 he along with inspector Shamsher Singh, constable Pankaj Kumar, constable Rajesh Kumar, Brijesh Kumar and constable Jeet Ram were present at Shilla Sward at Ghatashani Joginder Nagar road. He has stated that at about 7.30 AM maruti car having registration No. HP 58-1929 came from Ghatashani side which was signaled to stop. He has stated that car was driven by Manjeet Singh and another occupant was Ramesh Kumar. He has stated that when said vehicle was in the process of checking in the meanwhile accused Roshan Lal came from Barot side carrying a bag on his left shoulder. He has stated that when accused saw police officials he tried to turn back and on suspicion he was nabbed by

police officials. He has stated that consent of accused was obtained vide memo Ext PW6/A. He has stated that police officials and independent witnesses have given their personal search to accused. He has stated that thereafter search of the bag of accused was conducted in the presence of witnesses namely Manjeet Singh, Ramesh Kumar and Pankaj Kumar. He has stated that polythene bag was recovered inside the bag of accused and on opening said bag it was containing charas in the shape of sticks. He has stated that charas was weighed and it was found 850 grams. He has stated that charas was made homogeneous by mixing the same and two samples 25 grams each were separated. He has stated that NCB form Ext PW7/A was filled in triplicate and seal after use was handed over to witness Manjeet Singh. He has stated that spot map Ext PW7/C was prepared and statements of witnesses were recorded as per their versions. He has stated that case property along with sample seals, NCB form and seizure memo were produced before inspector Shamsher Singh. He has stated that each parcels were resealed by SHO and resealing certificate Ext PW7/E was issued by SHO. He has stated that thereafter he recorded statement of reader to SP Sh. Brahma Nand, MHC Kuldeep Singh and constable Rajinder Singh as per their versions. He has stated that on receipt of report of chemical examiner Ext PW7/F case file was handed over to inspector Vinod Kumar who prepared challan and submitted same in Court. He has stated that bag Ext P8, outer polythene packet Ext P5, inner polythene packet Ext P6 and charas Ext P7 are the same which were recovered from the possession of accused. He has stated that samples Ext P1 and Ext P2 and parcel containing bulk is Ext P3 are the same which were prepared at the spot. He has stated that inner cloth parcel is Ext P9. He has denied suggestion that accused was not apprehended by him. He has denied suggestion that no search of bag was conducted. He has denied suggestion that no contraband was recovered from the bag of accused. He has denied suggestion that statement of witnesses were not recorded as per their versions.

9. Prosecution also tendered following documentaries evidence. (1) Ext PW1/A copy of R.C (2) Ext PW2/A seizure memo of 850 grams of charas.(3) Ext PW2/B memo regarding specimen of seal (4) Ext PW2/C memo regarding identification of contraband. (5) Ext. PX memo regarding production of case property in the court. (6) Ext PW3/A memo regarding personal search of independent witnesses and police officials (7) Ext PW5/A rapat No.18 dated 28.8.2008 (8) Ext PW5/B FIR (9) Rukka sent to police station by I.O. (10) Ext PW5/D rapat No.8 dated 29.8.2008 (11) Ext PW5/E extract of malkhana register (12) Ext PW6/A memo under section 50 NDPS Act. (13) Ext PW6/B seal impression upon cloth (14) Ext PW6/C special report under section 57 NDPS Act (15) Ext PW7/A NCB Form (16) Ext PW7/C site plan (17) Ext PW7/F resealed certificate under section 55 NDPS Act. (18) Ext PW7/F examination report submitted by SFSL Junga (HP).

(A) Testimony of independent marginal witnesses of seizure memo of contraband is fatal to prosecution case

10. It is the case of prosecution that contraband i.e. charas to the quantity of 850 grams was recovered from exclusive and conscious possession of accused in the presence of independent marginal witness namely Manjeet Singh, Ramesh Kumar and constable Pankaj Kumar as per seizure memo Ext PW2/A placed on record. Court has carefully perused testimony of independent witnesses PW2 Ramesh Kumar. PW2 has denied suggestion that accused started running back when he saw police officials. PW2 has denied suggestion of prosecution that accused was nabbed by police officials. PW2 has denied suggestion that accused had disclosed his name as Roshan Lal. PW2 has denied suggestion that police officials who were present at the spot and independent witnesses have given their personal search to accused. PW2 has denied suggestion in positive manner that bag of accused was searched in the presence of independent witness. PW2 has denied suggestion that during search of bag white polythene envelope was recovered. PW2 has denied

suggestion that charas was found in polythene envelope which was in the possession of accused. PW2 has denied suggestion that three parcels were sealed with six seal of impression 'K'. PW2 has denied suggestion that seal after use was handed over to witness Manjeet Singh. PW2 has denied suggestion that consent memo of accused was signed by him. PW2 has denied suggestion that investigating officer prepared rukka and sent the same to police station through constable Rajesh Kumar. PW2 has denied suggestion that entire proceeding conducted by police officials in his presence as well as in the presence of Manjeet Singh. PW2 has denied suggestion that charas placed in three parcels was recovered in his presence from the bag of accused. PW2 has stated in positive manner that all papers as well as parcels were prepared by police officials in a hotel. In the present case independent witness namely PW2 Ramesh Kumar did not support prosecution case as alleged by prosecution. Hence it is held that testimony of PW2 independent witness is fatal to prosecution in present case.

(B) Non-examination of another independent witness Manjeet Singh is fatal to prosecution case despite his presence in court

11. It is the case of prosecution that 850 grams charas was recovered from exclusive and conscious possession of accused in the presence of independent witness Manjeet Singh. It is also the case of prosecution that seal after use was handed over to independent witness Manjeet Singh. Prosecution did not examine Manjeet Singh in Court. It is held that when independent witness Ramesh Kumar did not support prosecution case then non-examination of another marginal witness of seizure memo namely Manjeet Singh in Court is also fatal to prosecution case. In the present case no positive, cogent and reliable reason assigned by prosecution as to why prosecution did not examine another independent witness namely Manjeet Singh when PW2 Ramesh Kumar did not support prosecution case. Hence it is held that non-examination of another independent witness namely Manjeet Singh is also fatal to prosecution in present case. It is proved on record that on dated 22.5.2012 Manjeet Singh independent witness was present in Court but he was not examined by learned public prosecutor Sh N.S.Katoch and no plausible explanation has been given by learned public prosecutor for non-examination of Manjeet Singh independent witness who was present in Court on dated 22.5.2012. On dated 22.5.2012 public prosecutor namely Sh. N.S.Katoch has given statement that he does not want to examine independent witness namely Manjeet Singh who was present in Court won over by accused. Court is of the opinion that when Manjeet Singh was present in Court on dated 22.5.2012 for recording his statement and when PW2 Ramesh Kumar did not support prosecution case it was expedient in the ends of justice to examine Manjeet Singh to elicit truth from Manjeet Singh independent witness. Hence it is held that non-examination of Manjeet Singh independent witness who was present in Court on dated 22.5.2012 is also fatal to prosecution case and adverse inference is drawn against prosecution under section 114 (G) of Indian Evidence Act 1872.

(C) Two views theory is proved in present case which is fatal to prosecution case

12. It is well settled law that seizure memo of contraband Ext PW2/A is the substantial piece of documentary evidence. It is well settled law that contents of document can be proved only by way of testimony of marginal witnesses only. In seizure memo Ext PW2/A marginal witnesses are (1) Manjeet Singh (2) Ramesh Kumar (3) Constable Pankaj Kumar. In the present case one marginal witness of seizure memo Ext PW2/A namely Ramesh Kumar did not support prosecution case as alleged by prosecution and another marginal witness namely Pankaj Kumar has supported prosecution case as alleged by prosecution. There are material contradictions between the testimonies of PW2 Ramesh Kumar and PW6 HC Pankaj Kumar relating to recovery of charas from exclusive and

conscious possession of accused. PW2 Ramesh Kumar marginal witness has specifically stated in positive manner that no charas was recovered from exclusive and conscious possession of accused in his presence. On the contrary constable Pankaj Kumar has stated that 850 grams charas was recovered from accused in his presence. In view of material contradictions between testimonies of marginal witnesses of seizure memo Court is of the opinion that two views have emerged in present case. It is well settled law that when two views emerged in criminal case then benefit of doubt should be given to accused.

(D) Testimony of PW3 HC Rajesh Kumar is not sufficient for conviction as PW3 is not marginal witness of seizure memo Ext PW2/A and same fact is fatal to prosecution case.

13. Court has also perused testimony of PW3 HC Rajesh Kumar. PW3 Rajesh Kumar is not marginal witness of seizure memo Ext PW2/A. It is held that it is not expedient in the ends of justice to convict appellant simply on the testimony of PW3 Rajesh Kumar because PW3 is not marginal witness of seizure memo Ext PW2/A. It is well settled law that as per Indian Evidence Act 1872 contents of document can be proved only by witness who is signatory to document. PW3 is not signatory to seizure memo Ext PW2/A. Hence it is held that contents of seizure memo of contraband could not be proved as per testimony of PW3 HC Rajesh Kumar. PW2 Ramesh Kumar who is signatory to seizure memo of contraband did not prove contents of seizure memo of contraband Ext PW2/A placed on record and prosecution did not examine another independent witness namely Manjeet Singh despite his presence in Court on dated 22.5.2012 in order to prove contents of seizure memo of contraband Ext PW2/A placed on record. As per section 61 of Indian Evidence Act 1872 contents of document should be proved by way of primary evidence or by way of secondary evidence. No application filed by prosecution to prove content of document i.e. seizure memo of contraband by way of secondary evidence as mentioned under section 63 of Evidence Act 1872 or by way of oral accounts as provided under section 63(5) of Indian Evidence Act 1872.

(E) Non-issuance of certificate in chemical examiner report that seals of sample parcels were intact and tallied with seal impression separately sent in the office of FSL Junga is also fatal to prosecution

14. Court has carefully perused chemical examiner report Ext PW7/F placed on record submitted by HP State Forensic Science Laboratory Junga. There is no certificate in examination report submitted by FSL Junga that seal of sample parcels were intact and tallied with seal impression separately sent for comparison. Hence it is held that in the absence of recital in examination report sent by HP State Forensic Science Laboratory Junga that seal of sample parcels were intact and tallied with seal impression separately sent for comparison is also fatal to prosecution.

(F) Testimony of marginal witness PW6 HC Pankaj Kumar in cross examination that sample was not made homogeneous is also fatal to prosecution

15. PW6 HC Pankaj Kumar in examination-in-chief has stated that investigating officer mixed recovered charas and took two homogeneous sample of 25 grams each. In cross examination PW6 HC Pankaj has stated that samples were not taken homogeneously. The above stated two contradictory statements of PW6 HC Pankaj Kumar in examination-in-chief and cross examination is also fatal to prosecution case.

(G) There are material contradictions in the testimonies of official witnesses which is also fatal to prosecution.

16. PW7 Om Parkash investigating officer has stated that police officials reached at the spot at 11.30 PM on 28.8.2008 in examination in chief. PW3 HC Rajesh Kumar has stated in cross-examination that police officials reached at the spot at 6.30 AM. PW6 HC

Pankaj Kumar has stated in cross examination that police officials reached at the spot at 1-2 AM on 29.8.2008. It is held that above stated material contradictions in the testimony of police officials also creates doubt in the mind of Court. Hence it is held that testimony of official witnesses did not inspire confidence of Court.

(H) Non-production of original seal in Court is also fatal to prosecution case.

17. It is the case of prosecution that original seal was handed over to independent witness namely Manjeet Singh after use. Although independent witness Manjeet Singh was present in Court on dated 22.5.2012 but he was not examined by prosecution and original seal was not produced in Court for inspection of Court. There is no evidence on record that original seal was lost. Hence it is held that non-production of original seal in court is also fatal to prosecution in the present case.

18. It was held by Hon'ble Apex Court of India in case reported in 2011 (6) SCC 312 titled Yomeshbhai Pranshankar Bhatt Vs. State of Gujarat that evidence of hostile witness may contain elements of truth and should not be entirely discarded. Also see AIR 1989 SC 1543 titled State of UP Vs. Chet Ram. Also see AIR 1991 S.C 1853 titled Khujji alias Surendra Tiwari Vs. Stat of M.P. Also see 2012 (4) SCC 327 titled Bhajju alias Karan Singh Vs. State of Madhya Pradesh. Also see 1999 (8) SCC 624 titled Koli Lakhmanbhai Chanabhai Vs. State of Gujarat. Also see 2010 (8) SCC 536 titled Prithi Vs. State of Haryana. Also see 2010 (6) SSC 1 titled Sidhartha Vashisht Vs. State (NCT of Delhi). Also see 2007 (13) SCC 525 titled Ramkrushna Vs. State of Maharashtra. Also see 2012 (5) SCC 77 titled Ramesh Harijan Vs. State of Uttar Pradesh. Also see AIR 1976 SC 202 titled Bhagwan Singh Vs. State of Haryana. Also see 1977 SC 170 titled Ravindra Kumar Dey Vs. State of Orissa. Also see AIR 1979 SC 1848 titled Syad Akbar Vs. State of Karnataka.

19. It was held in case reported in Latest HLJ 2004 (HP) 642 titled State of HP Vs. Hanacho alias Stewart that if independent witness did not support prosecution case then benefit of doubt should be given to accused in ND&PS cases. It was held in case reported in 1998 (2) SLJ 1408 titled Shashi Pal and others Vs. State of HP that when two versions appear in the prosecution evidence then version beneficial to accused should be adopted. Also see 1993 (1) SLJ 405 titled State of HP Vs. Sudarshan Singh. Also see 1995 (3) SLJ 1819 titled State of HP Vs. Inder Jeet and others.

20. It was held in case reported in 2005 (9) SCC 765 titled Anjlus Dungdung Vs. State of Jharkhand that suspicion however strong cannot take place of proof. It was held in case reported in 2010 (11) SCC 423 titled Nanhar Vs. State of Haryana that prosecution must stand or fall on its own leg and it cannot derive any strength from the weakness of the defence. It is well settled law that conjecture or suspicion cannot take the place of legal proof. See AIR 1967 SC 520 titled Charan Singh Vs. State of Uttar Pradesh. Also see AIR 1971 SC 1898 titled Gian Mahtani Vs. State of Maharashtra. It was held in case reported in AIR 1979 SC 1382 titled State (Delhi Administration) Vs. Gulzarilal Tandon that moral conviction however strong or genuine cannot amount to legal conviction sustainable in law. Also see AIR 1984 SC 1622 titled Sharad Birdhichand Sarda Vs. State of Maharashtra. Also see 1983 SC 906 titled Bhugdomal Gangaram and others Vs. State of Gujarat. Also see AIR 1985 SC 1224 titled State of UP Vs. Sukhbasi and others. In view of above stated facts and case law cited supra point No.1 is answered in affirmative in favour of appellant.

Point No.2 Final order.

21. In view of findings on point No.1 appeal is accepted. Judgment and sentence passed by learned Special Judge Mandi HP set aside. It is held that learned trial Court did not properly appreciate oral as well as documentary evidence placed on record. Appellant is

acquitted qua offence punishable under Section 20 ND&PS Act 1985 by way of giving him benefit of doubt. Case property will be confiscated to the State of HP after expiry of limitation for filing further criminal proceedings before competent Court of law. Registrar Judicial will issue release warrant of appellant forthwith in accordance with law if appellant is not required in any other case. File of learned trial Court along with certified copy of judgment be sent back forthwith and file of this Court be consigned to record room forthwith after due completion. Appeal is disposed of. Pending applications if any also disposed of.

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

Suresh Kumar son of Sh Jhabe Ram. ...Petitioner.

Vs

State of Himachal Pradesh. ...Non-petitioner.

Cr.MP(M) No.1332 of 2015.
Order reserved on: 29.10.2015
Date of Order: November 4, 2015

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the accused for the commission of offences punishable under Sections 341, 342, 363, 376, 506 read with section 34 of IPC- held, that allegations against the accused are serious and grave in nature- offences of rape are increasing day by day in society- sexual assault is an attack upon the dignity and honour of a girl- 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 evidence being tampered with and the larger interest of the public and State- in view of gravity of the offence, it is not expedient to release the petitioner on bail- petition dismissed. (Para-5 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 Petitioner: Mr. O.P.Sharma, Sr. Advocate with Mr. Naveen K. Dass Advocate.
For Non-petitioner. Mr. M.L.Chauhan, Addl. Advocate General and Mr.R.S.Thakur, Addl. Advocate General.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present petition is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail relating to FIR No. 18 of 2014 dated 16.1.2014 registered under Sections 341, 342, 363, 376, 506 read with section 34 IPC in police station Kullu District Kullu HP.

Brief facts of case as per first information report:

2. Prosecutrix after completion of her B.A examination was learning stitching work in Nisha stitching centre Kullu. On dated 15.1.2014 when prosecutrix in the evening boarded down from bus at Kalung bus stand then three boys came nearby prosecutrix out of

them one was co-accused Suresh. Thereafter co-accused Suresh forcibly took prosecutrix in a black coloured vehicle by way of closing the mouth of prosecutrix so that prosecutrix could not cry. Thereafter accused also switch off the light of vehicle. Thereafter co-accused Suresh Kumar brought prosecutrix in his house at Hathithan and committed rape with prosecutrix. Thereafter co-accused Suresh Kumar also told to prosecutrix that in case she would narrate incident to anybody then she would be cut into pieces and pieces of body of prosecutrix would be thrown into a tank. Thereafter prosecutrix was medically examined and MLC of prosecutrix was obtained and as per MLC report prosecutrix was exposed to frequent coitus. Thereafter as per location shown by prosecutrix site plan was prepared and photographs of location, mattress and blanket upon which criminal offence of rape was committed was took into possession vide seizure memo. Co-accused Suresh Kumar was also medically examined and as per MLC report co-accused Suresh Kumar was able to performa sexual act. Vehicle No. HP51(T)-8129 in which prosecutrix was abducted also took into possession vide seizure memo. DNA report from SFSL Junga is still awaited.

3. Court heard learned Advocate appearing on behalf of petitioner and learned Additional Advocate General appearing on behalf of State.

4. Following points arise for determination in the present bail petition:

(1) Whether bail petition filed under Section 439 of the Code of Criminal Procedure 1973 is liable to be accepted as mentioned in memorandum of grounds of bail petition?.

(2) Final Order.

Reasons for findings upon Point No.1.

5. Submission of learned Advocate appearing on behalf of petitioner that co-accused Roshal Lal and co-accused Partap Chand have already been released on bail and on the concept of parity petitioner be also released on bail is rejected being devoid of any force for the reasons hereinafter mentioned. There is special recital in police report that co-accused Roshal Lal and co-accused Partap Chand did not commit offence of rape personally upon prosecutrix. There is recital in police report that co-accused Suresh Kumar has committed criminal offence of rape upon prosecutrix in positive active manner. There is no recital in police report that co-accused Roshan Lal and co-accused Partap Chand have also committed rape upon prosecutrix. Personal role of co-accused Roshan Lal and co-accused Partap Chand is non active relating to offence of rape. Hence it is held that in view of above stated facts it is not expedient in the ends of justice to release petitioner on bail on the concept of parity.

6. Submission of learned Advocate appearing on behalf of petitioner that petitioner is innocent and he has been falsely implicated in the present case and on this ground present bail petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Fact whether petitioner is innocent or not cannot be decided at this stage. Same fact will be decided when case shall be decided on merits by learned trial Court after giving due opportunity of hearing to both the parties to lead evidence in support of their case.

7. Submission of learned Advocate appearing on behalf of petitioner that petitioner will abide by the directions of Court and no useful purpose will be served keeping petitioner in judicial custody and on this ground bail petition be allowed is also rejected being devoid of any force for the reasons hereinafter mentioned. The allegations against the petitioner are very heinous and grave in nature relating to commission of rape upon prosecutrix. Prosecutrix was un-married girl and co-accused Suresh Kumar was married person at the time of alleged rape incident. Criminal offences of rape are increasing day by

day in society. Every girl and woman has fundamental constitutional right to live in society with dignity and honour and it is well settled law that sexual assault is attacked upon dignity and honour of girl or woman.

8. Submission of learned Advocate appearing on behalf of petitioner that petitioner will not directly and indirectly hamper prosecution evidence and petitioner will abide by the direction of Court and on this ground bail petition be allowed is also rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that at the time of granting bail following factors should be considered (i) Nature and seriousness of offence (ii) Character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) 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.*** Court is of the opinion that if petitioner is released on bail at this stage then investigation and trial of the case will be adversely effected. Court is of the opinion that if the petitioner is released on bail at this stage then interest of State and general public will also be adversely effected.

9. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that if petitioner is released on bail at this stage then petitioner will directly and indirectly threaten prosecution witnesses is accepted for the reasons hereinafter mentioned. There is apprehension in the mind of Court that if petitioner is released on bail at this stage then petitioner will directly or indirectly influence prosecution evidence which will hamper investigation and trial of the case. It is well settled law that murder destroy body of victim but rapist degrades soul of female victim. Bail in non-bailable criminal case is not a matter of right. Court should consider all relevant facts while granting bail in non-bailable criminal offence. Till date prosecutrix has not been examined in Court. There is positive allegations of overt act on part of petitioner relating to criminal offence of rape. In view of gravity of criminal offence it is not expedient in the ends of justice to release petitioner on bail at this stage of case. In view of above stated facts point No.1 is answered in negative.

Point No.2 (Final Order).

10. In view of findings on point No.1 bail petition filed by petitioner under Section 439 of the Code of Criminal Procedure 1973 is rejected. Observation made hereinabove will be strictly for the purpose of deciding present bail petition and it will not effect merits of case in any manner. As petitioner is in judicial custody proceedings of criminal case will be concluded expeditiously in accordance with law. Bail petition is disposed of. All pending application(s) if any also disposed of.

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

CWP No. 3641 of 2009 a/w
CWPs No.3307 of 2009, & 1097 of 2012.
Decided on: 04.11.2015.

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1. CWP No.3641 of 2009:

Union of India & Ors. ....Petitioners

Versus

Lal Dass ..... Respondent

2. CWP No.3307 of 2009:

Union of India & Ors. .....Petitioners

Versus

Nanak Chand (Deceased) thorough LRs Surmeet Kaur and Ors. ..... Respondents

3. CWP No.1097 of 2012:

Union of India & Ors. .....Petitioners

Versus

Paras Ram .....Respondent

Constitution of India, 1950- Article 226- Issue involved in the writ petition is similar to the issue already settled by the Apex Court- therefore, writ petition disposed of in terms of order passed by the Apex Court. (Para-2 and 3)

For the petitioner(s): Mr.Ashok Sharma, ASGI, with Mr.Nipun Sharma, Advocate.

For the respondent(s): Mr.Surender Sharma, Mr.Surender Verma and Mr.Pawan Gautam, in respective petitions.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

Respondent in CWP No.1097 of 2012 has filed the reply and alongwith the reply, the respondent has annexed a copy of the judgment Annexure R-2 passed by the Karnataka High Court in W.P. No.81669 of 2011. We have gone through the said judgment. It is apt to reproduce paragraph 9 and 10 of the said decision hereunder:

> *"9. The action of the petitioner in assailing the order passed by the Central Administrative Tribunal, Bangalore Bench, Bangalore astonishes us, inasmuch as, the impugned order passed by the Central Administrative Tribunal dated 23.3.11 reveals, that on identical controversy pertaining to another employee of the postal organization, the Central Administrative Tribunal, Madras Bench accepted the same plea, while disposing of OA 1246/01 by an order dated 18.4.02. The aforesaid order passed by the Central Administrative Tribunal, Madras Bench, was assailed by the Postal authorities before the Madras High Court in W.P. No.45465/02. However, the order of the Central Administrative Tribunal Madras Bench was affirmed by the High Court. Dis-satisfied with the orders passed by the Central Administrative Tribunal Madras Bench, as also Division Bench of the High Court of Madras, the postal authorities approached the Supreme Court by preferring Petition for Special Leave to Appeal (Civil) No.138/09. The aforesaid special leave petition came to be dismissed on 17.10.08.*
>
> *10. We are astonished because despite the fact that similar efforts made by the petitioner herein, on the similar controversy had failed upto the Supreme Court, the petitioners have chosen to contest the impugned order, in spite of the fact that the petitioners have not been able to point out single distinguishable feature as in the present controversy, from the one adjudicated by the Central Administrative Tribunal, Madras in O.A. No.1264/01. In the circumstances, we are satisfied that exemplary costs deserves to be imposed on the postal authorities. We are satisfied, that such an attitude at the hands of the Union of India, especially the postal authorities, should be curbed with a strong hand, since the instant attitude which requires a court to decide the*

same issue repeatedly, even after the same submissions failed earlier. We accordingly impose Rs.1,00,000 as cost on the petitioners. The aforesaid costs shall be deposited with the Gulbarga Bar Association, High Court Unit, Gulbarga within three months from today for raising library for the Bar Association. In case the aforesaid costs are not deposited within the time indicated above, the Registry of this Court is directed to re-list this case for recovery of costs."

2. It is submitted that the issue involved in the instant petitions is similar to the issue already settled by the Apex Court in the Special Leave Petition, reference of which has been made in paragraph 9 of the judgment, quoted hereinabove.

3. Accordingly, the writ petitions are disposed of in terms of the decision of the Apex Court supra.

4. At this stage, Mr.Surender Verma, Advocate, stated that there is dispute about the legal representatives of deceased respondent Nanak Chand (CWP No.3307 of 2009). The legal representatives of the said deceased respondent have already been brought on record vide order, dated 7th September, 2015, for the purpose of this lis. It is made clear that we have not made any adjudication relating to the said issue. Therefore, the affected persons are at liberty to seek appropriate remedy.

5. Pending CMPs, if any, also stand disposed of, in view of the disposal of the writ petitions.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Jagdev Singh ...Appellant
Versus
State of Himachal Pradesh ...Respondent

Criminal Appeal No. 132 of 2015
Judgment reserved on : 30.10.2015
Date of Decision : November 5, 2015

Indian Penal Code, 1860- Sections 279, 337, 338, 304-AA- **Motor Vehicles Act, 1988-** Section 185- Accused was driving maxi cab under the influence of liquor and could not negotiate the curve due to which vehicle rolled down into gorge - some passengers died in the accident- PW-1 stated that accused might have consumed liquor- PW-4 stated that accused was under the influence of liquor – no passenger had asked the accused to stop the vehicle – no passenger had lodged any protest- Medical Officer stated that accused was smelling of alcohol and quantity of alcohol found in the blood was 279.72 mg%- doctor had not stated that he had sealed the blood sample - malkhana register was not produced to establish the deposit of blood sample in the safe custody- it was not established as to who had received the sample in the police station- link evidence is, therefore, missing- held, that in these circumstances, prosecution case was not proved- accused acquitted. (Para-10 to 41)

Cases referred:
Shivaji Sahabrao Bobade and another Versus State of Maharashtra, (1973) 2 SCC 793
Lal Mandi v. State of W.B., (1995) 3 SCC 603

State through PS Lodhi Colony, New Delhi vs. Sanjeev Nanda, (2012) 8 SCC 450
Satnam Singh @ Chint Ram vs. State of Himachal Pradesh, ILR 2015 (V) HP 579 (D.B.)
Behram Khurushid Pesikaka vs. State of Bombay, AIR 1955 SC 123
Connabatula Satya Rao vs. State, AIR 1954 Andhra 4
The State of Bombay & another vs. F. N. Balsara, AIR (38) 1951 SC 318

For the appellant	:	Mr. B. S. Chauhan, Sr. Advocate with Mr. Vaibhav Tanwar, Advocate, for the appellant-accused.
For the respondent	:	Mr. R. S. Verma, Addl. Advocate General with Mr. R. M. Bisht, Dy. A.G. for the respondent-State. Mr. Ankush Dass Sood, Sr. Advocate and Mr. Neeraj Gupta, Advocate, as Amicus Curiae.

The following judgment of the Court was delivered:

Sanjay Karol, J.

In connection with F.I.R. No. 65 of 2009, dated 12.6.2009 (Ext. PW-13/A), registered at Police Station Jhakari, Distt. Shimla, accused was charged to face trial for having committed offences punishable under the provisions of Sections 279, 337, 338, 304-AA of the Indian Penal Code and 185 of the Motor Vehicles Act, 1988. In terms of the impugned judgment dated 8.4.2015/9.4.2015, passed by the learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushahr, H.P., in Sessions Trial No. 010003 of 2010, titled as State of Himachal Pradesh vs. Jagdev Singh, appellant-accused stands convicted of all the charged offences and sentenced to undergo rigorous imprisonment for a period of seven years and fine of Rs.5000/- for offence punishable under the provisions of Section 304-AA IPC and in default thereof to further undergo simple imprisonment for a period of one year; simple imprisonment for a period of three months and fine of Rs.500/- and in default thereof to further undergo simple imprisonment for one month, for each of the offences punishable under the provisions of Sections 279, 337 and 338 IPC; and fine of Rs.500/- for offence punishable under the provisions of Section 185 of the Motor Vehicle Act and in default thereof to undergo simple imprisonment for 15 days. Present appeal stands filed by the appellant-accused under the provisions of Section 374 of the Code of Criminal Procedure, 1973.

2. Appellant lays challenge to his conviction only under the provisions of Sections 304-AA of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') and 185 of the Motor Vehicles Act, 1988 (hereinafter referred to as the 'Act'), on the ground that prosecution has not been able to establish, beyond reasonable doubt, that at the time of occurrence of the accident, he was driving the vehicle in question under the influence of alcohol.

3. In view of limited challenge, one need not, in detail, discuss the prosecution evidence, save and except that through the testimonies of Pravesh Kumar (PW-1), Surinder Negi (PW-4), Vikas Prashar (PW-14) and Jyoti Prakash (PW-15) it stands established on record that on 12.6.2009 accused was driving Maxi Cab bearing registration number HP-02-1683, which on account of rash and negligent driving on the part of the accused, met with an accident. The vehicle was not found to be mechanically defective.

4. Allegedly at the time of occurrence of the incident, accused was under the influence of alcohol and as such could not negotiate the curve, resulting into the vehicle rolling down into the gorge by about 200 – 250 mts.

5. As a result of the accident, passengers Surinder Negi, Vikas Prashar, Jyoti Prakash and Pravesh Kumar sustained injuries and another passenger i.e. Vipin Chander died. Through the testimonies of the passengers and Dr. Vivek Anand (PW-6) who proved on record MLC's (Ext. PW-6/B to Ext. PW-6/F) as also Dr. Mani Ram (PW-7) who proved on record the post mortem report (Ext. PW-7/C), such fact stands proved.

6. Having heard learned counsel for the parties as also perused the record, I am of the considered view that findings as also the impugned judgment, to the extent of its challenge, are not based on correct and complete appreciation of evidence and material placed on record, causing prejudice to the accused as also having resulted into miscarriage of justice.

7. In *Shivaji Sahabrao Bobade and another Versus State of Maharashtra,* (1973) 2 SCC 793, the apex Court, has held that:

> ".....Lord Russel delivering the judgment of the Board pointed out that there was "no indication in the Code of any limitation or restriction on the High Court in the exercise of its powers as an appellate Tribunal", that no distinction was drawn "between an appeal from an order of acquittal and an appeal from a conviction", and that "no limitation should be placed upon that power unless it be found expressly stated in the Code". .... (Emphasis supplied)

8. The apex Court in *Lal Mandi v. State of W.B.,* (1995) 3 SCC 603, has held that in an appeal against conviction, the appellate Court is duty bound to appreciate the evidence on record and if two views are possible on the appraisal of evidence, benefit of reasonable doubt has to be given to the accused.

9. It is settled position of law that graver the punishment the more stringent the proof and the obligation upon the prosecution to prove the same and establish the charged offences.

10. Section 185 of the Act deals with a case where a person is found driving or attempting to drive a motor vehicle at the time when alcohol content exceeding 30 mg. per 100 ml. is found in his blood detected in a test conducted by a breath analyzer or is under the influence of a drug to such an extent, so as to be incapable of exercising proper control over the vehicle. Person found committing such an offence can be imprisoned up to two years, depending upon the given fact situation.

11. By virtue of the provisions of Section 202 of the Act, a police officer in uniform, may without warrants, arrest a person who commits such an offence. However, section itself mandates the person so arrested, to be subjected to medical examination by a registered medical practitioner. Mandatorily this has to be within two hours of his arrest. Examination has to be in conformity with the provisions of Sections 203 and 204 of the Act. In the absence thereof, such person is required to be released from the custody.

12. Section 203 of the Act empowers a police officer in uniform or an authorized officer of the Motor Vehicles Department to ask a person driving or attempting to drive a motor vehicle, in a public place, to provide specimen of his breath for breath test. This section envisages another fact situation. In a case where the police officer in uniform, has a reasonable cause to suspect, that a motor vehicle involved in an accident, was being driven by a person under the influence of alcohol, he may require such person to provide specimen of his breath for a breath test if such person is an indoor patient, at the hospital, or at any other place, including the specified police stations. Sub-Section (3) of this Section

empowers a police officer to arrest a person if the test conducted indicates presence of alcohol in the person's blood. What is a breath test and the type of device required to be used, stands explained in the Explanation to this section.

13. Further Section 204 of the Act, empowers the police officer to get the specimen of the blood of the person arrested by him to be tested in a laboratory. It deals with a situation where a person may or may not be involved in an accident and/or he may or may not have been admitted in the hospital. What is a 'laboratory test' stands clarified in the explanation to this Section. It is analysis of specimen of blood made at a laboratory established, maintained or recognized by the Central Government or a State Government.

14. Failure on the part of a person to either give specimen of his breath for breath test or blood for a laboratory test, leads to a presumption of a circumstance of unfitness to drive the vehicle, supporting any evidence led by the prosecution. This is so provided under Section 205 of the Act.

15. The apex Court in *State through PS Lodhi Colony, New Delhi vs. Sanjeev Nanda,* (2012) 8 SCC 450 had the occasion to construe the provisions of Section 185, 203 and 205 of the Act. The Court held that the language of the sections indicated that the test is required to be carried out only when a person is driving or is attempting to drive a vehicle and the object being instant determination of the presence of the alcohol in the blood of a person prosecuted for drunken driving. Finding the report of the laboratory to have been duly proven on record, the Court convicted the accused for the charged offence, holding that:

> "86. Drunken driving has become a menace to our society. Everyday drunken driving results in accidents and several human lives are lost, pedestrians in many of our cities are not safe. Late night parties among urban elite have now become a way of life followed by drunken driving. Alcohol consumption impairs consciousness and vision and it becomes impossible to judge accurately how far away the objects are. When depth perception deteriorates, eye muscles lose their precision causing inability to focus on the objects. Further, in more unfavourable conditions like fog, mist, rain etc., whether it is night or day, it can reduce the visibility of an object to the point of being below the limit of discernibility. In short, alcohol leads to loss of coordination, poor judgment, slowing down of reflexes and distortion of vision."

16. Here with profit one would like to reproduce the notes of the Editor, so recorded in *Sanjeev Nanda* (supra), with regard to the effect which alcohol has on the body of a person driving a vehicle. They read as under:-

> "Ed.: In order to understand the import of Section 185 of the Motor Vehicles Act, 1988, it is necessary to study the biological process which is set in motion when alcohol is consumed. Alcohol is a depressant. When alcohol goes into the stomach it mixes with blood and then through the circulatory system, it diffuses into the whole body. It primarily affects the central nervous system, particularly the brain (vide Richard Saferstein: *Criminalistics,* 10th Edn., p.214). Biologically, drunkenness is a temporary impairment of the nervous system caused due to consumption of alcohol.
>
> In order to determine how much a particular person is affected by alcohol consumption, the ideal situation is to examine his brain tissues but practically it is not feasible to interfere with such a sensitive organ of a living human being, simply to know the effect of alcohol. Scientists have therefore

found an alternative method of detecting the effect of alcohol in the body through blood examination. There is a close correlation between the concentration of alcohol in the blood and in the brain. If the concentration of alcohol in the blood is determined, this will in turn determine the level up to which it has affected nervous system.

Saferstein puts it like this: "From a medico-legal point of view, blood-alcohol levels have become the accepted standard for relating alcohol intake to its effect on the body." (p. 215) However, blood analysis requires expert medical examination which should be carried out in clinical conditions in a properly equipped laboratory. This is therefore not a very handy method for traffic police who has to keep a watch over hundreds of drivers to know whether they are sober or drunken. The problem arises particularly when traffic on highways has to be watched at night. It is because of this difficulty, that portable devices called breath analysers or testers have been devised which can be used conveniently by the police. These devices estimate the presence of alcohol through alveolar breath but they by no means completely dispense with the requirement of blood examination in certain cases. Quoting *Saferstein* again, results obtained through modern portable instruments like an alco-sensor or alcometer should be considered preliminary and non-evidential in nature. They establish only a probable cause for requiring an individual to submit to a more thorough breath or blood test (p. 222).

Thus the position which emerges is that a portable breath analyser may be a useful device to conduct a preliminary test at the spot when a drunken driver is caught on the road but this is not the only test to determine the effect of alcohol. There are other sophisticated techniques like gas chromatography through which the presence of alcohol in blood can be detected with a high degree of accuracy. It may therefore be possible to book a drunken driver under Section 185 of the MV Act, 1988 on the basis of a test conducted on a portable device provided his only fault is that he was found drunken on the road but did not otherwise cause any harm. Mention of a breath analyser in Section 185, it is suggested, must be understood in this perspective. <u>However, if a drunken driver has caused a serious accident or some other harm so as to be liable for punishment under the Penal Code, 1860, Section 185, it is submitted, does not exclude detailed medical examination which may be conducted under Section 53 of the Criminal Procedure Code, 1973.</u>

Even otherwise, a breath analyser can be used when a drunken driver is caught at the spot. If he has fled from scene and is caught later on, say after a few hours, the prudent approach seems to be to subject him to blood analysis and other medical tests. In such a situation, the task of prosecution becomes more onerous inasmuch as an additional fact has to be proved: that the offending driver had consumed liquor *before* the mishap took place. Authoritative works on Toxicology do not provide much material about the estimation of time when alcohol might have been consumed but still some useful guidelines are available. According to *Saferstein,* "Depending on a combination of factors, maximum blood-alcohol concentration may not be reached until two or three hours have elapsed from the time of consumption. However, under normal social drinking conditions, it takes anywhere from 30 to 90 minutes from the time of the final drink

until the absorption process is completed." (p.215) Once alcohol has been absorbed in the body, then the elimination process starts. Elimination takes place through oxidation and excretion of alcohol. Again, according to *Saferstein*, "The elimination or burn off rate of alcohol varies in different individuals: 0.015 per cent w/v (weight per volume) per hour seems to be the average rate once the absorption process is complete. However, this figure is an average that varies by as much as 30% among individuals." (p.216) In *Modi's Medical Jurisprudence and Toxicology* (23rd Edn.), it is mentioned that alcohol in blood diminishes at the rate of 12-15 mg per hour (p. 312). Considering that *Saferstein* qualifies his opinion both as to the time it takes for alcohol to be absorbed and with the possibility of a 30% variation as to the rate of elimination depending on the individual, it is submitted that the prosecution would have to produce some other evidence in addition to the medical evidence, relating to the time of consumption of alcohol."]

[Emphasis supplied]

17. A Division Bench of this Court in Cr. Appeal No. 76 of 2015, titled as Satnam Singh @ Chint Ram vs. State of Himachal Pradesh, Decided on 21st September, 2015, while dealing with the report of blood test of a convict observed as under:-

"24. … … A person with blood alcohol concentration of 150-300 mg% would be intoxicated, as per Lyon's Medical Jurisprudence and Toxicology, 11th Edition, page 626. Similarly in Medical Jurisprudence and Toxicology by Dr. K.S.Narayan Reddy, Edition 2004 (Reprint), at page 590, a person who has consumed 150-300 mg %, would be drunk. In Parikh's Text book of Medical Jurisprudence and Toxicology at page 855, it is stated that at a concentration of 0.15 per cent (150 mg %), some are under the influence of alcohol and others decidedly would be drunk. With increasing concentrations the symptoms become more intense. In the instant case, the quantity of ethyl alcohol in exhibit P/5 (blood) was 209.81 mg%. … …"

18. A Constitution Bench of the apex Court in *Behram Khurushid Pesikaka vs. State of Bombay,* AIR 1955 SC 123, while interpreting the provisions of the Bombay Prohibition Act, 1949 held that the onus to prove that the alcohol of which the accused was smelling, so as to fall within the prohibited category, was on the prosecution. Significantly the Court further held as under:-

"(52) Again, we are not able to subscribe to the view that in a criminal prosecution it is open to an accused person to waive his constitutional right and get convicted. A reference to Cooley's Constitutional Limitations, Vol. I. p. 371 makes the proposition clear. Therein the learned professor says that a party may consent to waive rights of property, but the trial and punishment for public offences are not within the province of individual consent or agreement. In our opinion, the doctrine of waiver enunciated by some American Judges in construing the American Constitution cannot be introduced in our Constitution without a fuller discussion of the matter. No inference in deciding the case should have been raised on the basis of such a theory.

The learned Attorney-General when questioned about the doctrine did not seem to be very enthusiastic about it. Without finally expressing an opinion on this question we are not for the moment convinced that this theory has any relevancy in construing the fundamental rights conferred by Part III of our Constitution. We think that the rights described as

fundamental rights are a necessary consequence of the declaration in the preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political: liberty of thought, expression, belief, faith and worship; equality of status and of opportunity.

These fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy. Reference to some of the Articles, 'inter alia', Articles 15(1), 20, 21 makes the proposition quite plain. A citizen cannot get discrimination by telling the State "You can discriminate", or get convicted by waiving the protection given under Articles 20 and 21. " [Emphasis supplied]

19. Section 304-AA IPC provides that whenever a driver of a public service or a private vehicle drives or attempts to drive, in a state of intoxication and causes death (not amounting to culpable homicide) or injury due to such rash and negligent driving, he shall be liable for punishment.

20. But what is 'intoxication' is not defined in the IPC.

21. Black's Law Dictionary defines 'intoxication' to mean as under:-

"**Intoxication.** Term comprehends situation where, by reason of taking intoxicants, an individual does not have the normal use of his physical or mental faculties, thus rendering him incapable of acting in the manner in which an ordinarily prudent and cautious man, in full possession of his faculties, using reasonable care, would act under like conditions. Hendy v. Geary, 105 R.I. 419, 252 A.2d 435, 441.

A disturbance of mental or physical capacities resulting from the introduction of substance into the body. Model Penal Code, §. 2.08.

The fact that a person charged with a crime was in an intoxicated condition at the time the alleged crime was committed is a defense only if such condition was involuntarily produced and rendered such person substantially incapable of knowing or understanding the wrongfulness of his conduct and of conforming his conduct to the requirements of law. An act committed while in a state of voluntary intoxication is not less criminal by reason thereof, but when a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind.

Under most state statutes dealing with driving while intoxicated, "intoxication" includes such by alcohol or by drug or by both. *See* Driving while intoxicated.

… …

See also Habitual drunkenness or intoxication; Intemperance.

Public intoxication. Public intoxication is being on a highway or street or in a public place or public building while under the influence of intoxicating liquor, narcotics or other drug to the degree that one may endanger himself or other persons or property, or annoy persons in his vicinity.

Voluntary intoxication. The voluntary introduction of any substances into the body which the defendant knows or should know are likely to have intoxicating effects. The Model Penal Code (§ 2.08) uses the term "self-induced intoxication" to refer to this idea. Evidence of voluntary or self-induced intoxication can be admitted in some circumstances but not others."

[Emphasis supplied]

22. Oxford English Dictionary defines 'intoxication' as under:

"Intoxicate: v. [usu. As adj. intoxicated] 1 (of alcoholic drink or a drug) cause (someone) to lose control of their faculties. – excite or exhilarate. 2. *archaic* poison (someone).

- DERIVATIVES intoxicating adj. intoxicatingly adv. intoxication n.
- ORIGIN ME: from med. L. *intoxicare*, from *in-* 'into' + *toxicare* 'to poison', from L. *toxicum* (see TOXIC)"

23. Interpreting the word 'intoxication' under the provisions of the Madras Prohibition Act where the word 'intoxication' was not defined, the Court in *Connabatula Satya Rao vs. State,* AIR 1954 Andhra 4 held that:-

"(3) It looks to me that it is very doubtful whether the prosecution has brought home even the charge that the petitioner was smelling arrack. P. Ws. 5 and 6 are admittedly the enemies of the petitioner and even as regards P. Ws. 1 and 2 it is very doubtful whether they could be definite that the smell of arrack emanated from the petitioner. However, it is not necessary for me to get into this question as the revision petition can be disposed of on a shorter ground, viz., whether, assuming the prosecution case to be true, the petitioner can be said to have committed an offence under Section 4-A, Madras Prohibition Act, which enacts that

> "whoever is found in a state of intoxication in any public place and whoever, not having been permitted to consume any liquor or intoxicating drug in pursuance of this Act, is found in a state of intoxication in any private place, shall be punished with imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

(4) The question for consideration is whether on the prosecution evidence, the petitioner can be brought within the terms of Section 4-A of the Act. As already pointed out, the only evidence for the prosecution is that the accused was smelling alcohol. In my opinion this does not amount to his being found in a state of intoxication within the meaning of Section 4-A. A person can consume alcohol without being intoxicated. The expression "intoxication" is synonymous with drunkenness. In the Concise Oxford Dictionary, the meaning of the word "intoxication" is given as "make drunk, excite, exhilerate, beyond self-control". In the 14th volume of the Encyclopedia of Britanica (11th edition) the meaning of the word "intoxication" is given as

> "poisoning or the action of poisoning, whether of drug, baectorial products or other toxic sub-stances and hence the condition resulting from such poisoning, particularly the disorder of the nervous system produced by excessive drinking of alcohol."

It is thus seen that the intoxication implies excessive drinking bringing about drunkenness.

(5) To constitute an offence of being found in a state of intoxication it is not sufficient to show that a person smelt liquor. Something more is necessary and that is that he was in a state of drunkenness, as a result of excessive drinking. For this reason, I must hold that an offence under Section 4-A of the Prohibition Act has not been committed by the petitioner and he is therefore entitled to an acquittal." [Emphasis supplied]

24. The expression 'liquor' used in various statutes also came up for consideration before the Constitution Bench of the apex Court in *The State of Bombay & another vs. F. N. Balsara,* AIR (38) 1951 SC 318 wherein it is held as under:-

"(13) Having dealt with and negatived the first two contentions upon which the validity of the entire Act was assailed, I now proceed to deal with certain sections of the Act, the validity of which also was brought into question. The provision which was most vigorously assailed and in regard to which the attack was successful in the High Court, is the definition of the word 'liquor' in S. 2 (24) of the Act. The definition runs thus :

"Liquor" includes :

(a) spirits of wine, methylated spirits, wine, beer, toddy and all liquids consisting of or containing alcohol; and

(b) any other intoxicating substance which the Provincial Govt. may, by notification in the Official Gazette, declare to be liquor for the purposes of this Act.

The High Court has held that the word "liquor" ordinarily means "a strong drink as opposed to soft drink", but it must in any event be a beverage which is ordinarily drunk. Proceeding upon this view, the High Court has held that although the legislature may while legislating under entry 31 prevent the consumption of non-intoxicating beverages and also prevent the use as drinks of alcoholic liquids which are not normally consumed as drinks, it cannot prevent the legitimate use of alcoholic preparations which are not beverages nor the use of medicinal and toilet preparations containing alcohol. This view of the High Court was very strongly supported on the one hand and equally strongly challenged on the other before us, and I therefore proceed to deal with the question at some length.

(14) In the 'Oxford English Dictionary', edited by James Murray, several meanings are given to the word "liquor", of which the following may be quoted:

LIQUOR:

1. A liquid; matter in a liquid state; in wider sense a fluid.

2. A liquid or a prepared solution used as a wash or bath, and in many processes in the industrial arts.

3. Liquid for drinking; beverage, drink. Now almost exclusively a drink produced by fermentation or distillation. Malt liquor, liquor brewed from malt; ale, beer, porter etc.

4. The water in which meat has been boiled; broth, sauce; the fat in which bacon, fish or the like has been fried; the liquid contained in oysters.

5. The liquid produced by infusion (in testing the quality of a tea). In liquor, in the state on an infusion.

Thus, according to the Dictionary, the word 'liquor' may have a general meaning in the sense of a liquid, or it may have a special meaning, which is the third meaning assigned to it in the extract quoted above, viz., a drink or beverage produced by fermentation or distillation. The latter is undoubtedly the popular and most widely accepted meaning, and the basic idea of beverage seems rather prominently to run through the main provisions of the various Acts of this country as well as of America and England relating to intoxicating liquor, to which our attention was drawn. But, at the same time, on a reference to these very Acts, is difficult to hold that they deal exclusively with beverage and are not applicable to certain articles which are strictly speaking not beverages. A few instances will make the point clear. In the National Prohibition Act, 1919 of America (also known as the Volstead Act), the words, liquor and intoxicating liquor, are used as having the same meaning and the definition states that these words shall be construed to :

"include alcohol, brandy, whisky, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes."

Having defined 'liquor' and 'intoxicating liquor' rather widely, the Volstead Act excepted denatured alcohol, medicinal preparations, toilet and antiseptic preparations, flavouring extracts and sirups, vinegar and preserved sweet cider (S. 4), which suggest that they were included in the definition. In some of these items, we have the qualifying words "unfit for use for beverage purposes", but the heading of S. 4, Volstead Act, under which these exceptions are enumerated, is "exempted liquors.'"

... ...

"(16) Coming now to the various definitions given in the Indian Acts, I may refer in the first instance to the Bombay Abkari Act of 1878 as amended by sub-sequent Acts, where the definition is substantially the same as in the Act with which we are concerned. In the Bengal Excise Act, 1909 "liquor" is said to mean :

"liquid consisting of or containing alcohol, and includes spirits of wine, spirit, wine, tari pachwal. beer, and any substance which the Provincial Govt. may.... declare to be liquor for the purposes of the Act."

In several other Provincial Acts, e.g., the Punjab. Excise Act, 1914, the U. P. Excise Act, 1910, "liquor" is used as meaning intoxicating liquor and as including alcohol. The definition of "liquor" in the Madras Abkari Act, 1886 is the same as in the Bombay Act of 1878. Even if we exclude the American and English Acts from our consideration, we find that all the Provincial Acts of this country have consistently included liquids containing alcohol in the definition of 'liquor' and 'intoxicating liquor'. The framers of the Govt. of India Act 1935 could not have been entirely ignorant of the accepted sense in which the word 'liquor' has been used in the various Excise Acts of this country, and, accordingly I consider the appropriate conclusion to be that the word "liquor" covers not only those alcoholic liquids which are generally used for beverage purposes and produce intoxication, but also all liquids containing alcohol. It may be that the latter meaning is not the meaning which is attributed to the word "liquor" in common parlance especially when that word is prefixed by the qualifying word 'intoxicating', but in my opinion

having regard to the numerous statutory definitions of that word, such a meaning could not have been intended to be excluded from the scope of the term "intoxicating liquor" as used in entry 31 of List II."

25. It is thus seen that 'intoxication' is not synonymous with alcohol or drunkenness. It can be with the use of drugs etc.

26. For determining facts, limited to the ground of challenge, Court proceeds to examine the ocular evidence being the testimonies of the relevant prosecution witnesses. Undisputedly no evidence in defence stands led by the accused.

27. Pravesh Kumar (PW-1) who was travelling in the ill fated vehicle states that at the time of the accident, accused "might have consumed liquor". He clarifies that in the hospital he did not inform the police about such fact. Absence thereof, is sought to be justified on the plea of perplexity. But then his statement was recorded twice and he is not categorically certain whether the accused was under the influence of liquor or not. Surinder Negi (PW-4) who was also travelling in the said vehicle states that the accused "appeared to be under the influence of liquor". He is not certain of such fact. Vikas Prashar (PW-14) and Jyoti Prakash (PW-15), the other occupants of the vehicle, do state that at the time of occurrence of the incident accused was under the influence of liquor. But to what effect is not clear with certainty. Well this is the ocular version of the witnesses.

28. It be only observed that having found the accused to have driven the vehicle in a rash and negligent manner, under the influence of liquor, none of them asked him to stop the vehicle or lodged any protest, for after all they had travelled with him over a considerable distance and period of time. Their testimonies do not conclusively establish the factum of the accused being in a state of intoxication, beyond reasonable doubt.

29. Be that as it may, factum of intoxication has to be proved by the prosecution by leading scientific evidence.

30. Now Dr. Vivek Anand (PW-6) states that on 12.6.2009 at about 10.45 p.m., he examined accused Jagdev Singh, who was smelling of alcohol from his mouth. The accused was afebrile, semi-conscious and not responding to verbal commands. His blood sample was drawn and handed over to the police in a sealed pack. Evidently, accused also sustained serious injuries in the accident. With regard to his oral observation of the accused smelling of alcohol from mouth, witness admits that such smell subsists even after a person comes out of state of intoxication. He admits it to be correct that certain substances like acetone, ether, tar and aldehyde present in the blood are likely to be determined as alcohol. He further admits it to be correct that due to trauma caused by the accident, injured could have become semi conscious. On the basis of report (Ext. PW-13/F) of the chemical examiner, Doctor opined that the quantity of alcohol found in the blood was 279.72 mg%. It is this report which is subject matter of scrutiny.

31. Dr. Vivek Anand further states that he handed over the blood sample of the accused to the police. But to whom? and which one of them present in the hospital, he does not state.

32. ASI Om Prakash (PW-13) does not state that he either received the sample or handled the same. HC Nup Ram (PW-16) who conducted the investigation is also silent on this aspect.

33. Constable Bharat Bhushan (PW-8) states that on 16.6.2009, HC Nup Ram handed one sealed parcel, sealed with seal bearing impression-H alongwith Road Certificate

No. 71/09 which he deposited at the State Forensic Science Laboratory, Junga on 17.6.2009. But such version is not corroborated by HC Nup Ram.

34. Constable Roshan Lal (PW-5) states that on 13.6.2009 he received the blood sample of accused Jagdev from the Medical Officer, SJVNL. Jhakhari. He wants the Court to believe that the blood sample was deposited in the Police Station, Jhakhari.

35. Now, undisputedly the MHC has not been examined in Court nor has the Malkhana Register produced or proven on record to establish the factum of its deposit in safe custody. ASI Om Parkash and HC Nup Ram are conspicuously silent on this aspect. When did Constable Roshan Lal hand over the sample and to whom he does not state. Also who received the sample in the police station, prosecution is absolutely silent on this aspect.

36. Thus there is no link evidence establishing the factum of receipt of the sample from the doctor till such time it was handed over to the police official who got it deposited in the laboratory. Whether it was kept in safe custody and not tampered with, remains unproven on record.

37. The SHO/Investigating Officer have not deposed that the sample was deposited in the police station. Where was the sample kept between the 13th and 17th June, 2009 remains unexplained on record. Also seal-H with which the alleged sample was sealed has not been produced in Court. Crucially and significantly even the Road Certificate has not been produced on record which would have only thrown light as to with whom and where the sample was kept at the police station.

38. No doubt MLC (Ext.PW-6/G) records the sample to be that of Jagdev (accused), but then Doctor does not specifically state that the sample was sealed. All that he states is that the sample was handed over to the police in a sealed bag. But then who sealed the same and with which seal, he does not state and Constable Roshan Lal (PW-5) is also silent about the same. In fact he is silent about the seal impression. As already observed, ASI Om Prakash and HC Nup Ram are silent with regard to the sample, much less sealing thereof. It is in this backdrop, it was necessary for the prosecution to have produced the original seal or impression thereof, with which the sample was sealed, for it cannot be said with certainty that the sample was not tampered with.

39. Thus, findings returned by the trial Court, convicting the accused, cannot be said to be based on correct and complete appreciation of testimonies of prosecution witnesses. Such findings cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused. Incorrect and incomplete appreciation thereof, has resulted into grave miscarriage of justice, inasmuch as accused stands wrongly convicted for some of the charged offences.

40. The court in the given facts and circumstances does not deem it proper, at this stage, to order retrial as no content of alcohol would be found in the blood of the accused. While taking such view, reliance is sought on the decision rendered by the apex Court in *Ukha Kolhe vs. The State of Maharashtra,* AIR 1963 SC 1531.

41. Hence, for all the aforesaid reasons, appeal is partly allowed and the judgment of conviction and sentence dated 8.4.2015/9.4.2015, passed by the learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushahr, H.P. in Sessions Trial No. 010003 of 2010, titled as State of Himachal Pradesh vs. Jagdev Singh, qua the offences charged under Section 304-AA IPC and 185 of the Act are set aside. The accused stands acquitted in relation to such offences. With respect to the same, he be released from jail, if not required in relation to any other offences or case, and amount of fine, if deposited by the

accused, be refunded to him. It is clarified that in relation to the offences for which he stands convicted, he has to undergo and serve the sentence. Release warrants be prepared accordingly.

42. Valuable assistance rendered by Mr. Ankush Dass Sood, learned Senior Advocate and Mr. Neeraj Gupta, learned Advocate appointed as amicus curiae by the Court are highly appreciable.

Appeal stands disposed of, so also pending application(s), if any.

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

Kuber Raj and another. ...Appellants

Versus

Hari Singh (died) through his LRs. ...Respondents.

RSA No. 389 of 2005
Reserved on: 3.11.2015
Decided on: 5.11.2015

Specific Relief Act, 1963- Section 34- Plaintiffs sought declaration and injunction pleading that they are in possession of the suit land- defendant has no right over the suit land and the revenue entries showing the defendant as owner are wrong- defendant pleaded that entries were correctly recorded- suit land was earlier in possession of the grand-father of the plaintiffs and father of the defendant- held that father of the plaintiffs and defendant inherited the tenancy to the extent of ½ share - suit property was earlier in possession of the grand-father and thereafter it was to be succeeded equally- mutation was attested in the presence of the plaintiffs without any objection from them- it cannot be believed that after the death of the grand-father only one son would have acquired the entire suit land as tenant- case of the plaintiffs was not proved and suit was rightly dismissed.

(Para- 15 and 16)

For the Appellants : Mr. Ajay Sharma, Advocate.
For the Respondents: Mr. Atul Jhingan, 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 1.6.2005 rendered by the District Judge, Kangra at Dharamshala in Civil Appeal No. 76-D/XIII-2004.

2. "Key facts" necessary for the adjudication of this appeal are that the appellants-plaintiffs (hereinafter referred to as the "plaintiffs" for convenience sake) filed a suit against the respondent-defendant (hereinafter referred to as the "defendant" for convenience sake) for declaration as well as prohibitory injunction. According to the plaintiffs, land as detailed in the head note of the plaint, was in exclusive cultivatory possession of the plaintiffs earlier as tenants-at-will and thereafter as owners. Defendant has never come in possession in any capacity. He has no right, title or interest over the suit

land. Revenue entries reflecting the defendant as owner to the extent of ½ share vide mutation are wrong and illegal.

3. Suit was contested by the defendant. On merits, it is stated that the defendant was owner in possession of the land to the extent of ½ share and the entries of record of right depicts correct position. Suit land was in cultivatory possession of Ram Saran, grand father of the plaintiffs and father of the defendant. Tenancy after the death of Ram Saran was inherited by Dulo Ram, father of the plaintiffs to the extent of ½ share and Hari Singh defendant to the extent of ½ share. The proprietary rights were conferred upon them vide mutation No. 101 dated 25.3.1985.

4. Replication was filed by the plaintiff. Issues were framed by the learned Civil Judge (Sr. Division), Kangra on 1.7.2002. He dismissed the suit on 5.7.2004. Plaintiffs preferred an appeal before the District Judge, Kangra at Dharamshala. He dismissed the same on 1.6.2005. Hence, the present appeal. It was admitted on 29.7.2005 on the following substantial questions of law:

1. **Whether impugned judgments and decrees stand vitiated on account of misreading and mis-appreciation of pleadings and evidence more particularly provisions of section 2 (17) and 2 (18) of the H.P. Tenancy and Land Reforms Act?**
2. **Whether impugned judgments and decrees stand vitiated in view of misreading and mis-appreciation of oral evidence more particularly statements of PW-1 to PW-4 and DW-1?**
3. **Whether date of death of Ram Saran having not been brought on record, tenancy being claimed by defendant by succession could not have been held in his favour and contrary decision rendered by courts below, thus, stand vitiated the impugned judgments and decrees?**

5. Mr. Ajay Sharma, on the basis of the substantial questions of law, has vehemently argued that the provisions of H.P. Tenancy and Land Reforms Act have not been correctly appreciated by the courts below. He has also contended that both the courts below have misread and mis-appreciated the oral as well as documentary evidence. He has faintly argued that date of death of Ram Saran has not been brought on record during the pendency of *lis* between the parties.

6. Mr. Atul Jhingan has supported the judgments and decrees passed by the court below.

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

8. Since all the substantial questions of law are interconnected and interlinked the same are taken up together for determination to avoid repetition of discussion of evidence.

9. PW-1 Ram Parshad Sharma has deposed that the suit land is about 11 kanals. It is cultivated by the plaintiffs. Plaintiffs were tenants under him in respect of some other land. Plaintiffs have become owners of the suit land under the Act and were not paying Galla Batai to him. In his cross-examination, he has deposed that he himself was the sole land owner of the suit land. He has also deposed that only Dulo Ram was cultivating the suit land.

10. PW-2 Jai Ram has deposed that he was familiar with the suit land. It was in possession of the plaintiffs. They have been cultivating the suit land from the time of their grand-father on Galla Batai. After the death of Ram Saran, only Dulo Ram was cultivating the suit land. Hari Singh never cultivated the suit land. Entries have been made wrongly in his name. He never resided in the village. In his cross-examination, he has stated that Ram Saran died in the year 1976 and Dulo Ram died later. Dulo Ram has cultivated the suit land 4-5 years after the death of Ram Saran.

11. PW-3 Partap Chand has deposed that he has seen the suit land. The suit land was in possession of the plaintiffs. In his cross-examination, he has deposed that he knew Ram Saran. He did not know who was cultivating the suit land when he used to be outside on employment. He has admitted that Ram Saran was cultivating the suit land.

12. PW-4 plaintiff No.1 Kuber Raj has deposed that the suit land was in their possession since the time of their grand-father Ram Saran. They were residing in village Bhutehre whereas defendant was residing in village Sakoh. Mutation was wrongly entered in favour of defendant. Ram Saran died in the year 1976 and Dulo Ram died in the year 1977. He has admitted that Ram Saran was cultivating the suit land during his life time. Dulo Ram has cultivated the suit land alongwith Ram Saran.

13. Defendant has appeared as DW-1. According to him, the suit land was 11 kanals. Earlier, Amar Nath had filed a suit regarding the suit land against the parties. It was decided against the parties. Ram Saran had two sons, i.e. the defendant and Dulo Ram. Dulo Ram was father of plaintiffs. Parties have become owners of the suit land under the Act. He has never relinquished the possession of the same. Parties are in possession of the suit land in equal share. Though he has admitted that he was residing at village Sakoh which was about 3-4 KMs away from village Bhutehre. He retired from the Settlement Department.

14. DW-2 Rajinder Kumar has proved documents Ex.D-1 to Ex.D-3. Defendant has placed on record copy of Jamabandi for the year 1965-66 Ex.D-4, copy of missal Haquiat Bandobast Jadid Sani for the year 1973-74 Ex.D-5, copy of Jamabandi for the year 1985-86 Ex. D-6, copy of Jamabandi for the year 1990-91 Ex.D-7, copy of pedigree table Ex.D-8, copy of Khasra Girdawari Ex.D-9, copy of pedigree table Ex.D-10, copy of judgment in civil suit No. 120/91 Ex.D-11 with decree sheet Ex.D-12, copy of Jamabandi for the year 1995-96 Ex.D-13 and copy of Missal Haquiat Bandobast Jadid for the year 1973-74 Ex. D-14.

15. According to Jamabandi for the year 1965-66 Ex.D-4 Ram Saran, grand-father of the plaintiffs and father of defendant Hari Singh was a non-occupancy tenant over the suit land. It is also proved from Missal Haquiat Bandobast Jadid Sani Ex.D-5 for the year 1973-74. The parties are successors of Ram Saran, non-occupancy tenant, as per pedigree table Ex.D-8. PW-2 Jai Ram, in his cross-examination, has admitted that when Ram Saran was alive, plaintiffs were cultivating the suit land on his behalf. PW-3 Partap Chand has also deposed, as discussed hereinabove, that Ram Saran was cultivating the suit land earlier. PW-4 Kuber Raj has deposed that Ram Saran died in the year 1976 and Duli Ram, father of the plaintiffs, died in the year 1977. Ram Saran was non-occupancy tenant over the suit land. He became owner of the same on the appointed date, i.e. 3.10.1975 when the Act came into force. The suit property, thus, was to be inherited equally by the parties. Ram Saran died in the year 1976 after the proprietary rights were already conferred upon him. The mutation is Ex.P-2 whereby the proprietary rights were conferred upon the parties to the extent of ½ share. The mutation was attested in favour of plaintiff No.2 Prem Chand. He was present at the time of sanction of mutation, but he did not raise any

objection. Plaintiffs have not filed any petition or appeal against mutation No. 101. Thus, the mutation has rightly been sanctioned. It is also not believable that after the death of Ram Saran only his one son Dulo Ram would have acquired the entire suit land as tenant. It has not come on record that defendant has ever surrendered or relinquished his tenancy in favour of Dulo Ram. Thus, after the death of Ram Saran, defendant inherited the land in equal share and became owner under the H.P. Tenancy and Land Reforms Act. Merely that defendant was living in different village would not come in the way of his being granted proprietary rights. Plaintiffs have not taken the plea of section 2 (17) and 2 (18) of the H.P. Tenancy and Land Reforms Act before the courts below. The substantial questions of law can only be based on the pleadings and the evidence led before the courts below. Both the courts below have correctly come to the conclusion that the factum of death of Ram Saran would have no bearing on the adjudication of this case since the proprietary rights were conferred upon him in the year 1975 and he died in the year 1976.

16. The courts below have correctly appreciated the oral as well as documentary evidence led by the parties and there is no need to interfere with the well reasoned judgments and decrees passed by both the courts below.

17. The substantial questions of law are answered accordingly.

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

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Manu Maharaaj ...Petitioner.

Versus

Union of India and another ...Respondents.

CWP No. 2086 of 2009
Reserved on: 29.10.2015
Decided on: 05.11.2015

Constitution of India, 1950- Article 226- Writ Petitioner appeared in civil service examination and was allotted Bihar cadre in Indian Police Services- he filed a representation for seeking transfer of his cadre- his representation was rejected on which he filed an application before the Tribunal- Tribunal held that petitioner had no right to seek allotment of any particular State- held that a person having been appointed to All India Service has no right to claim allocation to State of his own choice or to home State- Tribunal had rightly dismissed his original application- writ petition dismissed. (Para-6 to 20)

Cases referred:

Union of India and others versus Rajiv Yadav, IAS and others, (1994) 6 Supreme Court Cases 38

C.M. Thri Vikrama Varma versus Avinash Mohanty and others, (2011) 7 Supreme Court Cases 385

Union of India versus Mhathung Kithan and others with Union of India versus Kumari Bindhyeshwari Negi and others, (1996)10 Supreme Court Cases 562

For the petitioner:	Mr. Bipin C. Negi, Senior Advocate, with Mr. Arush Matlotia, Advocate.
For the respondents:	Mr. Ashok Sharma, Assistant Solicitor General of India, with Mr. Ajay Chauhan, Advocate, for respondent No. 1. Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. V.S. Chauhan, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

The writ petitioner, by the medium of this writ petition, has called in question the judgment and order, dated 24.10.2008, passed by the Central Administrative Tribunal, Chandigarh Bench (for short "the Tribunal") in O.A. No. 617/HP/2006, titled as Shri Manu Maharaj versus Union of India (Annexure P-5) (for short "the impugned judgment") and has also sought writ of mandamus commanding the respondents to consider the case of the writ petitioner for allotting him the Himachal Pradesh Cadre in terms of his option, on the grounds taken in the writ petition.

2. The writ petition, on the face of it, merits to be dismissed. However, it stands admitted, calls for detailed and speaking judgment.

Brief facts:

3. The writ petitioner participated successfully in the Civil Services Examination, 2004, in the discipline of Indian Police Services and was allotted Bihar cadre, which constrained him to file representation, was rejected, constraining him to approach the Tribunal by the medium of the Original Application on the grounds, which are enumerated in para 5 of the said Original Application, as under:

> *"5.I) That since the applicant while appearing in the Civil Services examination has opted for the allocation of the Home cadre and he was allocated the Bihar cadre. The respondents have rejected the representation of the application on a wrong criteria, since the applicant appeared in the examination as a General Candidate and not as a OBC Candidate and his rank was in the All India Merit list was 132. The respondents rejected the case of the applicant that since the applicant belongs to OBC category candidate and as such he could not be given the vacancy meant for General category candidate. The vacancies filled up in the IPS cadre of H.P. was to be filled up against an outside roster point meant for general category candidate, but the respondents rejected the claim of the applicant as an insider candidate from Himachal Pradesh belonging to O.B.C. category and as such he was not eligible for allocation to I.P.S. cadre of Himachal Pradesh.*
>
> *II). That the rejection of the representation of the applicant is illegal for allocation to Himachal Pradesh, as the applicant belongs to general category candidate and as per the merit list pertaining to the*

H.P. he was toping the list and as such was eligible for allocation to the Himachal Pradesh cadre.

III). That even the respondent No. 2 has no objection regarding allocation of probationers to the IPS cadre of State on the basis of Civil Services Examination, 2004 (2005 batch). The respondent No. 1 has alloted only 1 IPS officer to the respondent No. 2 and one more IPS probationer is yet to be allocated to the respondent No. 2, as such the request of the applicant can be acceded to for which the applicant prays."

4. No other ground was pressed into service and the relief sought was to direct the respondents to consider the case of the writ petitioner.

5. The respondents resisted the Original Application by the medium of reply. The specific pleas have been taken in paras 3 to 7 of the reply.

6. The Tribunal examined the pleadings and the law applicable, held that the writ petitioner has no right to seek allotment of any particular State. It is the prerogative of the respondents in terms of the mandate of the Rules and policy read with the judgments made by the Apex Court.

7. The Tribunal has rightly made discussions from paras 2 to 5 of the impugned judgment and thereby dismissed the Original Application. It has also discussed the mandate of the judgment delivered by the Apex Court in the case titled as **Union of India and others versus Rajiv Yadav, IAS and others,** reported in **(1994) 6 Supreme Court Cases 38.**

8. The writ petitioner has tried to build up a case, by the medium of the writ petition, which he has not projected in the Original Application before the Tribunal. It was not the case of the writ petitioner that an undeserving candidate, who was lower in merit, has been allotted Himachal Pradesh cadre, he was highest in merit and was entitled to the said cadre. But what he has sought for is to direct the respondents to consider his case.

9. Can the Court direct the respondents to consider the case of the writ petitioner, while keeping in view the mandate of the Rules and policy applicable read with the Apex Court judgment in **Rajiv Yadav's case (supra)?**

10. The answer is in the negative for the following reasons:

11. It is apt to reproduce paras 5 and 6 of the judgment rendered by the Apex Court in **Rajiv Yadav's case (supra)** herein:

"5. We have given our thoughtful consideration to the reasoning and the conclusions reached by the Tribunal. We are not inclined to agree with the same. Rule 5 of the Cadre Rules provide that the allocation of the members of the IAS to various cadres shall be made by the Central Government in consultation with the State Government or the State Governments concerned. Sub-rule (2) of Rule 5 further provides that a cadre officer can be transferred from one cadre to another. When a person is appointed to an All India Service, having various State Cadres, he has no right to claim allocation to a State of his choice or to his home State. The Central Government is under no legal obligation to have options or even preferences from the officer concerned. Rule 5 of the Cadre Rules makes the Central Government the sole authority to allocate the members of the service to various

cadres. It is not obligatory for the Central Government to frame rules / regulations or otherwise notify "the principles of allocation" adopted by the Government as a policy. The letter dated 31-5-1985 shows that the Central Government has always been having guidelines either in the shape of "limited Zonal preferences system" or "Roster System" for the exercise of its discretion under Rule 5 of the Cadre Rules. Simply because the principles of allocation called "Roster System" were not notified, it is no ground to hold that the same are nonest and the Central Government cannot follow the same. In any case the "Roster System" has stood the test of time. It was operative during the years 1966 to 1977 and again it is being followed from 1985-batch onwards. The fact that the "Roster System" is being followed in practice by the Central Government for all these years is in itself a sufficient publication of its principles.

6. We may examine the question from another angle. A selected candidate has a right to be considered for appointment to the IAS but he has no such right to be allocated to a cadre of his choice or to his home-State. Allotment of cadre is an incidence of service, A member of an All India Service bears liability to serve in any part of India. The principles of allocation as contained in Clause 2 of the letter dated 31-5-1985, wherein preference is given to a Scheduled Caste/Scheduled Tribe candidate for allocation to his home State, do not provide for reservation of appointments or posts and as such the question of testing the said principles on the on the anvil of Article 16(4) of the Constitution of India does not arise. It is common knowledge that the Scheduled Caste/Scheduled Tribe candidates are normally much below in the merit list and as such are not in a position to compete with the general category candidates. The "Roster System" ensures equitable treatment to both the general candidates and the reserved categories. In compliance with the statutory requirement and in terms of Article 16(4) of the Constitution of India $22^{1/2}$% reserved category candidates are recruited to the IAS. Having done so both the categories are to be justly distributed amongst the States. But for the "Roster System" it would be difficult rather impossible for the Scheduled Castes/Scheduled Tribes candidates to be allocated to their home States. The principles of cadre allocation, thus, ensure equitable distribution of reserved candidates amongst all the cadres." (Emphasis added)

12. Viewed thus, the writ petitioner has no right to claim cadre of his choice or home State.

13. Learned counsel for the writ petitioner has relied upon the judgment rendered by the Apex Court in the case titled as **C.M. Thri Vikrama Varma versus Avinash Mohanty and others,** reported in **(2011) 7 Supreme Court Cases 385,** which is not applicable.

14. The said judgment is outcome of the decision of the High Court of Andhra Pradesh, where the case projected was that the writ petitioner in that case was higher in merit and was entitled, as per the Roster, to allotment of his home cadre, but he was shown door and another candidate of the same State, who was below in the rank, was allotted the home cadre. The aggrieved writ petitioner filed representation, approached the

Tribunal, but without any success, was constrained to file writ petition, which was allowed vide judgment and order, dated 22.03.2007, which was subject matter of the Civil Appeal before the Apex Court. It is apt to reproduce paras 18 to 20 of the Apex Court judgment in **C.M. Thri Vikrama Varma's case (supra)** herein:

> *"18. In Para 6 of the judgment in Rajiv Yadav case, (1994) 6 SCC 38, the Court explained that in compliance with the statutory requirements and in terms of Article 16(4) of the Constitution, 22$^{1/2}$% reserved category candidates are recruited to the IAS and having done so, both the categories are to be justly distributed amongst the States. The Court also held that when a person is appointed to the All India Service, having various State cadres, he has no right to claim allocation to a State of his choice or to his home State and the Central Government is under no legal obligation to have options or even preferences from the officer concerned and Rule 5 of the Indian Administrative Service (Cadre) Rules, 1954, made the Central Government the sole authority to allocate the members of the service to various cadres.*
>
> *19. This position of law was reiterated in Mhathung Kithan, (1996) 10 SCC 562. The Court, however, has not held in Rajiv Yadav or in Mhathung Kithan that such authority of the Central Government can be exercised arbitrarily or in a manner which is not equitable to the general or reserved category candidates selected for appointment to an All India Service. On the contrary, the Court has held in Rajiv Yadav that the roster system as contained in the letter dated 31.05.1985 ensures equitable treatment to both the general candidates and the reserved candidates.*
>
> *20. In fact, the object of the principles of allocation indicated in different clauses in the letter dated 31.05.1985 is not only to implement the policy having 2 outsiders and 1 insider in each cadre, but also to ensure that general and reserved candidates selected and appointed to the All India Service get a fair and just treatment in the matter of allocation to different cadres. This will be clear from clause (2) of the letter dated 31.05.1985 which states that the vacancies for Scheduled Castes and Scheduled Tribes in the various cadres should be according to the prescribed percentage and from clause (3) which states that the allocation of insiders, both men and women, will be strictly according to their ranks, subject to their willingness to be allocated to their home States. This will also be clear from clause 4 (vii) which explains how the candidates belonging to the reserved category and the general category will be dealt with. These principles have been laid down in the letter dated 31.05.1985 because while making allocations of different candidates appointed to the service to different State cadres or Joint cadres, the Central Government has also to discharge its constitutional obligations contained in the equality principles in Articles 14 and 16(1) of the Constitution. A member appointed to the All India Service has no right to be allocated to a particular State cadre or Joint cadre, but he has a right to a fair and equitable treatment in the matter of allocation under Articles 14 and 16(1) of the Constitution."*

15. Keeping in view the facts and relief sought, the ratio is not applicable to the instant case.

16. Learned counsel for the writ petitioner argued that as per the table given in the reply before the Tribunal and discussed by the Tribunal, two vacancies were avaialble in the subsequent year also and the writ petitioner was entitled to his home cadre. The argument is misconceived for the reason that it is the prerogative of the respondents to allot the cadre and mere shortfall in the Home State is no ground.

17. The same issue was raised before the Apex Court in the case titled as **Union of India versus Mhathung Kithan and others with Union of India versus Kumari Bindhyeshwari Negi and others,** reported in **(1996)10 Supreme Court Cases 562.** It is profitable to reproduce paras 7 and 8 of the judgment herein:

> *"7. The first respondent has contended that in the batch passing the examination in 1984, when the vacancy was for an insider, no insider was available and the vacancy had been occupied by an outsider. Hence he should be considered for one of the roster points available for the batch of 1985. We have, however, not been shown any rule which provides for a carry-over of "insider"vacancies if they are not filled due to non-availability of insider candidates. In the absence of any such rule for carry-forward of insider vacancies. We do not see how the first respondent can be accommodated in the vacancies which are earmarked for outsiders as per the relevant roster points.*
>
> *8. In the policy statement of 30-7-1984, a reference was made to the fact that State service officers who get promoted to IAS/IPS are in the age group of 40 to 50 and at that late stage, their transfer to another State cadre may give rise to personnel and administrative problems of adjustment. Therefore, in order to restore the outsider-insider balance in a State cadre, it was proposed that the outsider element in the direct recruitment quota required to be increased. In this context it is difficult to accept the contention of the first respondent regarding carry-forward of "insider"vacancies. The roster is framed bearing in mind this requirement of increasing outsiders in the quota of Direct Recruits. The policy requires that at least 66-2/3% of the officers who are directly recruited are from outside the State concerned. It does not impose a ceiling of 66-2/3%. The Tribunal was, therefore, not right in disturbing the implementation of this policy as per the roster." (Emphasis added)*

18. The writ petitioner is virtually seeking writ of mandamus commanding the respondents to allot him the Home Cadre. It is their prerogative and they maintain roster system and it is their duty to see as to which cadre is to be allotted to which candidate, the Court cannot interfere with the same.

19. Having said so, the Tribunal has rightly passed the order, is well reasoned and legal one, needs no interference.

20. Accordingly, the impugned judgment is upheld and the writ petition is dismissed alongwith all pending applications.

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

Prem Tamang .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 94 of 2015
Reserved on: November 04, 2015.
Decided on: November 05, 2015.

Indian Penal Code, 1860- Section 302- A loud noise came out from the Dhara, where the Nepali families were residing- complainant went to the Dhara and found that accused 'N' and deceased were quarreling with each other- complainant and 'S' intervened but the accused and the deceased continued to quarrel- injuries were caused to the deceased who fell down and died on the spot- accused took a defence that deceased was drunk – he gave kick blows and opened the door- deceased caught the wife of the accused and started abusing the accused on which quarrel took place- complainant and 'S' admitted that incident had taken place inside the Dhara of the accused- accused had reasonable apprehension that the deceased was likely to hit him in order to abduct his wife- his case is covered under Section 100 of Indian Penal code- accused acquitted. (Para-24 to 27)

Cases referred:
Vishwanath vrs. The State of Uttar Pradesh, AIR 1960 SC 67
Deo Narain vrs. State of U.P., AIR 1973 SC 473,
Satna Majhi vrs. State of Assam, 1983 Cri. L.J. 287
Ram Phal and others vrs. State of Haryana, 1993 Supp. (3) SCC 740
Sunil Gangrade vrs. State of M.P., 1997 Cri. L.J.4238
Radhe vrs. State of Chhattisgarh, AIR 2008 SC 2878
State of Haryana vrs. Ram Singh, (2002) 2 SCC 426
Sanjiv Kumar vrs. State of Punjab, (2009) 16 SCC 487

For the appellant: Mr. Lovneesh Kanwar, 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 and order dated 19.5.2014 and 22.5.2014, respectively, rendered by the learned Addl. Sessions Judge, Kullu, H.P. in Sessions Trial No. 39 of 2014 (2012), whereby the appellant-accused (hereinafter referred to as accused), who was charged with and tried for offence punishable under Section 302 IPC, has been convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs.20,000/- and in default of payment of fine, he was ordered to further undergo imprisonment for two years.

2. The case of the prosecution, in a nut shell, is that on the midnight of 2.8.2012 at around 1:00 AM at Manali, near Johnson Lodge, a loud noise came out from the Dhara (temporary hut), where the Nepali families were residing. Complainant Chander Mani

(PW-5), alongwith Suresh was sleeping in the adjoining Dhara. They came out from their Dhara and found that accused Prem Tamang and one Ravi, resident of Nepal, were quarrelling with each other inside the Dhara of Prem Tamang, accused. Complainant and Suresh intervened but both of them continued to quarrel. Injury was caused to Ravi. He fell down and blood started oozing from the head of the deceased. He died on the spot. The accused committed the murder of Ravi by hitting his head with wooden bar. The accused ran away from the spot. The police was informed about the occurrence through telephone, on the basis of which, FIR Ext. PW-4/A was recorded. The police reached the spot. The statement of PW-5 Chander Mani under Section 154 Cr.P.C. was recorded vide Ext. PW-5/A. The spot map was prepared. The police took into possession the blood stained soil and control sample of soil Ext. P-11 with the help of cotton swab Ext. P-9 by packing the same in a plastic jar (dibbi) Ext. P-8 and took the same into possession vide memo Ext. PW-5/B. Wooden bar Ext. P-6 was taken into possession vide seizure memo Ext. PW-5/D. The post mortem of deceased was got conducted. The report Ext. PW-8/A was obtained. On completion of the investigation, challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 11 witnesses. The accused was also examined under Section 313 Cr.P.C. He denied the incriminating circumstances put to him. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Lovneesh Kanwar, Advocate for the accused has vehemently argued that the prosecution has failed to prove the case against the accused. On the other hand, Mr. P.M.Negi, Dy. Advocate General, appearing on behalf of the State, has supported the judgment and order of the learned trial Court dated 19.5.2014 and 22.5.2014, respectively.

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

6. PW-5 Chander Mani deposed that he used to work with contractor and used to do the work of steel and iron. He used to stay in Dhara at Manali. Suresh Kumar also resided with him at Van Vihar. On 2.8.2012 at about 12-01 AM, they heard some noise from the nearby Dhara. He saw that accused Prem Tamang and Ravi were quarrelling with each other. He saw Prem Tamang hitting Ravi with a wooden stick on his head. Thereafter, Ravi fell down and after some time he died. Prem was inside the Dhara. He informed the police on phone. The police came to the spot and recorded his statement vide Ext. PW-5/A. The occurrence was witnessed by him in the light of the Dhara. He had also switched on the light of his Dhara. The police came to the spot and collected the blood stained soil with the help of cotton swabs and packed the same in the plastic jar. The police also sealed the dibbi with six seals of “M” and took into possession vide seizure memo Ext. PW-5/B. The police also took into possession tarpuline vide seizure memo Ext. PW-5/C. Wooden stick was taken into possession vide memo Ext. PW-5/D. In his cross-examination, he deposed that all Dharas were occupied by the people. There was no hotel known as Johnsons lodge near the Dhara. He heard the noise in the night at about 12:00 AM. He could not say by what time the quarrel had started as he was sleeping. The quarrel had taken place in the Dhara of accused Prem Tamang. He denied the suggestion that the roof of the Dhara was uprooted. Voluntarily stated that the tin sheets were damaged in the fighting. According to him, the quarrel continued for about 30-45 minutes. He had no knowledge about the cause of quarrel. Other persons also came on the spot. He admitted that six-seven persons also came on the spot. The wife of the accused was also residing in the Dhara and she was also present at that time. Ravi was inside the Dhara of the accused. He informed the police twice through phone. Ravi had consumed liquor.

7. PW-6 Suresh Kumar deposed that he heard the noise from nearby Dhara, where the light was switched on. He alongwith Chander Mani came out of the Dhara and saw that Prem accused and Ravi were quarrelling in the Dhara. Accused Prem picked up a wooden log and struck it on the head of Ravi. Ravi fell down and died. The tin sheets of the Dhara of Prem were also uprooted. Chander Mani informed the police on the phone and police arrived at the spot. In his cross-examination, he categorically admitted that the fight took place inside the Dhara of the accused.

8. PW-8 Dr. Balbir Rawal, has conducted the post mortem examination on the dead body on 2.8.2012. The post mortem report is Ext. PW-8/A. The cause of the death opined was due to severe head injury.

9. PW-11 SI Matharu Ram has conducted the investigation. He testified that on 2.8.2012, a telephonic information was received at Police Station, Manali to the effect that Nepali persons were quarrelling with each other in their Dhara near Johnson lodge. On this information, rapat Ext. PW-11/H was recorded. He alongwith PSI Rajesh Kumar, PSI Prashant and ASI Bhupender Singh went to the spot. When they reached the spot, they found Nepali dead. Chander Mani was present on the spot. His statement under Section 154 Cr.P.C. was recorded vide Ext. PW-5/A. The case property was taken into possession. In his cross-examination, he admitted that when any article or object is deposited in the Malkhana, entry is made in Register No. 19. He also admitted that when article or object is taken out of the Malkhana, entry of the same is made in that Register. He also admitted that in PW-11/G, there is no reference of the Danda (stick) having been sent under a sealed cover. He also admitted that Chhering Lama was a witness of the spot.

10. The statement of the accused was also recorded under Section 313 Cr.P.C. He also gave his statement in writing under Section 313 (5) Cr.P.C. According to his statement, Ravi was drunk. He gave a kick blow on their door and he woke up. He opened the door. He asked him why he has come. He pushed him aside and entered the Dhaara. His wife was sleeping. He called his wife. He objected to the same. He started hurling abuses on him. He asked him to leave the Dhara. He picked up a quarrel and his wife also got up in the meantime. He started uprooting the tin sheets. He also objected to it. He tried to push him outside the Dhara. He pushed him and insisted to take his wife with him. Both of them objected. He kept on fighting. He tired to drag his wife from the Dhara. He tried to save his wife from the clutches of the accused. The victim picked up a stick. He threatened to hit him with the stick. He tried to save him and also tried to snatch the stick from him and in the process, the stick struck the deceased Ravi Kumar.

11. DW-1 Mayali Tamang is the wife of the accused. She deposed that she and her husband were sleeping. One drunkard person entered into their room. Earlier, he knocked at the door. They asked who was at the door. Then, he opened the door and came inside. After entering the room, he caught hold of her hand. When she resisted, that man started breaking the wall of their temporary hut. When she asked him not to do so, then he tried to pull her out. When, she again resisted he became more violent. When they again resisted, he became angry and picked up a stick and tried to hit them. She wanted to save herself and in the process, she as well as that man both fell down. She became unconscious.

12. The case of the prosecution, precisely, is that the deceased entered the Dhara of the accused. The accused hit him on the head with a wooden stick. It led to the death of the deceased. According to the post mortem, report, the deceased died due to severe head injury.

13. The statement of PW-5 Chander Mani was recorded under Section 154 Cr.P.C. vide Ext. PW-5/A. He testified that he saw the accused hitting Ravi with wooden stick on his head on 2.8.2012. In his cross-examination, he admitted that the tin sheets were damaged in the fighting. The quarrel had taken place for about 30-45 minutes. Other people had also come on the spot. He has categorically deposed that Ravi was inside the Dhara of the accused. The quarrel has also taken place inside the Dhara of accused Prem Tamang. PW-6 Suresh Kumar has also deposed in his cross-examination that fighting has taken place inside the Dhara of the accused. The deceased died due to severe head injury, as per the post mortem report Ext. PW-8/A.

14. The defence taken by the accused as per the statement tendered under Section 313 (5) Cr.P.C. is that the deceased was in drunkard condition. He gave a kick blow on their door and he woke up. He opened the door. He asked him why he has come. He pushed him aside and entered the Dhaara. His wife was sleeping. He called his wife. He raised objection to the same. Ravi started hurling abuses on him and quarrel took place. He asked him to leave the Dhara. He picked up a quarrel and his wife also got up in the meantime. He started uprooting the tin sheets. He also objected to it. He pushed him and insisted to take his wife with him. Both of them objected. He tired to drag his wife from the Dhara. He threatened to hit him with the stick. He tried to save him and also tried to snatch the stick from him and in the process, the stick struck the deceased Ravi Kumar. His statement is probablized by the statement of his wife DW-1 Mayali Tamang. She specifically deposed that one drunkard person entered into their room. After entering the room, he caught hold of her hand. When she resisted, that man started breaking the wall of their temporary hut. When she asked him not to do so, then he tried to pull her out. When, she again resisted he became more violent. When they again resisted, he became angry and picked up a stick and tried to hit them. She wanted to save herself and in the process, she as well as that man both fell down. She became unconscious.

15. According to the statements of PW-5 Chander Mani and PW-6 Suresh Kumar, the fight has taken place inside the Dhara of the accused. It was almost mid-night time. The victim had no business at all to be in the Dhara of the accused at midnight. He was drunk. He has misbehaved with the wife of the accused. He had also forcibly entered into the Dhara. It was expected from the accused to save the body of his wife from the clutches of the accused who was trying to drag her out and also to protect him. The quarrel has taken place for more than half an hour. The accused had reasonable apprehension in his mind that the deceased was likely to hit him with wooden bar in order to abduct his wife. The victim has not come to the Dhara with good intention. The deceased had already picked up a stick. The accused tried to snatch the same and in the process, the deceased suffered danda (stick) blow on the head. The case of the accused is covered under Section 100 of the Indian Penal Code. He has not exceeded his right of self defence/private defence by hitting the danda on the head of the deceased resulting in his death. There is only one blow inflicted by the accused on the head of the deceased.

16. Their lordships of the Hon'ble Supreme Court in the case of ***Vishwanath vrs. The State of Uttar Pradesh,*** reported in ***AIR 1960 SC 67,*** have held that when the appellant's sister was being abducted from her father's house by her husband, and there was an assault on her and she was being compelled by force to go away from her father's place, the appellant had the right of private defence of the body of his sister against an assault with the intention of abducting her by force and that right extended to the causing of death. It has been held as follows:

> "5. Section 97 gives the right of private defence of person against any offence affecting the human body. Section 99 lays down that the right of

private defence a no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. Section 100 with which we are concerned is in these terms:-

> " The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely-
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> " First-Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;
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> Secondly-Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;
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> Thirdly-An assault with the intention of committing rape ; (1) I.L.R. 1948 All. 165. (3) A.I. R. 1930 Pat. 347 (2). (2) A.I.R. 1923 Lab. 155 (1). (4) 1 L.R. 1950 Nag 508. (5) A 1. R. 1953 Madhya Bharat 182.
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> Fourthly-An assault with the intention of gratifying unnatural lust;
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> Fifthly-An assault with the intention of kidnapping or. abducting;
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> Sixthly-An assault with the intention of wrongfully confining a person under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release."

The right of private defence of person only arises if there is an offence affecting the human body. Offences affecting the human body are to be found in Ch. XVI from s. 299 to s. 377 of the Penal Code and include offences in the nature of use of criminal force and assault. Abduction is also in Ch. XVI and is defined in s. 362. Abduction takes place whenever a person by force compels or by any deceitful means induces another person to go from any place. But abduction pure and simple is not an offence under the Penal Code. Only abduction with certain intent is punishable as an offence. If the intention is that the person abducted may be murdered or so disposed of as to be put in danger of being murdered, s. 364 applies. If the intention is to cause secret and wrongful confinement, s. 365 applies. If the abducted person is a woman and the intention is that she may be compelled or is likely to be compelled to marry any person against her will or may be forced or seduced to illicit intercourse or is likely to be so forced or seduced, s. 366applies. If the intention is to cause grievous hurt or so dispose of the person abducted as to put him in danger of being subjected to grievous hurt, or slavery or the unnatural lust of any person, s. 367applies. If the abducted person is a child under the age of ten and the intention is to take dishonestly any movable property from its person, s. 369 applies. It is said that unless an offence under one of these sections is likely to be committed, the fifth clause of s. 100 can have no application. On a plain reading, however, of that clause there does not seem to be any reason for holding that the word " abducting " used there means anything more than what is defined as " abduction " in s. 362.

It is true that the right of private defence of person arises only if an -offence against the human body is committed. Section 100 gives an extended right of private defence of person in cases where. the offence which occasions the

exercise of the right is of any of the descriptions enumerated therein. Each of the six clauses of s. 100 talks of an assault and assault is an offence against the human body; (see s. 352). So before the extended right under s. 100 arises there has to be the offence of assault and this assault has to be of one of the six types mentioned in the six clauses of the section. The view in Ram Saiya's case (1) seems to overlook that in each of the six clauses enumerated in s. 100, there is an offence against the human body, namely, assault. So the right of private defence arises against that offence, and what s. 100 lays down is that if the assault is of an aggravated nature, as enumerat- ed in that section, the right of private defence extends even to the causing of death. The fact that when describing the nature of the assault some of the clauses in s. 100 use words which are themselves offences, as for example, " grievous hurt ", " rape ", " kidnapping ", " wrongfully confining ", does not mean that the intention with which the assault is committed must always be an offence in itself. In some other clauses, the words used to indicate the intention do not themselves amount to an offence under the Penal Code. For example, the first clause says that the assault must be such as may reasonably cause the apprehension of death. Now death is not an offence anywhere in the Penal Code. Therefore, when the word " abducting " is used in the fifth clause, that word by itself reed not be an offence in order that clause may be taken advantage of by or on behalf of a person who is assaulted with intent to abduct. All that the clause requires is that there should be an assault which is an offence against the human body and that assault should be with the intention of abducting, and whenever these elements are present the clause will be applicable.

6. Further the definition of " abduction " is in two parts, namely, (i) abduction where a person is compelled, (1) I.L.R. 1948 All. 165. by force to go from any place and (ii) abduction where a person is induced by any deceitful means to go from any place. Now the fifth clause of s. 100 contemplates only that kind of abduction in which force is used and where the assault is with the intention of abducting, the right of private defence that arises by reason of such assault extends even up to the causing of death. It would in our opinion be not right to expect from a person who is being abducted by force to pause and consider whether the abductor has further intention as provided in one of the sections of the Penal Codequoted above, before he takes steps to defend himself, even to the extent of causing death of the person abducting. The framers of the Code knew that abduction by itself was not an offence unless there was some further intention coupled with it. Even so in the fifth clause of s. 100 the word " abducting " has been used without any further qualification to the effect that the abducting must be of the kind mentioned in s. 364 onwards. We are therefore of opinion that the view taken in Ram Saiya's case (1) is not correct and the fifth clause must be given full effect according to its plain meaning. Therefore, when the appellant's sister was being abducted, even though by her husband, and there was an assault on her and she was being compelled by force to go away from her father's place, the appellant would have the right of private defence of the body of his sister against an assault with the intention of abducting her by force and that right would extend to the causing of death."

17. In the instant case also, the deceased had tried to abduct the wife of the accused by dragging her out of the Dhara in a drunken state. The quantity of ethyl alcohol

in urine was 319.70 mg% and in blood of the deceased was 268.38 mg%, as per Ext. PB, report of the FSL.

18. In the case of ***Deo Narain vrs. State of U.P.,*** reported in ***AIR 1973 SC 473,*** their lordships of the Supreme Court have held that for right of private defence rests on the general principle that where a crime is endeavoured to be committed by force, it is lawful to repel that force in self defence. Their lordships have further held that therefore, as soon as a reasonable apprehension of danger arises, the right of private defence can be exercised. It has been held as follows:

> "5. In our opinion, the High Court does seem to have erred in law in convicting the appellant on the ground that he had exceeded the right of private defence. What the High Court really seems to have missed is the provision of law embodied in s. 102, I.P.C. According to that section the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit it he offence , though the offence may not have been committed, and such right continues so long as such apprehension of danger to the body continues. The threat, however, must reasonably give rise to the present and imminent, and not remote or distant, danger. This right rests on the general principle that where a crime is endeavored to be committed by force, it is lawful to repel that force in self-defence. To say that the appellant could only claim the right to use force after he had sustained a serious injury by an aggressive wrongful assault is section. The right of private defence is available forprotection against-apprehended unlawful aggression and not forpunishing ,the aggressor for the offence committed by him. It isa preventive and not punitive right. The right to punish forthe commission of offences vests in the State (which has a duty to maintain law and order) and not in private individuals.If after sustaining a serious injury there is no apprehension of further (1) [1970] 3 S.C.R. 473 danger to the body then obviously the right of private defence would not be available. In our view, therefore, as soon as the appellant reasonably apprehended danger to his body even from a real threat on the part of the party of the complainant to assault him for the purpose of forcibly taking possession of the plots in dispute or of obstructing their cultivation, he got the right of private defence and to use adequate force against the wrongful aggressor in exercise of that right. There can be little doubt that on the conclusions- of the two courts below that the party of the complainant had deliberately come to forcibly prevent or obstruct the possession of the accused persons and that this forcible obstruction and prevention was unlawful, the appellant could reasonably apprehend imminent and present danger to his body and to his companions. The complainants were clearly determined to use maximum force to achieve their end. He was thus fully justified in using force to defend himself and if necessary also his companions against the apprehended danger which was manifestly imminent. Again the approach of the High Court that merely because the complainant's party had used lathis, the appellant was not justified in using his spear is no less misconceived and insupportable. During the course of a marpeet, like the present, the use of a lathi on the head may very well give rise to a reasonable apprehension that death or grievous hurt would result from an injury caused thereby. It cannot be laid down as a general rule that the use of a lathi as distinguished from the us,-- of, a spear must always be held to result only in milder injury.

> Much depends on the nature of the lathi, the part of the body aimed at and the force used in giving the blow. Indeed, even a spear is capable of being so used as to cause a very minor injury The High Court seems in this connection to have overlooked the provision contained in s. 100, I.P.C. We do not have any evidence about the size or the nature of the lathi. The blow, it is known, was aimed at a vulnerable part like the head. A blow by a lathi on the head may prove instantaneously fatal and cases are not unknown in which such a blow by a lathi has actually proved instantaneously fatal. If, therefore a blow with a lathi is aimed at a vulnerable part like the head we do not think it can be laid down as a sound, Proposition of law 'that in such cases the victim is not justified in using his spear in defending himself. In such moments of excitement of disturbed mental Equilibrium it is somewhat difficult to expect parties facing grave aggression to coolly weigh, as if in golden scales, and calmly determine with a composed mind as to what precise kind and severity of blow would be legally sufficient for effectively meeting the unlawful aggression. No doubt, the High Court does seem to be aware of this aspect because the other accused persons were given the benefit of this rule. But while dealing with the appellant's case curiously enough the High Court has denied him the right of private defence on the sole ground that he had given a dangerous blow with considerable force with a spear on the chest of the ,deceased though he himself had only received a superficial lathi blow on his head. This view of the High Court is not only unrealistic and unpractical but also contrary to law and indeed even in conflict with its own observation that in such cases the matter .cannot be weighed in scales of gold."

19. In the case of ***Satna Majhi vrs. State of Assam,*** reported in ***1983 Cri. L.J. 287,*** the Division Bench has held that the reasonableness of apprehension of imminent peril of life and limb in the mind of the accused who claimed right of private defence must be judged objectively from the conduct of deceased coupled with the reasoning faculties of accused, and with reference to the events and deeds at the crucial time and in the total situation of surrounding circumstances. In this case, the deceased, an elder brother of accused returned home at mid-night in a drunken state, abused his mother and sister, assaulted and kicked them both, broke the walls and posts of the house, chased after everyone with a dangerous weapon in his hand and threatened the inmate "to cut to pieces". The Division Bench has held that the circumstances were sufficient to give rise to reasonable apprehension of death or grievous hurt in the mind of a reasonable person, not to speak of accused, a boy of 16 years. The Division Bench has held as follows:

> "2. The crucial question for determination is whether the accused, a boy aged about 15/16 years at all relevant times, had reasonable apprehension that there was imminent peril of life and limb of himself and the other members of the family-his own dear and near relations, his mother and sister. The .apprehension in the mind of the accused who claimed the right of private defence must be judged objectively with reference to the events and deeds at that crucial time and in the total situation of the surrounding circumstances. The accused was a young boy aged 15/16 years; the deceased, his eldest brother, was drunk, had assaulted his mother and sister, kicked them, damaged the posts and wall of the house, thereafter he brought out a dao and chased everyone threatening to kill them. Therefore, the deceased created a horrendous quandary at the, dead of the night and these happened in quick successions obtaining aid from private sources and

recourse to public authority were beyond any question on the fact-situation. Further, reasonableness of the apprehension must be judged from the conduct of the deceased coupled with the reasoning faculties of the young boy. The accused comes from the family to tea garden labourers. He is illiterate vide L. T. Is in his confessional statement and statement recorded under Section 313 of the Cri. P. C. He never minced a word. He killed his elder brother in self defence to prevent commission of apprehended crimes which the deceased was about to commit, namely, either death or grievous hurt to the inmates of the house. Admittedly, the conduct of the drunk, armed with a dangerous weapon in his hand, was sufficient to give rise to the alluded reasonable apprehension in the mind of a reasonable person not to speak of a teenager. It was quite reasonable for the boy to have reasonable apprehension that his elder brother was out to cause grievous injury or death to his mother, sister as well as himself. He tried to prevent the commission of crimes and exercised the right of private defence. In fact, the deceased had already kicked and assaulted his mother and thereafter took the dao, and threatened all to do away with their lives. Therefore, there was reasonable " apprehension of danger to. the accused, his mother and sister from the attempt or threat to commit the offence of murder or grievous hurt. There was existence of real apprehension of danger. The young boy faced imminent peril of life and limb of himself and others, he could not be expected to weigh in goldsmith's scale the precise force needed to repel the danger. It may be recalled that the attacker was his elder brother fully armed and if the accused would have allowed the deceased to get the better of the accused, the latter would have been finished along with the members of his family. Under such circumstances, if he had dealt more than one blow on the deceased it cannot be said that he exceeded the right as in the heat of the moment and excitement the power of calculation with precision and exactitude by a calm and unruffled mind were destroyed by the situation created by the attacker. What would have happened had he not dared to snatch away the dao? It would have been perilous end of three lives. What would have happened if he would not have dealt sufficient blows to disable the attacker ? It would have resulted in the same consequence. The blows given by the accused were neither vindictive nor malicious. In deciding whether the force used was reasonable, all the attending circumstances must be considered, the matter being fully a question of fact.

3. We have considered all the relevant facts including the fact that there was no possibilities of retreat and, we hold that the accused had the right of private defence and allowance must necessarily be made for his "feeling" at all relevant time. He faced an imminent danger to his life or at least grievous hurt which inevitably caused great excitement and confusion in his mind. At such moments the uppermost feeling was necessarily not only to ward off the danger but to save himself and naturally he would be anxious to strike a decisive blow in exercise of his right,

4. While considering the right of private defence of person we have borne in mind the limitations onSections 99 to 100 of the Indian Penal Code. On materials we find that there, was a real apprehension of death or grievous assault upon the accused and/or his neap relations (mother and sister), There was no time for recourse to the public authorities nor was there any possibility of getting public assistance; the injuries inflicted on the deceased cannot be said to be excessive as (a) the deceased was drunk

> powerful and if allowed to get the better of the accused the former could have certainly finished him; (b) the blows were neither vindictive nor malicious but protective in nature; (c) the act of giving blow cannot be weighed in golden scale and we have given allowance to the status of the accused and his age. The blows were inflicted in the heat of the moment and excitement when it was a case of life and death for the accused."

20. In the present case, the deceased was drunk. He had started uprooting the tin sheets of the Dhara in question. He was trying to drag the wife of the accused outside the Dhara and was also armed with stick. Thus, there was reasonable apprehension in the mind of the accused that drunken man could hit him and cause him grievous injury or even death.

21. In the case of ***Ram Phal and others vrs. State of Haryana,*** reported in ***1993 Supp. (3) SCC 740,*** their lordships of the Hon'ble Supreme Court have held that it is enough if a reasonable doubt arise on examination of probabilities of the case and accused inflicting only one injury on head with blunt weapon which proved fatal, the right of self defence was not exceeded. It has been held as follows:

> "3. In this appeal learned Counsel submits that the prosecution has not explained so many injuries on the accused persons and, therefore, they have not come out with the whole truth as to the genesis of the occurrence and on the other hand the plea of the accused that they inflicted injuries on the deceased in exercise of their right of self-defence must be accepted and they should be given the benefit of doubt. In this context it has to be noted that as matter of fact, the accused went to the Police early and informed about the occurrence. It is unfortunate that the deceased though received only one injury dies as the same resulted in the fracture of skull bones. Having regard to the specific plea put forward by the accused under Section 313, Cr.P.C. there is no reason why it should be rejected outright. In this context, it has to be noted that the accused need not establish their right beyond all reasonable doubt. It is enough if a reasonable doubt arises on examination of the probabilities of the case. In the instant case we have seen that the accused persons received fairly number of injuries. Some of them were on vital parts. The prosecution has no plausible explanation. In such a situation, the plea put forward by the accused appears to be quite probable and therefore, it cannot be rejected. The next question is whether they have exceeded the right of private defence. Only one overt act is attributed to A-1. It is clear that he inflicted only one injury and dealt one blow on his head. Therefore, in such a situation, it cannot be said that the act of A-1 is not in conformity with the limitations laid down in Section 100, I.P.C. In the result we give the benefit of doubt to all the accused as such. We are of the view that they have not exceeded the right of self-defence. The appeal is allowed. If the appellants are on bail, their bail bonds shall stand cancelled. The sentences of fine are also set aside."

22. The Division Bench of the Madhya Pradesh High Court in the case of ***Sunil Gangrade vrs. State of M.P.,*** reported in ***1997 Cri. L.J.4238,*** has held that the person apprehending danger is not required to wait for sustaining injury. Sustaining of injury is not necessary. The mere reasonable apprehension would be sufficient for exercise of right of self defence. It has been held as follows:

> "25. We do not agree with this contention of the learned counsel for State as in that case during the Panchayat of the village deceased took out a shoe

and dishonoured certain Panchas present there in the Panchayat. He was thereafter dragged out of the Panchayat and taken to road and then stabbed to death. It was in this background that the Apex Court of the country held that the accused persons in that case exceeded right of self defence.

Here in this case accused had come "second time" to the shop of Sunil. He did hurl filthy abuses second time, and pelted stones which had caused fear in the minds of the persons present in the shop who were scared and left the shop. He again tried to pick-up stone from in front of the shop of Sunil. In such a situation Sunil had a right to react and his apprehension of sustaining grievous injury at the hands of Gangaram was reasonable. It is noteworthy that the person apprehending danger is not required to wait for sustaining injury. Sustaining of injury is not necessary; mere reasonable apprehension would be sufficient for exercise of right of self-defence."

23. Their lordships of the Hon'ble Supreme Court in the case of ***Radhe vrs. State of Chhattisgarh,*** reported in ***AIR 2008 SC 2878,*** have held that right of private defence of body and property commences as soon as reasonable apprehension of danger arises from an attempt or threat. It lasts so long as reasonable apprehension of danger continues. It has been held as follows:

"7. Sections 102 and 105, IPC deal with commencement and continuance of the right of private defence of body and property respectively. The right commences, as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat, or commit the offence, although the offence may not have been committed but not until that there is that reasonable apprehension. The right lasts so long as the reasonable apprehension of the danger to the body continues. In Jai Dev v. State of Punjab (AIR 1963 SC 612), it was observed that as soon as the cause for reasonable apprehension disappears and the threat has either been destroyed or has been put to route, there can be no occasion to exercise the right of private defence."

24. There were no major contradictions as observed by the learned trial Court in the statement of the accused made by him under Section 313 Cr.P.C. and the statement of DW-1.

25. Their lordships' of the Hon'ble Supreme Court in the case of ***State of Haryana vrs. Ram Singh,*** reported in ***(2002) 2 SCC 426,*** have held that the evidence tendered by defence witnesses cannot always be termed to be a tainted one. The defence witnesses are entitled to equal treatment and equal respect as that of the prosecution. It has been held as follows:

"19. Significantly all disclosures, discoveries and even arrests have been made in the presence of three specific persons, namely, Budh Ram, Dholu Ram and Atma Ram - no independent witness could be found in the aforesaid context - is it deliberate or is it sheer coincidence - this is where the relevance of the passage from Sarkar on Evidence comes on. The ingenuity devised by the prosecutor knew no bounds - can it be attributed to be sheer coincidence? Without any further consideration of the matter, one thing can be, more or less with certain amount of conclusiveness be stated that these at least create a doubt or suspicion as to whether the same have been tailor-made or not and in the event of there being such a doubt, the benefit must and ought to be transposed to the accused persons. The trial court addressed itself on scrutiny of evidence and came

to a conclusion that the evidence available on record is trustworthy but the' High Court acquitted one of the accused persons on the basis of some discrepancy between the oral testimony and the documentary evidence as noticed fully hereinbefore. The oral testimony thus stands tainted with suspicion. If that be the case, then there is no other evidence apart from the omnipresent Budh Ram and Dholu Ram, who however are totally interested witnesses. While it is true that legitimacy of interested witnesses cannot be discredited in any way nor termed to be a suspect witness but the evidence before being ascribed to be trustworthy or being capable of creating confidence, the court has to consider the same upon proper scrutiny. In our view, the High Court was wholly in error in not considering the evidence available on record in its proper perspective. The other aspect of the matter is in regard to the defence contention that Manphool was missing from the village for about 2/3 days and is murdered on 21-1-1992 itself. There is defence evidence on record by DW 3 Raja Ram that Manphool was murdered on 21-1-1992. The High Court rejected the defence contention by reason of the fact that it was not suggested to Budh Ram or Dholu Ram that the murder had taken place on 21-1-1992 itself and DW 3 Raja Ram had even come to attend the condolence and it is by reason therefor Raja Ram's evidence was not accepted. Incidentally, be it noted that the evidence tendered by defence witnesses cannot always be termed to be a tainted one - the defence witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and the trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution. Rejection of the defence case on the basis of the evidence tendered by the defence witness has been effected rather casually by the High Court. Suggestion was there to the prosecution witnesses, in particular PW 10 Dholu Ram that his father Manphool was missing for about 2/3 days prior to the day of the occurrence itself - what more is expected of the defence case: a doubt or a certainty - jurisprudentially a doubt would be enough: when such a suggestion has been made the prosecution has to bring on record the availability of the deceased during those 2/3 days with some independent evidence. Rejection of the defence case only by reason thereof is far too strict and rigid a requirement for the defence to meet - it is the prosecutor's duty to prove beyond all reasonable doubts and not the defence to prove its innocence - this itself is a circumstance, which cannot but be termed to be suspicious in nature."

26. Their lordships' of the Hon'ble Supreme Court in the case of ***Sanjiv Kumar vrs. State of Punjab,*** reported in ***(2009) 16 SCC 487,*** have held that generally defence witnesses are observed to be untruthful, however, it is not to say that in all cases defence witnesses must be held to be unthruthful, merely because they support the case of accused. Right given to accused to explain incriminating circumstances appearing against him, serves a purpose, which cannot be ignored outrightly.

"23. It has been observed that defence witnesses are often untruthful, but that is not to say that in all cases defence witnesses must be held to be untruthful, merely because they support the case of the accused. The right given to the appellant to explain the incriminating circumstances appearing against him serves a purpose, and cannot be ignored outright. In every case the court has to see whether the defence set up by the accused is probable, having regard to the totality of the facts and circumstances of the case. If the defence appears to be probable, the court may accept such defence. This is primarily a matter of appreciation of evidence on record and no straitjacket formula can be enunciated in this regard."

27. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 19.5.2014 and consequent order dated 22.5.2014, rendered by the learned Addl. Sessions Judge, Kullu, H.P., in Sessions trial No. 39 of 2014 (2012), is set aside. The accused is acquitted of the charge framed under Section 302 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.

28. 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.

Satpal ...Petitioner.
Versus
State of H.P. and another ...Respondents.

Cr.M.M.O No. : 210/2015
Decided on: 5.11.2015

Code of Criminal Procedure, 1973- Section 482- An FIR was registered under Sections 363 and 366 of IPC and Section 4 of POCSO Act against the petitioner- petitioner approached the Court for quashing of the FIR on the ground that he had married 'P' after having attained the age of majority and thereafter a daughter was also born to them- held, that FIR and complaint can be quashed under Section 482 Cr.P.C in appropriate cases to meet the ends of justice, where the Court is satisfied that parties have settled the dispute amicably and without any pressure- since, petitioner and 'P' were married after attaining the age of majority and had a daughter from the wedlock and were residing together amicably, thus, it is a fit case, where FIR requires to be quashed. (Para-5 to 9)

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

For the Petitioner : Mr. Nimish Gupta, Advocate.
For the Respondent : Mr. Parmod Thakur, Addl. A.G. with Mr. Neeraj K. Sharma, Addl. A.G. for respondent No.1.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge (oral).

This petition is instituted for quashing of FIR No.45/2013 dated 18.12.2013 registered at Police Station, Sadar, District Chamba for offence under sections 363 and 366 of the Indian Penal Code and 4 of the Protection of Children from Sexual Offences Act.

2. "Key facts" necessary for the adjudication of this petition are that petitioner and Pooja daughter of respondent No.2 were having love affair. They intended to marry each

other. They married and a female child was born on 13.6.2014. Petitioner and Pooja have attained the age of majority as per the material placed on record. In view of this, continuation of proceedings arising out of FIR No. 45/2013 for offences punishable under sections 363 and 366 IPC and 4 of the Protection of Children from Sexual Offences Act would lead to gross misuse of process of law. Continuation of proceedings would also be futile exercise.

3. Mr. Parmod Thakur, learned Additional A.G. has vehemently argued that the offences are non-compoundable and the proceedings be not quashed.

4. I have heard the learned counsel for the parties.

5. FIR No. 45/2013 was registered on 18.2.2013 for offences punishable under sections 363 and 366 of the Indian Penal Code and 4 of the Protection of Children from Sexual Offences Act. Petitioner was declared as proclaimed offender by the Chief Judicial Magistrate, Chamba vide order dated 23.4.2014 and the challan was also put up in the court on 25.4.2004. In fact, petitioner has appeared before the Court with his wife and minor daughter to prove that he was married to Pooja and a child was born on 13.6.2014.

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

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

7. Their Lordships of the Hon'ble Supreme Court ***in Preeti Gupta and another*** vs. ***State of Jharkhand and another***, (2010) 7 SCC 667 have held that the ultimate object

of justice is to find out the truth and punish the guilty and protect the innocent. The tendency of implicating the husband and all his immediate relations is also not uncommon. At times, even after the conclusion of the criminal trial, it is difficult to ascertain the real truth. Experience reveals that long and protracted criminal trials lead to rancour, acrimony and bitterness in the relationship amongst the parties. The criminal trials lead to immense sufferings for all concerned. Their Lordships have further held that permitting complainant to pursue complaint would be abuse of process of law and the complaint against the appellants was quashed. Their Lordships have held as under:

> **[27] A three-Judge Bench (of which one of us, Bhandari, J. was the author of the judgment) of this Court in Inder Mohan Goswami and Another v. State of Uttaranchal & Others, 2007 12 SCC 1 comprehensively examined the legal position. The court came to a definite conclusion and the relevant observations of the court are reproduced in para 24 of the said judgment as under:-**
>
> "**Inherent powers under section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute.**"
>
> **[28] We have very carefully considered the averments of the complaint and the statements of all the witnesses recorded at the time of the filing of the complaint. There are no specific allegations against the appellants in the complaint and none of the witnesses have alleged any role of both the appellants.**
>
> **[35] The ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. To find out the truth is a herculean task in majority of these complaints. The tendency of implicating husband and all his immediate relations is also not uncommon. At times, even after the conclusion of criminal trial, it is difficult to ascertain the real truth. The courts have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realities into consideration while dealing with matrimonial cases. The allegations of harassment of husband's close relations who had been living in different cities and never visited or rarely visited the place where the complainant resided would have an entirely different complexion. The allegations of the complaint are required to be scrutinized with great care and circumspection.**
>
> **36. Experience reveals that long and protracted criminal trials lead to rancour, acrimony and bitterness in the relationship amongst the parties. It is also a matter of common knowledge that in cases filed by the complainant if the husband or the husband's relations had to remain in jail even for a few days, it would ruin the chances of amicable settlement altogether. The process of suffering is extremely long and painful.**

> **[38] The criminal trials lead to immense sufferings for all concerned. Even ultimate acquittal in the trial may also not be able to wipe out the deep scars of suffering of ignominy. Unfortunately a large number of these complaints have not only flooded the courts but also have led to enormous social unrest affecting peace, harmony and happiness of the society. It is high time that the legislature must take into consideration the pragmatic realities and make suitable changes in the existing law. It is imperative for the legislature to take into consideration the informed public opinion and the pragmatic realities in consideration and make necessary changes in the relevant provisions of law. We direct the Registry to send a copy of this judgment to the Law Commission and to the Union Law Secretary, Government of India who may place it before the Hon'ble Minister for Law & Justice to take appropriate steps in the larger interest of the society.**

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

> **[13] As stated earlier, it is not in dispute that after filing of a complaint in respect of the offences punishable under Sections 498A and 406 of IPC, the parties, in the instant case, arrived at a mutual settlement and the complainant also has sworn an affidavit supporting the stand of the appellants. That was the position before the trial Court as well as before the High Court in a petition filed under Section 482 of the Code. A perusal of the impugned order of the High Court shows that because the mutual settlement arrived at between the parties relate to non-compoundable offence, the court proceeded on a wrong premise that it cannot be compounded and dismissed the petition filed under Section 482. A perusal of the petition before the High Court shows that the application filed by the appellants was not for compounding of non-compoundable offences but for the purpose of quashing the criminal proceedings.**
>
> **[14] The inherent powers of the High Court under Section 482 of the Code are wide and unfettered. In B.S. Joshi , this Court has upheld the powers of the High Court under Section 482 to quash criminal proceedings where dispute is of a private nature and a compromise is entered into between the parties who are willing to settle their differences amicably. We are satisfied that the said decision is directly applicable to the case on hand and the High Court ought to have quashed the criminal proceedings by accepting the settlement arrived at.**
>
> **[15] In our view, it is the duty of the courts to encourage genuine settlements of matrimonial disputes, particularly, when the same are on considerable increase. Even if the offences are non-compoundable, if**

they relate to matrimonial disputes and the court is satisfied that the parties have settled the same amicably and without any pressure, we hold that for the purpose of securing ends of justice, Section 320 of the Code would not be a bar to the exercise of power of quashing of FIR, complaint or the subsequent criminal proceedings.

[16] There has been an outburst of matrimonial disputes in recent times. The institution of marriage occupies an important place and it has an important role to play in the society. Therefore, every effort should be made in the interest of the individuals in order to enable them to settle down in life and live peacefully. If the parties ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law, in order to do complete justice in the matrimonial matters, the courts should be less hesitant in exercising its extraordinary jurisdiction. It is trite to state that the power under Section 482 should be exercised sparingly and with circumspection only when the court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice require that the proceedings ought to be quashed. We also make it clear that exercise of such power would depend upon the facts and circumstances of each case and it has to be exercised in appropriate cases in order to do real and substantial justice for the administration of which alone the courts exist. It is the duty of the courts to encourage genuine settlements of matrimonial disputes and Section 482 of the Code enables the High Court and Article 142 of the Constitution enables this Court to pass such orders.

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

9. Accordingly, in view of discussion and analysis made hereinabove, the petition is allowed. FIR. No.45/2013 registered at Police Station Sadar Chamba including challan are quashed. Pending application(s), if any, also stands disposed of. No costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Shridhar Sharma .....Appellant.

Versus

Mukesh Thakur and others. ...Respondents.

LPA No.:198 of 2014
Reserved on: 15/10/2015.
Date of Decision : 05.11.2015

Constitution of India, 1950- Article 226- Writ petitioner was appointed as Constable on secondment basis- he was absorbed as clerk in H.P. Administrative Tribunal - when the Tribunal was disbanded, he was put in surplus pool - he joined the office of Lokayukta and was absorbed as clerk- Lokayukta notified Recruitment and Promotion Rules for the post of Senior Assistant Class-III, providing that post of Senior Assistant was to be filled 100% by promotion failing which on secondment basis- writ petitioner pleaded that he was eligible for promotion under the Rules- condition provided that official would be placed at the bottom in the respective cadre and seniority would be counted on the basis of his joining in the department on secondment basis- it was contended that writ petitioner was estopped from claiming seniority on the basis of this condition- Writ Court held that past service would be counted while counting the qualifying services for promotion in the feeder cadre- held, that mere acceptance of the condition by the petitioner will not estop him from claiming the benefit of past service for fulfilling the eligibility criteria- further, proviso to the rules read that minimum qualifying services of three years or that prescribed in the Rules which ever less shall be considered- writ petitioner fulfilled this criterion- Writ Court rightly held entitled for the relied- appeal dismissed. (Para-3 to 6)

Case reffered:
Union of India and others vs. Deo Narain and others, (2008) 10 Supreme Court Cases 84

For the Appellant:	Mr. P.P. Chauhan, Advocate.
For the respondents:	Mr.Dilip Sharma, Senior Advocate with Mr. Minish Sharma, Advocate, for respondent No.1. Mr. Anup Rattan, Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for respondents No.2 and 3.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, *Judge*

Respondent No.1 herein had instituted before this Court Civil Writ Petition No.9603 of 2013 for affording in his favour the hereinafter extracted reliefs:-

> (i) That the respondent No.2 may be directed to consider the petitioner for promotion to the post of Senior Assistant from a date prior to the date of appointment of respondent No.3 as Senior Assistant on secondment basis in the office of respondent No.2 i.e. 19.6.2012 with all consequential benefits.
>
> (ii) That if it is found necessary to quash the appointment on secondment basis of respondents No.3 and 4 or anyone of them vide Annexures P-5 and P-11 or any other appointment on secondment basis made during the pendency of writ petition, in that event such appointment(s) may also be quashed and set aside.

2. The learned Single Judge of this court while considering the factual matrix of the case at hand entwined with the case law apposite to it, had wrested the controversy in favour of respondent No.1 herein. The appellant herein arrayed as respondent No.3 in the writ petition, being aggrieved by the judgment of the learned Single Judge has instituted the instant appeal before this Court assailing the findings recorded therein in favour of respondent No.1 herein. Respondent No.1 herein was appointed by direct recruitment as Constable in the Himachal Pradesh Police Department in the year 1988. He joined on

2.8.1994 as Gunman on secondment basis in the erstwhile H.P.State Administrative Tribunal (for short the Tribunal) and was eventually absorbed therein as a Clerk on 11.12.2001. On the disbanding of the Tribunal petitioner was on 9.7.2008 put in the surplus pool of the H.P. Government, yet he remained posted as Clerk on the establishment of the Tribunal upto May, 2009. Subsequently, the petitioner on 1.6.2009 joined the office of the Lokayukta, Himachal Pradesh, (for short the Lokayukta) and his case for permanent absorption was sent to the Government vide order of 16.8.2010. The petitioner stood permanently absorbed w.e.f. 1.6.2009 in the Lokayukta. The office of Lokayukta on 7.3.2011 notified Recruitment and Promotion Rules for the post of Senior Assistant Class-III (non-gazetted). The Rules aforesaid envisaged that the post of Senior Assistant was to be filled 100% by promotion failing which on secondment basis, besides there was a contemplation therein of promotion being made amongst the common clerical cadre of Clerk/Junior Assistant possessed of 10 years regular service or regular combined with continuous ad hoc service rendered in the grade, failing which on secondment basis from the incumbents in the said post working in identical pay scale in other Government departments.

3. Respondent No.1 herein espoused his having satiated the germane enshrined criteria envisaging completion of 10 years regular service or regular combined with continuous adhoc service rendered, if any in the grade/feeder category, inasmuch his having since his absorption as a Clerk in the Tribunal on 11.12.2001 upto the stage when vacancies in the promotional cadre occurred hence stripping the concert of the respondents to oust his claim for promotion to the post of Senior Assistant Class-III of its vigour. The relevant portion of Rule 11 of the Recruitment and Promotion Rules (hereinafter referred to as the 'Rules') for the post of Senior Assistant (Class-III) in the Lokayukta stands extracted hereinafter:-

11.	In case of recruitment by promotion deputation transfer grade from which promotion/ deputation/ transfer is to be made.	(1) By promotion from amongst the common, clerical cadre of Clerk/Junior Assistant, with 10 years regular service or regular combined with continuous ad hoc service rendered, if any in the grade failing which on secondment basis from the incumbents of this post working in identical pay scale from the other Government departments.

4. Apart therefrom, the contesting respondents had endeavored to oust the claim of respondent No.1 herein for his being considered for promotion to the post of Senior Assistant from his post of clerk arising from acceptance by him of the conditions precedent enshrined in the letter of 13.12.2011 emanating from the contesting respondent No.1 and addressed to respondent No.2, whereupon his services as a Clerk in the Lokayukta stood permanently absorbed. The conditions stands extracted hereinafter:-

> 1. The absorption shall be strictly in the own pay scale of Clerk and Asstt. Registrar (HPAT). In the case of any official if working in the higher pay scale of cadre of Clerks/Asstt. Registrar in the parent department at the time of absorption, only the basis payoff such employees shall be protected.
>
> 2. For the present, this absorption will be on temporary basis and they shall be on probation for the period of 2 (two) years.

> 3. The official being absorbed shall be placed at the bottom in their respective grade/cadre and seniority shall be determined on the basis of their joining in the department on secondment basis.
>
> 4. The absorption shall also be subject to satisfactory verification of character antecedents, if the same is not done earlier.

With condition No.3 enshrined therein which stood accepted by respondent No.1 herein and with its constituting a condition precedent for his being permanently absorbed in the Lokayukta, bespeaking the factum of his being placed at the bottom in the respective grade/cadre and his seniority liable to be determined on the basis of his joining in the department on secondment basis estopped besides imposed a legal fetter upon him to, on the anvil of the Rule 11 of the "Rules" claim any right for his being considered for promotion from his post of clerk to the post of Senior Assistant (Class-III) in the Lokayukta. In other words, it was contested by the contesting respondents to the writ petition that his seniority for his being considered for promotion to the post of Senior Assistant (Class-III) in the office of the Lokayukta from the post of clerk, is reckonable from the date of his joining in the office of the Lokayukta on 1.6.2009. The learned Single Judge of this Court, while culling out the ratio of the decision rendered by this Court in CWP No.8449 of 2010, titled Andeep Rana and others vs. State of H.P. Subordinate Services Selection Board, which bestowed a right in respondent No.1 therein to receive the benefit of his past service for the purpose of seniority and which decision of the learned Single Judge of this Court stood affirmed by the Division Bench of this Court in Letters Patent Appeal No.34 of 2012, held that when respondent No.1 herein satiated the eligibility criteria embedded in Rule 11 of the "Rules", emerging from the factum of his having since 11.12.2001 whereupon he stood absorbed as a Clerk in the Tribunal, till the stage of occurrence of vacancies in the promotional cadre rendered the enjoined period of qualifying service hence constituted his having in consonance therewith rendered the enjoined period of qualifying service in the feeder category for such fastening a right in him to stake a claim for his name being considered for promotion to the promotional cadre besides rendered the invocation of the conditions existing in the letter of respondent No.2 herein addressed to respondent No.3 herein, on acceptance whereof by respondent No.1 herein, his services in the Lokayukta stood permanently absorbed as a Clerk for defacilitating respondent No.1 herein to claim the right aforesaid, to be afflicted with legal emasculation. Even otherwise immense strength to the factum of acceptance of the hereinabove conditions by respondent No.1 herein whereupon his services in the Lokayukta stood permanently absorbed under communication of 13.12.2011 addressed by respondent No.2 herein to respondent No.3 herein acquiring no legal leverage besides devoid of legal force, to oust the claim of respondent No.1 herein to be considered for promotion to the post of Senior Assistant from his hitherto post of clerk in the Lokayukta nor estopping him to claim the aforesaid right stands garnered by the factum of respondent No.1 herein having as afore-stated satiated the eligibility criteria for vesting him a right of his name being considered for promotion to the post of Senior Assistant from post of Clerk, upsurging from the fact of his, in tandem with Rule 11, relevant portion whereof stands extracted hereinabove having completed 10 years of regular service reckonable from 11.12.2001 whereto he stood permanently absorbed as a Clerk uptil the stage when a vacancy/vacancies in the promotional cadre of Senior Assistant occurred. In sequel his having hence satiated the germane eligibility criteria constituted in the Rules overcomes besides overwhelms the legal impact if any of the conditions precedent imposed upon him under a letter of 13.12.2011, addressed by respondent No.2 to respondent No.3, on acceptance whereof by him his services in the Lokayukta stood permanently absorbed nor also any acceptance by him of the aforesaid conditions can give any room to them to have any play nor can they hence acquire any operational force so as to oust the command of the

relevant criteria constituted in Rule 11 of the "Rules", especially when the relevant criteria contemplated therein, of respondent No.1 being enjoined to render 10 years of continuous/regular service as a Clerk reckonable from 11.12.2001 stands achieved by him. In giving precedence to the acceptance by respondent No.1 herein of the conditions precedent cast in the letter of 13.12.2011 whereupon his services were permanently absorbed would relegate into the limbo of oblivion the sway or the operational command of the Rules, which relegation has to be obviated, as then it would beget infraction of the "Rules" as also would erode the vested right of respondent No.1 herein anchored thereupon for his being considered for promotion to the post of Senior Assistant from cadre of clerk, moreso when he has satiated the eligibility criteria contemplated therein. Furthermore, with the Hon'ble Apex Court in a verdict nomenclatured as **Union of India and others vs. Deo Narain and others,** reported in (2008) 10 Supreme Court Cases 84, the relevant portion of which stands extracted hereinafter

> "32..... The only thing which this Court said and with respect, rightly is that such an employee who had already worked in a particular cadre and gained experience, will not lose past service and experience for the purpose of considering eligibility when his case comes up for consideration for further promotion."

investing a right in an employee who has already worked in a particular cadre and gained experience to not lose past service and experience for the purpose of considering eligibility when his case comes up for consideration for further promotion renders the espousal by the petitioner of his alone, to the ouster of the claim of respondent No.1, having a vested right for his being considered for promotion to the post of Senior Assistant from the post of Clerk held by him, to not attain a sacrosanct legal pedestal, when for reasons aforesaid the right of respondent No.1 herein to claim his name being considered for promotion to the post of Senior Assistant from the post of clerk stands satiated within the purview of the rules whose operational force cannot be either sabotaged or throttled.

5. Dehors the above even the factum of respondent No.1 herein having accomplished the mandate of the relevant underlined portion of the proviso of Rule 11 of the "Rules", which stands extracted hereinafter:

> "Provided that in all cases, where a junior person becomes eligible for consideration by virtue of his total length of service (including the service rendered on ad hoc basis followed by regular service/appointment) in the feeder post in view of the provisions referred to above, all person senior to him in the respective category/post/cadre shall be deemed to be eligible for consideration and placed above the junior person in the field of consideration.
>
> **Provided that all incumbents to be considered for promotion shall possess the minimum qualifying service of at least three years or that prescribed in the Recruitment and Promotion Rules for the post whichever is less".**

gives him an added impetus to stake a claim for his name being considered for promotion to the post of Senior Assistant from the post of Clerk especially when hence his claim for his name being considered for promotion in the promotional cadre of Senior Assistant also does fall within the amplitude of the proviso. Even though the learned counsel for the appellant herein has contended that the application of the ratio of the judgement rendered in CWP No. 8449 of 2010 titled Andeep Rana and others vs. State of H.P. Subordinate Services Selection Board, by the learned Single Judge of this Court to the factual matrix of the

instant case was inapposite given the purported distinctivity in the factual scenario in the judgment relied upon vis-à-vis the factual matrix of the case in hand, inasmuch as with respondent No.1 herein having accepted the conditions precedent manifested by respondent No.2 in its letter of 13.12.2011 addressed by it to respondent No.3, whereupon it hence permitted the latter to permanently absorb the services of respondent No.1 herein as a Clerk in the Lokayukta and whose acceptance hence estopped respondent No.1 herein to claim promotion under the Rules besides rendered the judgement by the learned Single Judge of this Court in CWP No. 8449 of 2010 and affirmed by the Division Bench of this Court in LPA No. 34 of 2012, to be inapplicable. He contends that the verdict of the learned Single Judge acquires no binding force. However, the said argument is rudderless and stands effaced by the afore-referred discussion underlining the fact that any acceptance by respondent No.1 herein of the conditions precedent spelt out in the letter addressed by respondent No.2 herein to respondent No.3 herein whereupon his services stood permanently absorbed as a clerk, would not either estop him or forestall him to on its anvil stake a claim for his being considered for promotion to the promotional cadre of Senior Assistant especially when the right aforesaid stands ensued in his favour arising from his in tandem with the rules satiated the germane eligibility criteria encompassed therein, whose operational force or diktat cannot be subjected to any decapitation while applying to them the principle of estoppel arising from the factum of respondent No.1 herein having accepted the conditions precedent constituted in the letter of 13.12.2011 addressed by respondent No.2 to respondent No.3 whereupon services of respondent No.1 herein as a Clerk stood permanently absorbed in the office of the Lokayukta.

6. The view taken by the learned Single Judge is both a fair and just view anvilled upon an incisive and discerning consideration of the factual matrix in conjunction with the Rules and case law, which stands applied correctly to the factual matrix of the case.

7. Pre-eminently with the appellant herein having not contested the civil writ petition by filing a reply to it, rather estops the appellant herein to assail the decision of the learned Single Judge of this Court by instituting an appeal therefrom before this Court.

8. In view of the above discussions, the present appeal fails and the same is dismissed accordingly.

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

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

Cr.A. No. 302 of 2006
Reserved on: 3.11.2015
Decided on: 5.11.2015

Prevention of Food Adulteration Act, 1954- Section 16 (1) (a) (i)- Food Inspector took sample of Arhar Dal for analysis from the shop of the accused- sample was found to be adulterated on analysis – sample was taken in a carry bag- held that samples are to be taken in clean bottles, jars or any other suitable containers, which are to be closed sufficiently tight to prevent leakage, evaporation and entrance of moisture- polythene bag does not fall within the definition of a container as per description in Rule 14- Further, as

per Food Inspector, 600 grams of Arhar Dal was divided into three parts of 200 grams each, whereas, 150 grams Dal was received for analysis which does not confirm to the quantity of Dal prescribed in rules- prosecution case was not proved in these circumstances and accused was rightly acquitted. (Para-12 to 17)

Cases referred:
State of Himachal Pradesh vs. Hans Raj 1992 (1) FAC 73
State of Punjab vs. Raman Kumar, 1998 Cri.L.J. 737
Food Inspector v. Gunturu Venkateswara Rao and Another, 2009 Cri.L.J

For the Appellant : Mr. Parmod Thakur, Addl. A.G.
For the Respondent: Mr. Bhupender Gupta, Sr. Advocate with Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Appeal is directed against the judgment dated 11.5.2006 rendered by the Additional Sessions Judge, Shimla in Criminal Appeal No. 9/10 of 2004/02.

2. "Key facts" necessary for the adjudication of this appeal are that Sh. L.D. Thakur was working as Food Inspector for the District Shimla and visited Rohru on 21.4.2001. Accused was running a Karyana shop in the name and style of M/s Krishna Trading Company, Rohru in Rohru Bazar. The shop was visited by the Food Inspector at about 12.30 P.M. He disclosed his identity. He also disclosed his intention to take sample of Arhar dal for analysis. He issued notice to the accused. Thereafter, he purchased 600 grams of Arhar dal from a gunny bag placed in the shop containing 40 kgs of Arhar dal, which was displayed for sale. It was made homogeneous with bamboo (instrument used for mixing food articles). He paid the price and obtained the receipt. 600 grams of Dal was separated into three parts and was placed in three thick polythene bags, which was made air tight and was sealed. Accused was made to affix his signatures in such a manner that half of the signatures came on the slip and half on the thick paper. It was made tight with strong thread and thereafter seals were affixed by covering all the knots on the thread. A copy of form No.VII was placed in separate envelope and seal impression was also placed in envelope. The sample and copy of form No.VII were sent to the Public Analyst. Remaining two samples alongwith copies of form No.VII and seal impression were sent to the Local Health Authority. After the receipt of the report from the Public Analyst, the Food Inspector was informed by the office of the Local Health Authority through a letter. He collected all he papers and placed before the C.M.O. The C.M.O. gave written consent to launch the prosecution.

3. Thereafter, notice was sent to the accused. Accused applied for sending of one sample for analysis by the Director Central Food Laboratory, which was sent accordingly. The Director Central Food Laboratory reported the contents to be adulterated within the meaning of the Act. Notice under section 251 Cr.P.C. was issued. Prosecution evidence was recorded. Statement of accused was recorded. Accused stated that when the sample was taken he was not in the shop. Accused was sentenced by the Additional Chief Judicial Magistrate, Rohru for offence punishable under section 16 (1) (1) (i) of the Prevention of Food Adulteration Act vide judgment/order dated 5.8.2002/6.9.2002. Accused filed an appeal against the judgment/order dated 5.8.2002/6.9.2002 before the

Additional District Judge, Shimla. He allowed the same on 11.5.2006. Hence, the present appeal.

4. Mr. Parmod Thakur, learned Addl. A.G. has vehemently argued that the prosecution has proved the case against the accused for offence under section 16 (1) (a) (i) of the Prevention of Food Adulteration Act.

5. Mr. Bhupender Gupta, learned Senior Advocate has supported the judgment dated 11.5.2006.

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

7. PW-1 L.D. Thakur has testified that on 21.4.2001 at about 12.30 P.M., he visited the shop of accused. He found in a gunny bag about 40 Kgs Arhar dal. It was displayed for sale. He disclosed his identity. He purchased 600 grams of Arhar dal and paid a sum of Rs. 19.20 paise. The receipt was taken vide Ex.P-2. Dal was mixed with a clean bambo before purchasing it. Dal was separated into three parts and was packed into three thick polythene bags, which was closed with burning candle and was made air tight. The details of the sample were affixed on every packet and thereafter it was wrapped with thick paper, which was bearing Sr. number and code No.S-1/35/9 was affixed on the packets. Accused also signed on every packet. The samples were wrapped with strong thread, which was sealed with wax and four seals each were affixed on each packet. One sample alongwith form No.VII was sent with sealed packet to the Public Analyst, Kandaghat through Peon. One seal cover was sent separately to the Local Health Authority. Arhar Dal was found to be adulterated by the Public Analyst. The C.M.O. gave the permission to launch prosecution. Thereafter, he filed the complaint Ex.P-12. In his cross-examination, he has denied that no suitable container was used for taking the sample.

9. PW-5 Gulab Singh has deposed that nothing was done in his presence. The Food Inspector took permission to ask questions, which were permitted to be asked. He has deposed that he was present in the shop of accused on 21.4.2001. However, he could not tell that the Food Inspector came there. Fact of the matter is that he has admitted signatures on Ex.P-1 to Ex.P-3.

10. PW-4 Ashok Kumar has deposed that he was working as Peon in the health department. He accompanied the Food Inspector at the time of taking sample. According to him, Dal was packed in three separate polythene bags and thereafter the bags were closed with burning candle making air tight and wrapped with thick paper. PW-2 Naresh Sharma, Dealing Assistant in the office of C.M.O. was also examined. According to him, report of the Public Analyst was received on 28.5.2001. PW-3 K.R. Dutta has deposed that he was Dealing Assisting upto August, 2001 in the office of C.M.O. Shimla. After perusing the documents pertaining to the case, Dr. Vijay Kumar Sood gave written consent.

11. PW-5 Gulab Singh has not supported the case of prosecution. He was declared hostile. He has admitted the signatures on Ex.P-1 to Ex.P-3. It is evident from the statement of PW-1 L.D. Thakur that sample was mixed with bamboo and not by applying quartering method, as envisaged, i.e. by taking the sample after making the same homogeneous and dividing the entire lot into the quarter and then taking one quarter for analysis. His statement that the Dal was mixed has not been supported by PW-2 Ashok Kumar and PW-5 Gulab Singh.

12. According to PW-1 L.D. Thakur, the samples were taken in polythene bags. According to rule 14 of the Prevention of Food Adulteration Rules, samples for the purpose

of analysis are required to be taken in clean dry bottles or jars or any other suitable containers, which are to be closed sufficiently tight to prevent leakage, evaporation or in the case of substance, entrance of moisture and shall be carefully sealed. . The object to put the sample in clean dry bottle or jar is not only to prevent leakage or evaporation of the contents of the bottle, but also to eliminate the changes of presence of moisture. Thus, the polythene bag cannot be called a container within the meaning of provisions of rule 14.

13. This Court in ***State of Himachal Pradesh*** vs. ***Hans Raj*** 1992 (1) FAC 73 has held that rule 14 of the Rules deals with the manner of sending samples for analysis. It was further held that the provision contained in this rule are required to be strictly complied with and non-compliance thereof would be fatal to the prosecution since the provisions contained in rule 14 are mandatory in nature.

14. Division Bench of Punjab and Haryana High Court in ***State of Punjab*** vs. ***Raman Kumar***, 1998 Cri.L.J. 737 has held that polythene containers or a wrapper of strong thick paper cannot conform to a definition of container as contained in Rule 14 of the Rules. Division Bench has held as under:

> **"[16] Manner of packing and sealing the samples: - All samples of food sent for analysis shall be packed, fastened and sealed in the following manner namely:-**
>
> **(a) The stopper shall first be securely fastened so as to prevent leakage of the contents in transit.**
>
> **(b) The bottle, jar or other container shall then be completely wrapped in fairly strong thick paper. The ends of the paper shall be neatly folded in and affixed by means of gum or other adhesive.**
>
> **(c) A paper slip of the size that goes round completely from the bottom to top of the container, bearing the signature and code and serial number of the Local (Health) Authority, shall be pasted on the wrapper, the signature or the thumb impression of the person from whom the sample has been taken being affixed in such a manner that the paper slip and the wrapper both carry a part of the signature or thumb impression:**
>
> **Provided that in case, the person from whom the sample has been taken refuses to affix his signature or thumb impression, the signature or thumb impression of the witness shall be taken in the same manner.**
>
> **(d) The paper cover shall be further secured by means of strong twine or thread both above and across the bottle, jar or other container, and the twine or thread shall then be fastened on the paper cover by means of sealing wax on which there shall be at least four distinct and clear impressions of the seal of the sender, of which one shall be at the top of the packet, one at the bottom and the other two on the body of the packet. The knots of the twine or thread shall be covered by means of sealing wax bearing the impression of the seal of the sender.**
>
> **[17] Manner of despatching containers of samples: The containers of the samples shall be despatched in the following manner, namely :-**
>
> **(a) The sealed container of one part of the sample for analysis and a memorandum in Form VII shall be sent in a sealed packet to the**

public analyst immediately but not later than the succeeding working day by any suitable means.

(b) The sealed containers of the remaining two parts of the sample and two copies of the memoranda in Form VII shall be sent in a sealed packet to the Local (Health) Authority immediately but not later than the succeeding working day by any suitable means:

Provided that in the case of a sample of food which has been taken from container bearing Agmark seal, the memorandum in Form VII shall contain the, following additional information namely :-

(a) Grade;

(b) Agmark label No. /batch No.

(c) Name of packing station.

[18] Memorandum and impression of seal to be sent separately: - A copy of the memorandum and specimen impression of the seal used to seal the packet shall be sent, in a sealed packet separately to the Public Analyst by any suitable means immediately but not later than the succeeding working day.

14. It may be noted that in the case in hand, the Food Inspector had purchased six packets out of 12 packets of 100 gms. each which were wrapped in polythine papers and on which it was printed as Kashmiri Mirch Chillies Powder M.S. Company, Delhi Trade Mark. The so purchased packets were made into three packets containing 2 packets in each parcel. Each parcel was labelled wrapped in a strong thick khakhi paper and a paper slip bearing serial number and signatures of L.H.A., Hoshiarpur were pasted on each parcel length wise covering top and bottom of each parcel and making the ends of slip join with the help of gum. Each sample parcel was fastened with a strong thread and were sealed with the seal of the Inspector at four distinct places as prescribed. Each sample parcel was got signed by the accused in such a way that one portion of the signature was on the slip and other portion on the wrapper. The Food Inspector also signed in the same manner and put his sample number.

15. In the case in hand, thus, the packets purchased by the Food Inspector were not put in any container. Each packet was wrapped in a thick khaki paper as provided in Rule 16 of the Rules.

16. By this reference, we are called upon to decide as to whether a sample taken in a wrapper of strong thick paper is in violation of Rules 14 and 16 of the Rules. From the facts of the case, it may be taken that the sample was taken as such which was contained in a polythene wrapper and then wrapped in a thick khaki paper under Rule 16 of the Rules.

17. We will advert ourselves to decide the question as to whether a polythene container or a wrapper of strong thick paper are covered under the definition of other suitable container as provided under the provisions of Rule 14 of the Rules.

18. The expression other suitable container used in Rule 14 of the Rules cannot be defined as such and this expression suitable container cannot be confined in a straight-jacket. There may be scores

of suitable containers as defined in the rules and as such it is difficult to furnish with exactitude the list of such suitable containers.

[19] The only point to be determined is as to whether a polythene container or a wrapper of strong thick paper can be called suitable containers as defined in Rule 14 of the Rules. Rule 14 provides that samples of food for the purpose of analysis shall be taken in clean dry bottles or jars or in other suitable containers, which shall be closed sufficiently tight to prevent leakage, evaporation, or in the case of dry substance, entrance of moisture and shall be carefully sealed. A reading of the rule gives us a clear impression that other suitable containers mentioned in the rule connotes that it should be as hard as bottles and jars and also could be closed sufficiently tight to prevent leakage, evaporation and in the case of dry substance entrance of moisture. The words bottles and jars are generally understood as closed bottles or blass jars.

[20] When interpreting other suitable containers, the provisions contained in Rule 14 of the Rules have to be read as a whole and the words suitable container takes the hue from the words used in the rule itself. The words bottles or jars mentioned before other suitable container in Rule 14 itself indicates that a suitable container should be as hard as a closed bottle or as a glass jar. The expression used in Rule 16(a) which reads as under:

16(a). The stopper shall first be securely fastened so as to prevent leakage of the contents in transit.

is also indicative of the fact that the container stipulated in Rule 14 will have a stopper also. With the advancement of time some other containers are also available which are as hard as closed; though they may be made of some other hard substance like tin, hard plastic or other material like the one in which we get tooth, paste, cream etc. In sum and substance a suitable container as defined in Rule 14, should be of an inpervious character which should be closed sufficiently tight and carefully sealed to prevent leakage, evaporation or entrance of moisture.

[21] In our considered view, polythene containers or a wrapper of strong thick paper cannot conform to a definition of container as contained in Rule 14 of the Rules. The polythene bags or a thick paper have got a chance of being pierced. They are most susceptible to moisture, rodents, pests and can even burst with a little more pressure put on them. Such type of containers are not in a position of being closed tightly to prevent leakage etc. A thick paper packet has the chance of even being completely wet and again is unable to prevent entering moisture into it. There are every chances of such type of containers being affected as stated above not by design but even by chance when in transit i.e. after the sample is taken by the Food Inspector in such containers and thereafter it reaches the laboratory for final analysis."

15. Learned Single Judge of Andhra Pradesh High Court in ***Food Inspector*** v. ***Gunturu Venkateswara Rao and Another***, 2009 Cri.L.J has held that polythene bag

cannot be called as container within the meaning of rule 14 of the Rules. Learned Single Judge has held as under:

> **"[5] Moreover, polythene bag cannot be called as container within the meaning of Rule 14 of the Rules. The rule mandates that the samples have to be drawn in clean glass containers (bottles). Admittedly, in the present case, PW1 the Food Inspector drew samples into the empty plastic containers and thereby resorted to deliberate violation of Rule 14."**

16. There was breach of rule 14 of the Prevention of Food Adulteration Rules in the present case.

17. According to PW-1 L.D. Thakur, 600 grams of Arhar Dal was divided into three parts, meaning thereby 200 gram of Arhar Dal was put in each sample, but it has come in the report of Director Central Food Laboratory that only approximately 150 grams sample of dal was received. The sample sent for analysis does not conform to the quantity of Arhar Dal received by the Director Central Food Laboratory. The samples were also not sent as per the provisions of rules 17 and 18 of the Prevention of Food Adulteration Rules, 1995.

18. The prosecution has failed to prove its case against the accused for offence punishable under section 16 (1) (a) (1) of the Prevention of Food Adulteration Act beyond reasonable doubt.

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

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. and others …Appellants.

Versus

Roshan Lal and others …Respondents.

LPA No. 184 of 2015
Decided on: 05.11.2015

Constitution of India, 1950- Article 226- Writ Court had directed the respondents/ appellants to release the due and admissible wages to the writ petitioners- Deputy Commissioner had admitted in his affidavit that writ petitioners were in position at the time when the patwaris of patwar circle had joined- this shows that writ petitioners were in position and respondents have rightly been directed to release the wages to the petitioners- petition dismissed. (Para-8 and 9)

For the appellants: Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, with Mr. J.K. Verma, Deputy Advocate General.

For the respondents: Mr. Naresh Verma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

CMP (M) No. 761 of 2015

By the medium of this limitation petition, the appellants-applicants have sought condonation of delay of 253 days, which has crept-in in filing the present Letters Patent Appeal.

2. We have gone through the limitation petition read with the impugned judgment and are of the considered view that the appellants-applicants have carved out a sufficient cause for condoning the delay. Accordingly, the delay is condoned. The limitation petition is disposed of.

LPA No. 184 of 2015

3. Appeal is taken on Board.

4. Issue notice. Mr. Naresh Verma, Advocate, waives notice on behalf of the respondents.

5. This Letters Patent Appeal is directed against the judgment and order, dated 04.08.2014, made by the learned Single Judge in CWP No. 3496 of 2009, titled as Roshan Lal & ors. versus State of H.P. & ors., whereby the writ petition filed by the writ petitioners-respondents herein came to be allowed and the writ respondents-appellants were directed to release the due and admissible wages of the writ petitioners-respondents herein (for short "the impugned judgment").

6. Heard.

7. Mr. J.K. Verma, learned Deputy Advocate General, argued that the writ petitioners are not in position and no appointment order was issued in their favour.

8. We have gone through the impugned judgment. It appears that the Deputy Commissioner was asked by the learned Single Judge to file an affidavit, the relevant portion of which has been reproduced in para 13 of the impugned judgment.

9. While going through para 13 of the impugned judgment, it is crystal clear that the Deputy Commissioner has admitted in the said affidavit that the writ petitioners were in position at the time when the Patwaris of the concerned Patwar Circles had joined, is suggestive of the fact that the writ petitioners were in position and the respondents have rightly been directed to release the wages to them.

10. Having said so, the impugned judgment is legal and speaking one, needs no interference.

11. In view of the above, the impugned judgment is upheld and the appeal is dismissed alongwith all pending applications.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAOs (MVA) No. 481 and 512 of 2009.
Judgment reserved on 30.10.2015
Date of decision: 6th November, 2015.

FAO No. 481 of 2009.

Charan Dass .....Appellant

Versus

Amar Singh and others ....Respondents

FAO No. 512 of 2009.

Amar Singh and another .....Appellant

Versus

Charan Dass and another ....Respondents

Motor Vehicles Act, 1988- Section 149- Driver had a valid driving licence to drive LMV (Trans.) and HTV- held, that he was competent to drive tractor – Insurer had not led any evidence to prove the breach of the insurance policy- insurer was rightly held liable to pay compensation. (Para-8)

Motor Vehicles Act, 1988- Section 166- Claimant had pleaded and proved that he was earning Rs. 8,000/- per month- he had sustained permanent disability to the extent of 30%- he had lost source of dependency to the extent of Rs. 2,500/- per month- age of the claimant was 54 years at the time of accident- multiplier of '9' was applicable- thus, claimant is entitled to Rs.2,70,000/- (2500 x 9 x 12) towards loss of income, Rs. 10,000/- towards attendant charges, Rs. 10,000/- towards transportation charges, Rs. 50,000/- towards pain and suffering and Rs. 50,000/- under the head loss of amenities of life- thus, total compensation of Rs. 3,90,000/- along with interest @ 7.5% per annum awarded from the date of the award. (Para-15 to 18)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755

Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085

Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787

Kavita versus Deepak and others, 2012 AIR SCW 4771

Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120

For the appellant(s):	Mr. Lalit K. Sharma, Advocate, for the appellants in FAO No. 512 of 2009 and Mr. G.R. Palsara, Advocate, for the appellants in FAO No. 481 of 2009.
For the respondent(s):	Mr.Lalit K. Sharma, Advocate, for respondents No. 1 and 2 in FAO No. 481 of 2009 Mr. G.R. Palsara, Advocate, for respondent No.1 in FAO No. 512 of 2009. Mr. B.M. Chauhan, Advocate, fo respondent No.2 in FAO No. 512 of 2009 and for respondent No. 3 in FAO No. 481 of 2009.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice,

Both these appeals are directed against the judgment and award dated 22.8.2009, passed by the Motor Accident Claims Tribunal, Mandi, H.P. hereinafter referred to as "the Tribunal" in Claim Petition No. 72 of 2006 titled *Charan Dass versus Amar Singh and other,* whereby compensation to the tune of Rs.82,822/- came to be awarded in favour of the claimant and insurer was directed to satisfy the award with right of recovery from the insured, hereinafter referred to as the "the impugned Award", for short".

2. The claimant in FAO No. 481 of 2009, has sought enhancement of compensation and insured Amar Singh and another have questioned the impugned award, by the medium of FAO No. 512 of 2009, on the ground that the Tribunal has fallen in an error granting the right of recovery to the insurer.

Brief facts.

3. Claimant Charan Dass was mason by profession, who on 28.11.2005, was coming on foot from village Dhangyara after laying slab at village Dhangyara, was hit at about 8 p.m. by a tractor bearing registration No. HP-32-0491, which was being driven by respondent No.2 Hukam Chand rashly and negligently. The claimant fell down and sustained multiple injuries, including fracture of his left arm, was taken to PHC Gohar from where he was referred to Zonal Hospital, Mandi. He remained admitted in the hospital at Mandi during the period from 28.11.2005 to 29.11.2005 and was referred to IGMC Shimla where he remained admitted during the period 29.11.2005 to 2.1.2006.

4. The claimant had sought compensation to the tune of Rs.8 lacs, as per the break-ups given in the claim petition.

5. The claim petition was resisted and contested by the respondents and following issues came to be framed.

(i) Whether respondent No.2 was driving the vehicle No. HP-32-0491, tractor on 28.11.2005 at about 8 P.M. at village Dhangyara, in rash and negligent manner, resulting injuries to the petitioner as alleged? OPP.

(ii) If issue No.1 is proved, whether the petitioner is entitled for compensation. If so as to what amount and from whom? OPP.

(iii) Whether respondent No. 2 at the time of accident was not holding a effective and valid driving licence and was driving the vehicle in violation of the terms and conditions of the insurance policy, as alleged? OPR-3.

(iv) Whether the petition is not legally maintainable? OPR-3.

(v) Relief.

6. The claimant himself has appeared in the witness-box as PW1 and examined Dr. Desh Raj Chandel as PW2. The insurer has not examined any witness. However, Sh. Hukam Chand stepped in to the witness-box as RW1.

7. The Tribunal, after scanning the evidence and pleadings, held that Hukam Chand driver has driven the offending vehicle rashly and negligently and caused the accident in which the claimant sustained injuries. No dispute has been raised on the findings returned on issue No. 1, thus, the findings returned on issue No. 1 are upheld.

8. Before I deal with issue No.2, I deem it proper to deal with issues No. 3 and 4 at the first instance. The Tribunal has fallen in an error in holding that the driver was not holding a valid and effective driving licence. The copy of driving licence is exhibited as Ext. RB on record, which do disclose that he was having a valid and effective diving licence to drive LMV. Trans and HTV. Thus, he was competent to drive the light motor vehicle and heavy transport vehicle. Thus, how can it be said that he was not competent to drive the tractor. It was for the insurer to plead and prove that the owner has committed willful breach in order to seek exoneration and right of recovery which it has not done. The onus was on the insurer, has failed to discharge the same. The Tribunal has wrongly returned the

findings and decided issue No.3. Thus, the findings returned on this issue are set aside and issue No. 3 is decided in favour of the claimant, driver and owner and against the insurer.

9. **Issue No. 4.** It was for the insurer to discharge the onus, failed to do so. Accordingly, the issue is decided against the insurer and in favour of the claimant.

10. **Issue No.2.** The amount awarded appears to be meager for the following reasons. The claimant has pleaded that he was in hospital at Mandi from 28.11.2005 to 29.11.2005 and was referred to IGMC Shimla where he remained admitted during the period 29.11.2005 to 2.1.2006. The medical bills stand exhibited and vouchers of the amount spent have also been exhibited as Marks B to F, Marks H-1 to H-5. The disability certificate Ext. PA is also on record, which stands proved by Dr. Desh Raj. He deposed that the claimant has suffered 30% permanent disability.

11. The Tribunal had to assess the compensation by making a guess work. The Apex Court in case titled as **R.D. Hattangadi** versus **M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755,** had discussed all aspects and laid down guidelines how a guess work is to be made and how compensation is to be awarded under various heads. 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."

12. The said judgment was also discussed by the Apex Court in case titled as **Arvind Kumar Mishra** versus **New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085**, while granting compensation in such a case. It is apt to reproduce para-7 of the judgment 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."

13. The Apex Court in case titled as **Ramchandrappa** versus **The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR SCW 4787** also laid down guidelines for granting compensation. It is apt to reproduce paras 8 & 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."

14. The Apex Court in case titled as **Kavita** versus **Deepak and others**, reported in **2012 AIR SCW 4771** also discussed the entire law and laid down the guidelines how to grant compensation. It is apt to reproduce paras 16 & 18 of the judgment 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."

15. Applying the test, the Tribunal has fallen in an error in awarding only Rs.40,000/- under the head "loss of future income" for the following reasons.

16. The claimant has pleaded and proved that he was earning Rs.8000/- per month. The injuries have affected his earning capacity by 30%. He was doing manual work.

Thus, at least he has lost source of dependency to the tune of Rs.2500/- per month. Admittedly, the age of the claimant was 54 years at the time of accident and multiplier of "9" was applicable in view of the 2nd Schedule of the Motor Vehicles Act, for short "the Act, read with ***Sarla Verma and others versus Delhi Transport Corporation and another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***. Thus, the claimant has lost source of income to the tune of Rs.2500x9x12= Total Rs.2,70,000/-.

17. The claimant was attended upon by an attendant during the period he remained admitted in the hospitals and at least he was entitled to Rs.10,000/- under the said head. The amount of **Rs.10,000/-** is awarded, which is upheld. The clamant was taken to PHC Gohar, Zonal Hospital, Mandi and thereafter referred to IGMC Shimla and incurred money for transportation also. Thus, under the head "Transportation charges" the claimant is held entitled to **Rs.10,000/-.** The claimant has been deprived of his enjoyment of life, has undergone pain and suffering and has to undergo pain and suffering for ever and being a labourer/ mason it has made his life very painful. Thus at least Rs.50,000/- has to be awarded under this head. Accordingly, **Rs.50,000/-** is awarded under the head "pain and sufferings for future" and **Rs.50,000/-** under the head "loss of amenities of life"

18. Having glance of the above discussion, the claimant is held entitled to Rs.2,70,000+ Rs.10,000/-+ Rs.10,000/- + Rs.50,000+ Rs.50,000/-. Total Rs.3,90,000/- with 7.5% interest per annum from the date of the impugned award till its realization.

19. The insurer is directed to deposit the entire amount along with enhanced amount, with interest from the date of the impugned award till its realization, within six weeks from today in the Registry. On deposit, the Registry is directed to release the entire amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees' cheque account.

20. Both the appeals are accordingly disposed of, as indicated hereinabove.

21. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Gurmail Singh and another .....Appellants

Versus

Kamla Devi & others .....Respondents

FAO No.396 of 2014

Date of decision: 06.11.2015

Motor Vehicles Act, 1988- Section 149- Driver was competent to drive light motor vehicle- he was driving Mahindra pick-up which was a light motor vehicle- held, that driver having a valid and effective driving licence to drive light motor vehicle is not required to have an endorsement of public service vehicle- Tribunal had wrongly held that insured had committed breach of the terms and conditions of the insurance policy- appeal allowed.

(Para-9 to 12)

For the appellants: Mr.Dhruv Shaunak, Advocate.

For the respondents: Mr.Dalip K. Sharma, Advocate, for respondents No.1 to 4.

Mr.B.M. Chauhan, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 22nd August, 2014, passed by the Motor Accident Claims Tribunal-III, Kangra at Dharamshala, (for short, "the Tribunal"), in MAC RBT No.82-J/13/09, titled Kamla Devi and others vs. Gurmail Singh and others, whereby compensation to the tune of Rs.8,36,200/-, with interest at the rate of 7% per annum, came to be awarded in favour of the claimant and the owner and the driver (appellants herein) were saddled with the liability, (for short the "impugned award").

2. The claimants and the insurer have not questioned the impugned award on any count. Thus, the same has attained finality so far it relates to them.

3. The owner and the driver have questioned the impugned award on the ground that the Tribunal has fallen in error in saddling them with the liability. Thus, the only issue needs to be answered in this appeal is – Whether the Tribunal has rightly exonerated the insurer from the liability?

Brief facts:

4. Claimants filed the claim petition on the ground that on 11.3.2009, at about 8.15 p.m., at a place known as Patta Jatiyan, a Jeep (Mahindra Pick Up), bearing registration No.HP54-4861, being driven by its driver Gagan Singh rashly and negligently, hit the motor-cycle bearing No.HP-54-1427, on which the deceased was traveling, as a result of which he received multiple injuries and succumbed to the same. Thus, the claimants filed the claim petition claiming compensation to the tune of Rs.12.00 lacs, as per the break-ups given in the Claim Petition.

5. The claim petition was resisted by the respondents by filing replies. On the pleadings of the parties, the Tribunal framed the following issues:

> *"1. Whether the respondent No.2 on 11-03-2009 about 8.15 P.M. near Patta Jatian drove bus No.HP-54-4861 of which respondent No.1 was owner in a rash and negligent manner and collided with vehicle No.HP-57-1427 coming from the opposite side being driven by Ravinder Singh, who sustained injuries and ultimately died due to said injuries as alleged? OPP*
>
> *2. If issue No.1 is proved, to what amount of compensation the petitioner is entitled and from whom? OPP*
>
> *3. Whether the petition against respondents No.1 & 2 is not maintainable as the vehicle of respondent No.1 was not involved in the alleged accident? OPR-1 & 2.*
>
> *4. Whether the driver of the offending vehicle was not holding valid and effective driving licence as alleged? OPR-3*
>
> *5. Whether the vehicle was being driven in breach of terms and conditions of Insurance Policy? OPR-3*
>
> *6. Relief."*

6. In order to prove the above issues, parties have led their respective evidence. The Tribunal held that the claimants have proved issue No.1.

7. In view of fact that issue No.3 came to be decided in favour of the claimants, it was further held that the owner had committed willful breach of the terms and conditions of the insurance policy for the reason that the driver was not having a valid and effective

driving licence to drive the vehicle in question. Accordingly, the Tribunal saddled the owner and the driver (appellants before this Court) with the liability.

8. Thus, the only controversy needs to be settled in this appeal is regarding issues No. 4 and 5 - whether the driver of the offending vehicle was having a valid and effective driving licence at the relevant point of time.

9. Admittedly, the driver of the offending vehicle I.e. Mahindra Pick UP, was competent to drive a light motor vehicle and the vehicle in question was also a light motor vehicle.

10. This Court in series of cases i.e. FAO No.320 of 2008, titled Dalip Kumar and another vs. New India Assurance Company Ltd. & another, decided on 6th June, 2014, FAO No.306 of 2012, titled Prem Singh and others vs. Dev Raj and others, decided on 18th July, 2014 and FAO No.54 of 2012, titled Mahesh Kumar and another vs. Smt.Priaro Devi and Others, decided on 25th July, 2014, has discussed the issue and held that the driver having driving licence to drive Light Motor Vehicle is not required to have endorsement of "PSV" i.e. public service vehicle. Further held that Mahindra Pick Up is a Light Motor Vehicle.

11. The Apex Court in latest decision, in **Kulwant Singh and others vs. Oriental Insurance Company Limited, (2015) 2 Supreme Court Cases 186,** has held that the driver who is having valid and effective driving licence to drive a Light Motor Vehicle is not required to have endorsement to drive a light commercial vehicle. It is apt to reproduce paragraphs No.10 and 11 hereunder:

> *"10. In S. Iyyapan (supra), the question was whether the driver who had a licence to drive 'light motor vehicle' could drive 'light motor vehicle' used as a commercial vehicle, without obtaining endorsement to drive a commercial vehicle. It was held that in such a case, the Insurance Company could not disown its liability. It was observed :*
>
> > *"18. In the instant case, admittedly the driver was holding a valid driving licence to drive light motor vehicle. There is no dispute that the motor vehicle in question, by which accident took place, was Mahindra Maxi Cab. Merely because the driver did not get any endorsement in the driving licence to drive Mahindra Maxi Cab, which is a light motor vehicle, the High Court has committed grave error of law in holding that the insurer is not liable to pay compensation because the driver was not holding the licence to drive the commercial vehicle. The impugned judgment (Civil Misc. Appeal No.1016 of 2002, order dated 31.10.2008 (Mad) is, therefore, liable to be set aside."*
>
> *No contrary view has been brought to our notice.*
>
> *11. Accordingly, we are of the view that there was no breach of any condition of insurance policy, in the present case, entitling the Insurance Company to recovery rights."*

12. The insurer has failed to prove, by leading cogent evidence, that the owner has committed willful breach of the terms and conditions contained in the insurance policy and has, thus, failed to discharge the onus in order to seek exoneration.

13. Having said so, the Tribunal has wrongly decided issues No.4 and 5.

14. In view of the above discussion, the appeal is allowed, the impugned award is modified and the insurer is fastened with the liability. The insurer is directed to deposit the amount of compensation alongwith interest, as awarded by the Tribunal, within eight weeks from today and on deposit, the Registry is directed to release the said amount in favour of the claimants forthwith, as per the terms and conditions contained in the impugned award.

In addition to that, the statutory amount of Rs.25,000/-, deposited by the insured/owner, is awarded in favour of the claimants as litigation cost throughout. The Registry is directed to release the said amount in favour of the claimants forthwith.

15. The appeal stands disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Jasbir Singh .....Appellant
Versus
Munish Kumar ..... Respondent

FAO No.527 of 2009
Date of decision: 06.11.2015

Motor Vehicles Act, 1988- Section 166- Medical Officer had given the details of the injuries sustained by the claimant- held, that Tribunal is expected to pass fair, just and proper award, keeping in mind the hardship, discomfort, loss of amenities of life, pain and sufferings- Tribunal had awarded meager amount, since it was not questioned, therefore, it was reluctantly upheld. (Para-11 to 13)

Case referred:
R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755

For the appellant: Mr. Vishal Panwar, Advocate.
For the respondent: Mr. S.R. Pundeyar, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 30th October, 2008, made by the Motor Accident Claims Tribunal-II, Solan, District Solan, H.P., (for short, "the Tribunal") in MAC Petition No.7-S/2 of 2008, titled Munish Kumar vs. Sh. Jasbir Singh, whereby a sum of Rs.2,60,000/-, alongwith interest at the rate of 12% per annum, came to be awarded as compensation in favour of the claimant and the original respondent (appellant herein) was saddled with the liability, (for short the "impugned award").

2. The claimant filed a claim petition for grant of compensation to the tune of Rs.5,00,000/-, as per break-ups given in the claim petition.

3. The respondent contested the claim petition by filing a reply.

4. The Tribunal, on the pleadings of the parties, framed the following issues:-

"1. Whether the petitioner had sustained injuries due to rash and negligent driving of respondent No.1 on 18.6.2007 near Sikand and Company, Chambaghat, Distt. Solan while driving vehicle No.HP-14-A-1989? OPP

2. If issue No.1 proved in affirmative, as to what amount of compensation, the petitioner is entitled to and from whom? OPP

3. Relief."

5. The claimant, in support of his claim, has examined five witnesses, while the respondent has not led any evidence. Thus, the evidence led by the claimant remained un-rebutted.

6. I have gone through the claim petition as well as the evidence led by the claimant.

7. Dr. Desh Raj Chandel has given the details about the injuries sustained by the claimant, which has been discussed by the Tribunal in paragraph-8 of the impugned award.

8. The learned counsel for the appellant argued that the claimant was not entitled to compensation. He was asked to show why the claimant was not entitled to compensation. He has admitted that the claimant sustained injuries and suffered multiple fractures, but submitted that the disability certificate was not issued in favour of the claimant.

9. The Tribunal, while determining issue No.2, has rightly recorded the findings in paragraphs 8 to 14 of the impugned award and decided the said issue correctly.

10. Having said so, the appellant has failed to carve out a case for modification of the impugned award.

11. The Apex Court in case titled as **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755,** has discussed all aspects and laid down guidelines how a guess work is to be done and how compensation is to be awarded under various heads 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."*

12. Following the law expounded by the Apex Court, this Court, in catena of judgments, has held that in an injury case, the courts are expected to pass an award which appears to be fair, just and proper, and keeping in mind the hardships, discomfort, loss of amenities of life, pain and sufferings undergone and has to undergo by the claimant-injured throughout his/her life.

13. After going through the facts of the case, I am of the view that the Tribunal has awarded meager amount. Unfortunately, since the claimant has not questioned the impugned award, therefore, the same is reluctantly upheld.

14.. In view of the above discussion, there is no merit in the appeal filed by the appellant and the same is dismissed. Consequently, the impugned award is upheld.

15. The respondent is directed to deposit the entire award amount within eight weeks from today in the Registry of this Court, alongwith interest as awarded by the Tribunal, and on deposit, the Registry is directed to release the same in favour of the claimant, strictly in terms of the conditions contained in the impugned award.

16. Send down the record after placing a copy of this judgment on the Tribunal's file.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

National Insurance Company Ltd. .....Appellant

Versus

Rishivansh Sharma & others ..... Respondents

FAO No.323 of 2010
Date of decision: 06.11.2015

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid and effective driving licence and insured had committed willful breach- award is excessive and the Tribunal had awarded interest on the higher side- held that driver had licence to drive light motor vehicle- offending vehicle was a jeep, the unladen weight of which was less than 7500 kilograms and would fall within the definition of 'light motor vehicle'- therefore, driver had a valid driving licence to drive the vehicle- endorsement of PSV is not required in such cases - insurer had not led any evidence to prove the breach of the policy on the part of the insured- Tribunal had awarded interest @ 9% per annum interest, which is excessive and is reduced to 7.5% per annum- Tribunal had awarded compensation in accordance with the law and was not on higher side-appeal partly allowed. (Para-9 to 17)

Cases referred:

Kulwant Singh and others vs. Oriental Insurance Company Limited, (2015) 2 SCC 186
National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 SCC 217
R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755

For the appellant: Ms.Seema Sood, Advocate.
For the respondents: Nemo for respondents No.1 and 3.
Ms. Monica Shukla, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 24th April, 2010, passed by the Motor Accident Claims Tribunal-I, Kangra at Dharamshala, (for short, "the Tribunal"), in

MAC Petition No.29-K/II of 2007, titled Rishivansh Sharma vs. M/s Vikas Traders and others, whereby compensation to the tune of Rs.4,45,463/-, with interest at the rate of 9% per annum and costs quantified at Rs.2,000/-, came to be awarded in favour of the claimant and the insurer was saddled with the liability, (for short the "impugned award").

2. The claimant, the owner and the driver have not questioned the impugned award on any count. Thus, the same has attained finality so far it relates to them.

3. The insurer has questioned the impugned award on four grounds, namely – i) the driver was not having a valid and effective driving licence; ii) the insured had committed willful breach; iii) the impugned award is excessive; and iv) the interest has been awarded by the Tribunal on the higher rate.

4. In order to determine all these grounds, a reference may be made to the issues framed by the Tribunal, as under:

> *"1. Whether the petitioner suffered injuries due to the rash and negligent driving for jeep/Tata 207 DI, HP-19-B-0101 by respondent No.2 at the relevant date, time and place? OPP*
>
> *2. If issue No.1 is proved in affirmative to what amount of compensation the petitioner is entitled and from whom? OPP*
>
> *3. Whether the petition is bad for non-joinder of necessary parties as alleged? OPR-3*
>
> *4. Whether respondent No.2 was not holding a valid and effective driving license of the vehicle involved in the accident/? OPR-3*
>
> *5. Relief."*

5. There is no dispute about the findings recorded by the Tribunal on issue No.1. Accordingly, the said findings are upheld.

6. Before issue No.2 is dealt with, I deem it proper to deal with issues No.3 and 4 at the first place. In order to prove these issues, the onus was on the insurer, has not led evidence to prove the said issues. However, I have gone through the claim petition and the reply thereto filed by the insurer. It is not established from the pleadings as to how the claim petition was bad for non-joinder or mis-joinder of necessary parties.

7. The Motor Vehicles Act has gone a sea change and sub section (6) to Section 158 and sub section (4) to Section 166 have been added, whereby the Claims Tribunal can treat any report of accident forwarded to it under Section 158 (6) as an application for compensation. Thus, it does not lie in the mouth of the insurer to plead that the Claim Petition was bad for non-joinder of necessary parties.

8. Having said so, the Tribunal has rightly decided issue No.3 and accordingly, the same is upheld.

9. Coming to issue No.4, parties have led evidence and the Tribunal, in paragraph 23 of the impugned award, has held that the driver of the offending vehicle was having licence to drive a light motor vehicle. The offending vehicle involved in the accident was a Jeep, the unladen weight of which was less than 7500 kilograms and would fall within the definition of "light motor vehicle", as has been held by this Court in catena of judgments, i.e. FAO No.125 of 2006, titled Oriental Insurance Company vs. Shashibala and others, FAO No.312 of 2012, titled Sukhvinder Singh and another vs. The New India Assurance Ltd. and others, etc.

10. This Court in series of cases i.e. FAO No.320 of 2008, titled Dalip Kumar and another vs. New India Assurance Company Ltd. & another, decided on 6th June, 2014, FAO No.306 of 2012, titled Prem Singh and others vs. Dev Raj and others, decided on 18th July, 2014 and FAO No.54 of 2012, titled Mahesh Kumar and another vs. Smt.Priaro Devi and Others, decided on 25th July, 2014, has discussed the issue and held that the driver having driving licence to drive Light Motor Vehicle is not required to have endorsement of "PSV" i.e. public service vehicle.

11. The Apex Court in latest decision, in **Kulwant Singh and others vs. Oriental Insurance Company Limited, (2015) 2 Supreme Court Cases 186,** has held that the driver who is having valid and effective driving licence to drive a Light Motor Vehicle is not required to have endorsement to drive a light commercial vehicle. It is apt to reproduce paragraphs No.10 and 11 hereunder:

> *"10. In S. Iyyapan (supra), the question was whether the driver who had a licence to drive 'light motor vehicle' could drive 'light motor vehicle' used as a commercial vehicle, without obtaining endorsement to drive a commercial vehicle. It was held that in such a case, the Insurance Company could not disown its liability. It was observed :*
>
> > *"18. In the instant case, admittedly the driver was holding a valid driving licence to drive light motor vehicle. There is no dispute that the motor vehicle in question, by which accident took place, was Mahindra Maxi Cab. Merely because the driver did not get any endorsement in the driving licence to drive Mahindra Maxi Cab, which is a light motor vehicle, the High Court has committed grave error of law in holding that the insurer is not liable to pay compensation because the driver was not holding the licence to drive the commercial vehicle. The impugned judgment (Civil Misc. Appeal No.1016 of 2002, order dated 31.10.2008 (Mad) is, therefore, liable to be set aside."*
>
> *No contrary view has been brought to our notice.*
>
> *11. Accordingly, we are of the view that there was no breach of any condition of insurance policy, in the present case, entitling the Insurance Company to recovery rights."*

12. Having said so, the findings returned by the Tribunal on issues No.3 and 4 are upheld. It was for the insurer to plead and prove that the insured had committed willful breach, has not led any evidence to that effect. Having said so, the insurer came to be rightly saddled with the liability.

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 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment hereinbelow:

> *"105. .....*
>
> *(i) .....*
>
> *(ii) .....*
>
> *(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in subsection (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy*

regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings; *but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*

(v).....

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

14. It is also profitable to reproduce para 10 of the latest judgment of the Apex Court in the case of **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217** hereinbelow:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran ingh case. If despite such information with the owner that the licence possessed by his driver is 8 *: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."*

15. While assessing the amount of compensation, the Tribunal has discussed all aspects in paragraphs 18, 19, 20 and 21, and the amount awarded by the Tribunal cannot be said to be excessive in view of the law laid down by the Apex Court in **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755** and also in the latest judgments**.** On the contrary, it appears that the amount awarded is meager. However, the claimant has not questioned he impugned award. Accordingly, the compensation awarded is reluctantly upheld.

16. Coming to the last ground urged by the learned counsel for the appellant that the rate of interest is on the higher side. As per the prevalent interest rates, the rate of interest awarded by the Tribunal appears to be on the higher side. Accordingly, the rate of interest is reduced from 9% to 7.5% per annum from the date of filing of the claim petition till realization.

17. In view of the above discussion, the claimant is awarded compensation to the tune of Rs.4,45,463/- and costs quantified at Rs.2,000/-, as awarded by the Tribunal, with interest at the rate of 7.5% per annum from the date of the Claim Petition till realization. The impugned award stands modified, as indicated above.

18. The Registry is directed to release the amount in favour of the claimant, after proper identification and the excess amount, if any, deposited by the insurer be refunded to the insurer through payee's account cheque.

19. The appeal stands disposed of accordingly.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

The New India Assurance Co. Ltd. .....Appellant.

Versus

Smt. Devki Devi and others ...Respondents

FAO (MVA) No. 594 of 2008

Date of decision: 6th November, 2015

Motor Vehicles Act, 1988- Section 149- MACT had passed an award in the year 2002, in which it was held that accident had taken place due to the negligence of the driver of maruti car- no appeal was preferred against the same- held, that in view of this award, which had attained finality, insurer was rightly held liable to pay the compensation. (Para-2 to 4)

For the appellant: Mr.Ratish Sharma, Advocate.

For the respondents: Mr.G.R. Palsara, Advocate, for respondents No. 1 to 5.
Nemo for respondent No.6.
Mr. Varun Rana, Advocate, for respondent No.7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

This appeal is directed against the judgment and award dated 31.7.2008, made by the Motor Accident Claims Tribunal, Presiding Officer, Fast Track Court, Mandi, in Claim Petition Nos. 11/2002, 90/2005, titled *Devki Devi and others versus Sh. Krishan alilas Kala and others*, for short "the Tribunal", whereby compensation to the tune of Rs.6,64,000/- alongwith interest @ 7.5% per annum was awarded in favour of the claimants and appellant herein came to be saddled with the liability, hereinafter referred to as "the impugned award", for short.

2. On the last date of hearing, the learned counsel for the appellant was asked to state whether they have preferred any appeal against the award, the mention of which is

made in para 21 of the impugned award. It is apt to reproduce para 21 of the impugned award herein.

> *"21.The Ld. Motor Accident Claim Tribunal-I Mandi HP vide its Award dated 7.10.2002 whose certified copy is Ext. PC in which the present respondent Nos. 1 to 3 were arrayed as respondents by Smt. Kalasho Devi etc. has clearly held that the accident took place due to the rash and negligent driving of the Maruti Car bearing registration No. HR-26D-7183 and the accident had not taken place due to the negligence of the driver of police Jeep. Accordingly, it is held that the deceased had died as a result of rash and negligent driving of the respondent No.1 and thus issue is decided in favour of the petitioners and against the respondents."*

3. Today the learned counsel for the appellant has stated that they have not preferred any appeal against the said award. Thus, the said award has attained the finality. The copy of the award is on the record as Ext. PC.

4. I have gone through the said award. The insurer has been saddled with the liability. The findings returned in the said award have attained finality. No case for interference is made out in this appeal. Accordingly, the insurer has to satisfy the same.

5. Viewed thus, the impugned award is upheld and the appeal is dismissed.

6. The insurer is directed to deposit the amount within six weeks from today, if not already deposited. On deposit, the Registry is directed to release the same in favour of the claimants, strictly, as per the terms and conditions contained in the impugned award, through payee's cheque account.

7. Send down the record, forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAOs (MVA) No. 567 and 568 of 2008.
Judgment reserved on 30.10.2015
Date of decision: 6th November, 2015.

FAO No. 567 of 2008.

Oriental Insurance co. Ltd. .....Appellant
Versus
Rakesh Kumar and others ....Respondents

FAO No. 568 of 2008.

Oriental Insurance co. Ltd. .....Appellant
Versus
Rakesh Kumar and others .....Respondents

Motor Vehicles Act, 1988- Section 169- Claim petitions are to be decided summarily- provisions of Code of Civil Procedure are not applicable to them- compensation is to be granted without succumbing to the niceties and technicalities of procedure.

Cases referred:
Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 Supreme Court Cases 646,

N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354
Oriental Insurance Co. versus Mst. Zarifa and others, AIR 1995 Jammu and Kashmir 81
Cholamandlan MS General Insurance Co. Ltd. Versus Smt. Jamna Devi and others, I L R 2015 (V) HP 207
Tulsi Ram versus Smt. Mena Devi and others, I L R 2015 (V) HP 557
Anil Kumar versus Nitim Kumar and others, I L R 2015 (IV) HP 445 (D.B.)

For the appellant: Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.
For the respondents: Mr.Lalit K. Sehgal, Advocate, for respondents No. 1 and 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice,

A vehicular accident, occurred on 5.6.2004 at Kawara (Chamoda) Tehsil Kumarsain, has given birth to these appeals, in which insurer has questioned the two awards, dated 19.7.2008, passed by the Motor Accident Claims Tribunal, Shimla, hereinafter referred to as "the Tribunal" in MACT No. 8-S/2 of 2006/04 and MACT No. 6-S/2 of 2006/04 titled *Rakesh Kumar and others versus Dinesh Kumar and another*, for short "the impugned Awards".

2. The award passed in MACT No. 8-S/2 of 2006/04 is subject matter of FAO No. 567 of 2008 and award passed in MACT No. 6-S/2 of 2006/04 is subject matter of FAO No. 568 of 2008.

3. The claimants in MACT No. 8-S/2 of 2006/04, subject matter of FAO No. 567 of 2008 are the sons of Smt. Hem Lata, who died in the said accident, which was allegedly caused by driver, namely, Khima Ram while driving vehicle Matiz Car No.30-9090 and claimants in MACT No. 6-S/2 of 2006/04, subject matter of FAO No. 568 of 2008 are the parents of Baby Dikshita who also died in the said accident.

4. The claimants have claimed compensation to the tune of Rs.15 lacs and Rs.10 lacs respectively, as per the break-ups given in the claim petitions.

5. The claim petitions were resisted and contested by the respondents and following issues came to be framed.

MACT 8-S/2 of 2006/04.

(i) *Whether on 5.6.2004 at Kawara, Sh. Khima Ram was driving Car No. HP-30-9090 rashly and negligently and as such caused death of Smt. Hem Lata? OPP.*

(ii) *If issue No.1 is proved in affirmative, to what amount of compensation the petitioners are entitled and from whom? OPP.*

(iii) *Whether the driver of car NO. HP-30-9090 was not having a valid and effective driving licence at the time of accident? OPR.*

(iv) *Whether the vehicle was being driven in violation of the terms and conditions of the policy? OPR*

(v) *Relief.*

MACT 6-S/2 of 2006/04.

(I) Whether on 5.6.2004 at Kawara, Sh. Khima Ram was driving Car No. HP-30-9090 rashly and negligently and as such caused death of Baby Dikshita? OPP.

(II) If issue No.1 is proved in affirmative, to what amount of compensation the petitioners are entitled and from whom? OPP.

(III)Whether the driver of car No. HP-30-9090 was not having a valid and effective driving licence at the time of accident? OPR.

(IV) Whether the vehicle was being driven in violation of the terms and conditions of the policy? OPR

(V) Relief.

6. The claimants have examined four witnesses. The insurer has not examined any witness. However, Dinesh Kumar respondent No.1 appeared in the witness-box as RW1.

7. Virtually, the evidence led by the claimants has remained un-rebutted. The copy of FIR Ext. PW1/A and Post Mortem report Mark-X are on record, which do disclose that the driver had driven the offending vehicle rashly and negligently. The respondents have failed to prove that the accident was not caused by the driver or the driver was not negligent while driving the said vehicle.

8. The claim petitions are to be determined summarily and that is why the Code of Civil Procedure is not applicable. Some of the provisions of Code of Civil Procedure have been made applicable in terms of the provisions of the Rules framed by the Central Government as well as State Government. The State of Himachal Pradesh has also framed the Himachal Pradesh Motor Vehicles Rules, 1999 (for short "the Rules") in terms of Sections 169 and 176 (b) of the Motor Vehicles Act, and only some of the provisions of the Code of Civil Procedure have been made applicable.

9. The mandate of Chapter XI of the Motor Vehicles Act provides for the grant of compensation to the victim without succumbing to the niceties and technicalities of procedure. It is beaten law of the land that technicalities or procedural wrangles and tangles have no role to play.

10. My this view is fortified by the judgment delivered by the apex court in ***Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another***, reported in ***(2013) 10 Supreme Court Cases 646, N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,*** reported in ***AIR 1980 Supreme Court 1354*** **and** ***Oriental Insurance Co. versus Mst. Zarifa and others,*** reported in ***AIR 1995 Jammu and Kashmir 81.***

11. This Court has also laid down the similar principles of law in ***FAO No. 692 of 2008*** decided on 4.9.2015 titled ***Cholamandlan MS General Insurance Co. Ltd. Versus Smt. Jamna Devi and others***, ***FAO No. 287 of 2014*** along with connected matter, decided on 18.9.2015 titled ***Tulsi Ram versus Smt. Mena Devi and others***, ***FAO No. 72 of 2008*** along with connected matter decided on 10.7.2015 titled ***Anil Kumar versus Nitim Kumar and others*** and ***FAO No. 174 of 2013*** decided on 5.9.2014 titled ***Kusum Kumari versus M.D. U.P Roadways and others.***

12. Having said so, the Tribunal has rightly held that the driver of the offending vehicle was driving the vehicle rashly and negligently. Accordingly, the findings so returned by the Tribunal are upheld.

13. Before I deal with issue No.2, I deem it proper to deal with issues No. 3 and 4 at the first instance. The respondents had to discharge the onus, failed to led any evidence

and the findings returned on these issues have not been questioned by the respondents. Thus, the findings returned on these issues are upheld.

14. Coming to Issue No.2. In MACT No. 8-S/2 of 2006/04, the Tribunal has awarded Rs.2,30,000/- with interest @ 7.5% per annum, which is too meager, for the simple reason that the claimants are the sons of deceased mother Smt. Hem Lata, who died in the accident, at the age of 46 years, have lost love, affection and care of their mother. Virtually, they stand deprived of their home. The Tribunal has assessed her income at Rs.1500/- per month and held that the claimants have lost source of dependency to the tune of Rs.18,000/- per annum and applied the multiplier of "11". The amount awarded is otherwise too meager. However, the claimants have not questioned the same accordingly, the same is maintained.

15. In MACT No. 6-S/2 of 2006/04, parents of the claimants have lost their daughter Babi Dikshita, who was two years of age at the time of accident and Rs. 1 lac in *lump sum* was awarded, which is also too meager. However, the claimants have not questioned the same. Having said so, the amount awarded is upheld and both the appeals are dismissed.

16. The factum of insurance is not in dispute. Thus, the insurer has to satisfy.

17. The insurer is directed to deposit the amount, if not already deposited, in both the appeals along with interest from the date of filing of the claim petition till its realization, within six weeks from today in the Registry. On deposit, the Registry is directed to release the entire amount in favour of the claimants, strictly in terms of the conditions contained in the impugned awards, through payees' cheque account.

18. Both the appeals are accordingly disposed of.

19. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Co. Ltd. .....Appellant.
Versus
Sh. Ramesh kumar and others ...Respondents

FAO (WCA) No. 401 of 2009.
Date of decision: 6th November, 2015.

Workmen Compensation Act, 1923- Section 22- Claimants claimed that their brother had died in the road accident while driving the vehicle- Commissioner awarded a compensation of Rs. 7,21,160/-- it was contended that claimants were dependent upon the deceased- held, that claimants had lost their father and brother- claimant No. 2 was minor and was dependent upon the deceased - other claimants are minor sisters who fall within the definition of the 'dependent' under Section 2(d) – appeal dismissed. (Para-7 to 10)

For the appellant: Mr. Deepak Bhasin, Advocate.
For the respondents: Mr.G.S. Rathore, Advocate, for respondents No. 1 and 2.
Mr. Ashok Sharma, ASGI, with Mr. Nipun Sharma, Advocate, for respondent No.3.

Respondent No. 4 stands already deleted.
Nemo for respondent No.5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Appellant, by the medium of this appeal, has questioned the order/award dated 2.7.2009, made by the Commissioner, under Workmen's Compensation Act (SDM), Rampur Bushahar District Shimla, H.P. in case No. 3/2003, titled *Sh. Ramesh Kumar and another versus The Union of India and others,* whereby compensation to the tune of Rs.7,21,160/-, was awarded in favour of the petitioners/claimants and insurer/appellant came to be saddled with the liability, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. The claimants-respondents No. 1 and 2 herein had invoked the jurisdiction of the Commissioner under Workmen's Compensation Act by the medium of a petition filed under Section 22 of the Workmen's Compensation Act, for short "the Act" for the grant of compensation on the ground that their brother Ganesh Bahadur, died in a road accident on 17.4.1999 at about 2 P.M. near Kingal while driving vehicle No. DL-IG-3295, leaving behind claimants-respondents No. 1 and 2 herein, who were dependent on him. It is averred that they have lost their brother, causing irreparable loss to them.

3. The petition was resisted and contested only by the insurer-appellant herein and following issues came to be framed.

(i) Whether the deceased was in the employment at the time of the accident?

(ii) Whether the legal heirs of the deceased are entitled to get the compensation? OPP.

(iii) Whether the accident arose out or in the course of employment? OPP

(iv) Whether the opposite party is liable to pay the compensation? OPP

(v) Relief.

4. The Commissioner, after perusing the record, evidence and hearing the parties, determined the petition by granting compensation to the tune of Rs.7,21,160/-, referred to supra.

5. The claimants, owner, driver and Union of India have not questioned the impugned award on any count. Thus, it has attained finality so far as it relates to them.

6. Only the insurer has questioned the impugned award on the grounds taken in the memo of appeal.

7. In terms of Section 22 of the Act, substantial questions of law was to be framed. The appellant has framed five substantial questions of law at page 19 of the paper-book. However, the appeal was admitted on substantial questions of law No. 2 and 3.

8. The learned counsel for the appellant argued that claimants Ramesh Kumar and Kumari Sumitra were not dependents of the deceased thus, they were not entitled to seek compensation. The argument is misconceived for the following reasons.

9. In the said accident, the claimants have lost their father, namely, Bheem Bahadur and their brother also. They had filed claim petition for the grant of compensation so far it relates to the death of their father before the Motor Accident Claims Tribunal, the mention of which is made in the impugned award while determining issue No.1. They have rightly chosen the forum in lieu of death of their father before the Motor Accident Claims Tribunal and on account of death of their brother before the Commissioner, under the Workmen's Compensation Act, in terms of Section 22 of the Act.

10. Admittedly, claimant No. 2 was minor at the relevant point of time, i.e. at the time of death of her brother and her brother was also unmarried and dependent on him. The claimants have lost their brother. In terms of Section 2 (d) of the Act, a minor brother or an unmarried sister or a widowed sister, if a minor can claim compensation. Kumari Sumitra was minor and unmarried sister. Thus, the Tribunal has not fallen in an error in granting the compensation.

11. The appellant has not been able to carve out any substantial question of law.

12. Having said so, no interference is called for. The appeal is dismissed and the impugned award is upheld.

13. The Workmen Compensation Commissioner at Rampur Bushehar 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.

14. Send down the records, alongwith a copy of this judgment.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company ...Appellant
Versus
Shri Sanjay Kumar Sharma & others ...Respondents

FAO No. 464 of 2008
Reserved on : 30.10.2015
Decided on : 06.11.2015

Motor Vehicles Act, 1988- Section 166- Insurer challenged the award on the ground that offending vehicle was being driven in breach of terms and conditions of the policy- however; no evidence was led by the insurer to prove this fact- held that insurer is bound to prove the breach of the terms of the policy- appeal dismissed. (Para-14 and 15)

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

For the appellant : Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate.
For the respondents : Mr. G.S. Rathore, Advocate, for respondent No. 1.
Mr. Vishal Panwar, Advocate, for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

This appeal is directed against the award dated 16th July, 2008, passed by the Motor Accident Claims Tribunal, Shimla (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 32-S/2 of 2005, whereby and whereunder compensation to the tune of Rs.6,05,100/- with interest at the rate of 9% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimant-respondent No. 1, herein and the insurer-appellant, herein came to be saddled with liability (for short, the "impugned award").

2. The claimant, owner-insured and driver have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

3. The insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. Learned Counsel for the appellant argued that the insurer is not liable to pay the award amount as the offending vehicle was being driven in breach of the terms and conditions of the insurance policy.

5. Thus, the only question to be determined in this appeal is – *whether the Tribunal has rightly saddled the insurer with liability*? The answer is in the affirmative for the following reasons.

6. In order to determine the said issue, it is necessary to give a brief summary of the case, the womb of which has given birth to the instant appeal.

7. On 07.04.2004, the claimant was traveling in vehicle-Maruti Van bearing registration No. HP-01A-0152, from Shimla to Manali on National Highway No. 88, which was being driven by driver, namely, Vinay Kumar, rashly and negligently, and caused the accident, at about 3.30 a.m., near Namhol, in which he sustained injuries, was referred to Indira Gandhi Medical College, Shimla, where he remained admitted w.e.f. 07.04.2004 to 12.06.2004, constraining him to file 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.

8. The respondents contested the claim petition on the grounds taken in their memo of objections.

9. Following issues came to be framed by the Tribunal:

"i) Whether the petitioner suffered injuries as a result of rash and negligent driving of the respondent No. 2? …OPP

ii) In case issue No. 1 is proved to what amount the petitioner is entitled and from which of the respondents? …OPP

iii) Whether the vehicle was being plied in violation of the terms and conditions of the Policy in regard to R.C., fitness and route permit? …OPR-3

iv) Whether the driver was not having a valid and effective driving licence at the time of accident? ….OPR-3

v) Relief."

10. The claimant has examined seven witnesses and also appeared in the witness box as PW-5. The owner has also appeared in the witness box as RW-1. The other respondents have not led any evidence. Thus, the evidence led by the claimant has remained unrebutted.

Issue No. 1

11. I have gone through the record. The claimant has proved by leading the evidence, oral as well as documentary, that driver, namely, Vinay Kumar had driven the offending vehicle, rashly and negligently, on 07.04.2004, at about 3.30 a.m., near Namhol, in which the claimant sustained injuries. The owner-insured and driver have not questioned the findings returned by the Tribunal on the said issue. The insurer can not question the same. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

Issues No. 3 & 4

12. Before I deal with issue No. 2, I deem it proper to deal with issues No. 3 & 4.

13. It was for the insurer to discharge onus, has not led any evidence. Thus, the Tribunal has rightly decided issues No. 3 & 4 in favour of the claimant, driver and owner and against the insurer.

14. It is a beaten law of the land that in order to exonerate from liability, the insurer has to prove that the owner of the offending vehicle has committed willful breach in terms of the mandate of Section 147 of the Motor Vehicles Act, for short 'the Act' read with the terms and conditions contained in the insurance policy. But it has failed to do so. Thus, the insurer was rightly saddled with the liability. Accordingly, the findings returned by the Tribunal on issues No. 3 & 4 are upheld.

Issue No. 2.

15. Learned Counsel for the appellant argued that the award amount is excessive. This ground is not available to the insurer for the simple reason that neither it has sought permission under Section 170 of the Act nor it has led any evidence.

16. The Apex Court in case titled as **R.D. Hattangadi** versus **M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755,** has laid down guidelines how compensation is to be awarded under various heads in injury cases by making guess work.

17. The Apex Court in case titled as **Arvind Kumar Mishra** versus **New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085** in para-7 of the judgment has held as under:

> *"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."

18. The Apex Court in case titled as **Ramchandrappa** versus **The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR SCW 4787** also laid down guidelines for granting compensation in injury cases. 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."

19. The Apex Court in case titled as **Kavita** versus **Deepak and others**, reported in **2012 AIR SCW 4771** also discussed the entire law and laid down the guidelines how to grant compensation.

20. The Tribunal has discussed all aspects of the case from paras 17 to 29 of the impugned award and awarded compensation, which appears to be reasonable.

21. The award amount appears to be meager in view of the fact that the claimant has suffered disability to the extent of 45% and has spent a huge amount on his treatment, as discussed above, but he has not questioned the adequacy of compensation.

22. The Registry is directed to release the compensation amount in favour of the claimant, strictly as per the terms and conditions, contained in the impugned award.

23. Viewed thus, the impugned award is upheld and the appeal is dismissed.

24. Send down the records after placing a copy of the judgment on the file of the claim petition.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAO No. 4158 & 4159 of 2013,
296 of 2014, & 78 of 2015
Decided on : 06.11.2015

1.	**FAO No.4158 of 2013**	
	Oriental Insurance Co. Ltd.	.....Appellant
	Versus	
	Tara and another	..... Respondents
2.	**FAO No.4159 of 2013**	
	Oriental Insurance Co. Ltd.	.....Appellant
	Versus	
	Bimla and another	..... Respondents
3.	**FAO No.296 of 2014**	
	Tara	.....Appellant
	Versus	
	Seema Sharma and another	..... Respondents
4.	**FAO No.78 of 2015**	
	Bimla	.....Appellant
	Versus	
	Seema Sharma and another	..... Respondents

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not possess a valid driving licence- however, no evidence was led to prove that insured had engaged the driver without taking due care and caution and it was known to the owner that licence of the driver was fake- held, that insurer was rightly saddled with liability. (Para-7 to 10)

Motor Vehicles Act, 1988- Section 166- Age of the deceased was 21 years and multiplier of '15' was applicable- held, that Tribunal had fallen in error in applying multiplier of '14'. (Para-13 and 14)

Cases referred:

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

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

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

Presence for the Parties: PROVISIONAL

Mr.Ashwani K. Sharma, Senior Advocate, with Ms.Monica Shukla, Advocate, for the Insurance Company.

Mr.Rajiv Sirkeck and Mr.S.C. Sharma, for claimants Smt.Tara and Smt.Bimla, respectively.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

All these appeals are the outcome of common award, therefore, are being taken up together for final disposal.

2. Claim petition No.39-S/2 of 2008, titled Tara vs. Seema Sharma and another, and Claim Petition No.43-S/2 of 2008, titled Bimla vs. Seema Sharma and another, were determined by the Motor Accident Claims Tribunal (II), Mandi, H.P., (for short, the Tribunal), vide award, dated 26th August, 2013, whereby compensation to the tune of Rs.2,72,000/- each, with interest at the rate of 7.5% per annum from the date of filing of the claim petitions till realization, came to be awarded in favour of the claimants in both the claim petitions and the insurer was saddled with the liability, (for short the impugned award).

3. Feeling aggrieved, the insurer filed the appeals, being FAO No.4158 of 2013 and 4159 of 2013, while the claimants filed FAO Nos.296 of 2014 and 78 of 2015 for enhancement of compensation.

Brief facts

4. Claimants i.e. Smt.Tara and Smt. Bimla, invoked the jurisdiction of the Tribunal under Section 166 of the Motor Vehicles Act, 1988, (for short, the Act), claiming compensation to the tune of Rs.27,25,000/- in each claim petition, as per the break-ups given therein, on account of death of their respective sons, namely, Ankush and Pankaj Mehra, in a vehicular accident, occurred on 30th March, 2008 at Cheli Kasumpti, Shimla.

5. Replies were filed and the claim petitions were resisted by the respondents. On the pleadings of the parties, the following almost similar issues came to settled by the Tribunal in both the claim petitions and the issues framed in one of the claim petition i.e. Claim Petition No.39-S/2 of 2008 are being reproduced below:

> *"1. Whether the death of Ankush took place due to rash and negligent driving of vehicle No.HP-01A-0349 by the driver deceased Manoj Kumar? OPP.*
>
> *2. If issue No.1 is proved, what amount of compensation the petitioner is entitled to and from whom? OPP.*
>
> *3. Whether the petition is not maintainable having not been filed in accordance with Rules framed under Motor Vehicles Act? OPR.*
>
> *4. Whether the petition is not maintainable as against the respondent No.1? OPR-1.*
>
> *5. Whether the petition is not maintainable as the vehicle was not insured? OPR-2*
>
> *6. Whether the petition is not maintainable in view of the fact that the vehicle was being driven in a rash and negligent manner by the deceased himself? OPR.*
>
> *7. Whether the driver was not having valid and effective driving licence? OPR-2.*
>
> *8. Whether there is collusion between the petitioners and the respondent No.1? OPR-2.*
>
> *9. Whether the petition is not maintainable as there is breach of conditions of insurance policy? OPR-2.*
>
> *10. Relief."*

6. Firstly, FAO Nos.4158 of 2013 and 4159 of 2013, filed by the insurer, are being taken up. It has been argued by the learned Senior Advocate appearing for the insurer that the Tribunal has fallen in error in fastening the liability upon the insurer inasmuch as the driver of the offending vehicle was not having a valid and effective driving licence. It was further argued that the owner/insured had committed breach of the terms and conditions contained in the insurance policy and, therefore, the insurance company is entitled for exoneration.

7. The argument of the learned Senior Advocate appearing for the insurer is devoid of any force for the simple reason that it was for the insurer to plead and prove that the owner/insured had engaged the driver without taking due care and caution and it was known to the owner that the licence of the driver was fake. No such evidence was led by the insurer, thus the insurer has failed to discharge the onus cast upon him.

8. My this view is fortified by the judgment of the Apex Court in **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment hereinbelow:

> *"105. .....*
>
> *(i) .....*
>
> *(ii) .....*
>
> *(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in subsection (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings; but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v).....*
>
> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."*

9. It is also profitable to reproduce para 10 of the judgment of the Apex Court in the case of **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217** hereinbelow:

> *"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the*

services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran ingh case. If despite such information with the owner that the licence possessed by his driver is 8 :*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 Tribunal has made detailed discussion in paragraph 32 of the impugned award and has rightly saddled the insurer with the liability.

11. Having said so, the appeals filed by the insurer i.e. FAO Nos.4158 of 2013 and 4159 of 2013 are dismissed.

12. Coming to the appeals filed by the claimants i.e. FAO No.296 of 2014 (arising out of Claim Petition No.39-S/2 of 2008) and FAO No.78 of 2015 (arising out of Claim Petition No.43-S/2 of 2008), the Tribunal has rightly made the guess work and has rightly assessed the income of the deceased, in both the claim petition, as Rs.3,000/- per month and after making deduction has rightly held that the claimants lost source of dependency to the tune of Rs.1,500/- per month.

13. The learned counsel for the appellants/claimants argued that the Tribunal has fallen in error in applying the multiplier of 14.

14. Admittedly, the age of the deceased, in both the cases, was 21 years. As per schedule 2 appended with the Motor Vehicles Act, 1988 and as also as per the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120,** multiplier 15 was applicable. Thus, the Tribunal has fallen in error in applying the multiplier of 14. Therefore, it is held that multiplier of 15 is just and appropriate in this case.

15. Accordingly, the claimants, in each claim petition, are held entitled to Rs.1500 x 12 x 15 = Rs.2,70,000/-, under the head 'loss of source of dependency'.

16. In addition, the Tribunal has awarded Rs.10,000/- under the head 'loss of estate', Rs.5,000/- each under the heads 'funeral charges' and 'transportation charges', which amount is also on the lower side. Therefore, keeping in view the recent judgments of the Apex Court, a sum of Rs.10,000/- each is awarded under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate' and 'funeral expenses'.

17. Thus, a sum of Rs.2,70,000/- + Rs.40,000/- = Rs.3,10,000/- each is awarded in favour of the claimants, in both the claim petitions, with interest as awarded by the Tribunal.

18. In view of the above, the appeals filed by the claimants are allowed and the impugned award stands modified, as indicated above.

19. The enhanced amount, alongwith interest, be deposited by the insurer within a period of six weeks from today and on deposit, the amount be released in favour of the claimants strictly in terms of the impugned award.

20. All the appeals stand disposed of accordingly.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Shri Ramesh Chand .....Appellant

Versus

Smt. Vijay Devi & others ...Respondents

FAO No. 492 of 2009
Decided on : 06.11.2015

Motor Vehicles Act, 1988- Section 166- Award challenged by the owner of offending vehicle – claimants have proved that deceased was hit by offending scooter- Tribunal had rightly appreciated the evidence- held, that appellant is liable and appeal dismissed. (Para-5 and 6)

For the appellant : Mr. Sanjay Jaswal, Advocate.

For the respondents: Mr. Vivek Singh Thakur, Advocate, for respondents No. 1 to 4. Respondents No. 5 & 6 stand deleted.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This appeal is directed against the award, dated 6th August, 2009, made by the Motor Accident Claims Tribunal, (2), Kangra at Dharamshala, H.P. (hereinafter referred to as 'the Tribunal') in MAC Petition No. 48 of 2003, titled **Smt. Vijay Devi & others versus Shri Ramesh Chand & others**, whereby compensation to the tune of Rs.2,08,000/- with interest @ 7% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimants and against the owner-insured (hereinafter referred to as the "impugned award").

2. The claimants had filed claim petition before the Tribunal and sought compensation to the tune of Rs.10,00,000/-, as per the break-ups given in the claim petition.

3. Insured-owner resisted the claim petition on the grounds taken in the memo of his objection.

4. Following issues came to be framed by the Tribunal:

"1. *Whether the scooter No. HP-38-8846 owned by the respondent No. 1 had hit the deceased on 3.5.2003, at about 8.30 a.m., at Panjahra causing his death?...OPP*

2. If issue No. 1 is proved in affirmative, whether the petitioners being legal heirs of the deceased are entitled to compensation from the respondent no. 1, if so, to what amount? ...OPP

3. Relief."

5. The claimant has examined five witnesses and one of the claimants Smt. Vijay Devi, also appeared in the witness box as PW-3. Owner Ramesh Chand, also appeared in the witness box as RW-1.

6. The claimants have proved that on 3.5.2003, at about 10.00 a.m., at Panjahra, Tehsil Nurpur (Kangra) offending scooter bearing registration No. HP-38-8846 belonging to owner Ramesh Chand, hit deceased, namely, Bhummu Ram, who was walking on the road side, caused the accident, in which he sustained injuries and succumbed to the same.

Issue No. 1

7. The Tribunal has rightly appreciated the evidence. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

Issue No. 2.

8. The Tribunal has held that the deceased was earning Rs.5,000/- per month, applied the multiplier of '13' while keeping in view the age of the deceased as 45 years and after making deductions, the claimants have lost source of dependency to the tune of Rs.1,95,000/- and also awarded Rs.13,000/- under the other heads. The compensation to the tune of Rs.2,08,000/- came to be rightly awarded in favour of the claimants.

9. Learned Counsel for the appellant was asked to show how the impugned award is bad, has failed to do so. However, he has filed CMP No. 943 of 2009, for leading additional evidence, is misconceived, misdirected and against the concept of granting compensation in view of the fact that the claim petition came to be decided after six years and the appeal is also pending before this Court for the last six years. Dismissed as such.

10. Learned Counsel for the claimants stated at the Bar that so far, the claimants have not received the compensation amount.

11. The compensation amount is too meager. But unfortunately, the claimants have not questioned the same.

12. Accordingly, the impugned award is upheld and the appeal is dismissed.

13. The appellant is directed to deposit the award amount before the Registry or before the Tribunal, within eight weeks from today. On deposition, the Registry/Tribunal is directed to release the same in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payees account cheque.

14. Send down the records after placing a copy of the judgment on the file of the claim petition.

****

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

Smt.Sapna Kumari wife of Sh.Sonu Kumar. .....Petitioner.

Vs.

State of H.P. and others. .....Non-petitioners.

CWP No.6867 of 2014
Date of Order: 6.11.2015.

Constitution of India, 1950- Article 226- Service of Anganwari Workers is a public utility service which directly deals with public- services of Anganwari workers are connected with

the affairs of State or local authority which is directly under the control of the State Government- remuneration is also paid to Anganwari workers from public exchequer- Anganwari workers do not hold civil post and their service disputes fall within the definition of service matters- hence, case is ordered to be transferred to Administrative Tribunal.

(Para-7 to 12)

Cases referred:

Union of India and others vs. Major General Srikant Sharma and another, 2015(4)SC 576
Commissioner of Income Tax and others vs. Chhabil Dass Aggarwal, JT 2013(11) SC 387
C. Chander Kumar vs. Union of India, 1997 (3) SCC 261

For the petitioner: Mr.Ajay Sharma, Advocate.
For Non-petitioners No.1 to 3: Mr. J.S.Rana, Assistant Advocate General.
For non-petitioner-4. None.
For non-petitioner-5: Mr.Sunil Goel, Advocate.

The following order of the Court was delivered:

P.S.Rana Judge.

Present petition is filed under Articles 226/227 of Constitution of India with prayer that impugned order dated 26.8.2013 Annexure: P-2 passed by learned Deputy Commissioner Kangra District at Dharamshala be quashed and set aside and direction be issued to non-petitioners to allow petitioner to continue to serve as Anganwari worker in Anganwari Centre Jhakrehar.

2. Hon'ble Division Bench of High Court of HP on dated 25.2.2015 admitted Civil Writ Petition No. 6867 of 2014 with the direction that question whether post in dispute is civil post and whether post in dispute is in discharge of duties in the affairs of State would be decided at the time of hearing as preliminary objection.

3. In compliance to directions of Hon'ble Division Bench of H.P. High Court Court heard learned Advocate appearing on behalf of petitioner, learned Assistant Advocate General appearing on behalf of co-respondents No. 1 to 3 and learned Advocate appearing on behalf of co-respondent No.5 and Court also perused the record carefully.

4. Section 3 of Administrative Tribunals Act 1985 defines post in Section 3(k) and defines service in Section 3 (p) and define service matters in Section 3 (q). It is held that Section 3 of Administrative Tribunals Act 1985 has classified three types of services i.e. (1) Post (2) Service (3) Service matters.

5. Section 3(q) of Administrative Tribunal Act 1985 defines service matters which is quoted in toto.

> 3(q) "Service matters" in relation to a person, means all matters relating to the conditions of his service in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or as the case may be of any corporation (or society) owned or controlled by the Government.
>
> (i) Remuneration (including allowances) pension and other retirement benefits.
>
> (ii) Tenure including confirmation, seniority, promotion, reversion, premature retirement and superannuation.

(iii) Leave of any kind.

(iv) Disciplinary matter

(v) Any other matter whatsoever.

6. Section 3(q) of Administrative Tribunals Act 1985 is saved as per saving clause mentioned in Section 15 of Administrative Tribunals Act 1985. Administrative Tribunals Act 1985 is a special Act relating to service matters only. It is well settled law that when there is conflict between general Act and special Act then special Act always prevail. As per Section 29 of Administrative Tribunals Act 1985 all pending matters should be transferred to Administrative Tribunal after the operation of State Administrative Tribunals or Central Administrative Tribunal.

7. It is held that service of Anganwari workers is public utility service which directly deals with general public and it is held that service of Anganwari workers is connected with the affairs of State or local authority which is directly under the control of the State Government. It is held that remuneration also paid to Anganwari workers from public exchequer which is directly under the control of State Government. It is well settled law that all public utility services under the control of State Government are connected with affairs of State.

8. In view of above stated facts (1) It is held that Anganwari worker is not holding civil post. (2) It is held that service of Anganwari worker falls within the definition of service matters as defined under section 3(q)(v) of Administrative Tribunals Act 1985. It is held that Anganwari worker post is directly connected with affairs of State as public utility service.

9. H.P. Administrative Tribunal came into operation as per notification No. GSR 926-E dated 29.12.2014 issued in gazette of Union of India.

10. Thereafter vide notification No. Per(AP-B) (B)(15)4/2015 dated 25.3.2015 issued by H.P. State Government Administrative Tribunal Act 1985 became operative upon local or other authorities or Corporation or Societies controlled or own by State Government.

11. Petitioner has alternative efficacious remedy under special Act i.e. Administrative Tribunal Act 1985. It was held in case reported in Judgment Today ***2015(4)SC 576*** titled ***Union of India and others vs. Major General Srikant Sharma and another*** that when alternative statutory remedy is available then writ should not be entertained. Also see ***JT 2013(11) SC 387*** titled ***Commissioner of Income Tax and others vs. Chhabil Dass Aggarwal***. Also see ***1997 (3) SCC 261*** titled ***C. Chander Kumar vs. Union of India***.

12. Present case is transferred to State Administrative Tribunals Act 1985 under Section 29 of The Administrative Tribunal Act 1985. Be listed before the H.P. State Administrative Tribunal for effective hearing on **16th November 2015**.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Smt. Shakuntala & others ....Appellants.

Versus

Bajaj Allianz General Insurance Company Ltd. & others ....Respondents.

FAO No. 433 of 2009
Date of decision: 06.11.2015

Motor Vehicles Act, 1988- Section 149- Claim petition was dismissed on the ground that deceased was travelling in the maruti car as gratuitous passenger - policy proved on record is a package policy and not an act only policy- therefore, it not only covers the risk of 3rd party but that of the occupants of the vehicle as well- hence insurance company was liable to pay compensation - appeal allowed. (Para-12 and 13)

Case referred:
National Insurance Company Ltd. versus Balakrishnan and another, (2013) 1 SCC 731

For the appellant :	Mr. B.S. Chauhan, Senior Advocate with Mr. Vaibhav Tanwar, Advocate.
For the respondents:	Mr. Neeraj Gupta, Advocate, for respondents No. 1 & 2. Mr. Dhruv Shaunk, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award dated 20th June, 2009, passed by the Motor Accident Claims Tribunal, Shimla (hereinafter referred to as "the Tribunal") in MAC Petition No. 52-S/2 of 2008/07, titled as **Smt. Shankuntla & others versus Bajaj Allianz & others,** whereby, compensation to the tune of Rs.14,39,985/-, was awarded in favour of the claimants and the claim petiton came to be dismissed on the ground that the deceased was traveling as a gratuitous passenger in the offending vehicle-Maruti Car bearing registration No. HP-10-1329 at the time of accident (for short, "the impugned award-I").

2. The insurer, and owner-insured have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

3. Only the claimants have questioned the impugned award, on the grounds taken in the memo of appeal.

4. All the issues framed by the Tribunal, except issue No. 7, came to be decided in favour of the claimants and that is the reason, the claim petition was dismissed.

5. There is no dispute regarding issues No. 1 to 6. I deem it proper to return issue wise findings.

Issue No. 1.

6. I have gone through the record. I am of the considered view that the claimants have proved that the driver, namely, Lokinder Singh, had driven the offending vehicle-Maruti bearing registration No. HP-10-1329, rashly and negligently, on 30.03.2007,

at about 9.30 a.m., near Chhol, Nagar Panchayat Kotkhai, Tehsil Kotkhai and caused the accident, in which deceased Harvinder sustained injuries and succumbed to the same. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

Issues No. 3 to 6.

7. It was for the respondents to prove issues No. 3 to 6, have not led any evidence, thus has failed to discharge the onus. The findings on these issues have not been questioned. Accordingly, the findings returned on issues No. 3 to 6 are upheld.

Issue No. 7.

8. Now coming to issue No. 7, the Tribunal has fallen in an error in holding that deceased, namely, Harvinder was traveling in the offending vehicle as a gratuitous passenger for the following reasons.

9. It was for the insurer to prove this issue, has failed to prove the same.

10. The deceased was traveling in the offending vehicle, which is a private car. Harvinder was an occupant. The insurance company has placed on record policy Ext. R-1, which is package policy and not an Act Policy.

11. I was dealing a case of the like nature as Judge of the Jammu and Kashmir High Court where the award of Rs.1, 68,09,089/- was made and it has been held that the occupant/(employee) of a vehicle of the employer, is covered by the "Comprehensive Insurance Policy." I have delivered the judgment in case titled **New India Assurance Co. Ltd. *versus* Shanti Bopanna and others** decided on 8.3.2013. It is apt to reproduce paras 1, 2 and 16 of the judgment herein.

> *"1.Does the "Comprehensive Policy of Insurance" exempts the Insurance Company from its liability of paying compensation to the victim of a vehicular accident who is traveling in a vehicle which is covered under such policy, at the time of accident, is but the only important point, raised in the instant appeal which seeks setting aside of Award dated 26th April, 2012, for short as impugned Award, passed by Motor Accidents Claims Tribunal Samba, for short as Tribunal?*
>
> *2."No" is possible the only answer for the reasons those would flow from the narration of events below."*
>
> *3 to 15.....*
>
> *16.Having regard to the ratio laid down by the Hon'ble Apex Court, Hon'ble High Courts of Delhi and Punjab and Haryana read with statement of the insurance official, S.K. Gupta, the appellant has rightly been saddled with the liability."*

12. I also deem it proper to reproduce paras 10, 19, 21, and 26 of the judgment of the Apex Court titled as **National Insurance Company Ltd. *versus* Balakrishnan and another** reported in (2013) 1 SCC 731.

> "*10. As per the command of Section 146 of the Act, the owner of a vehicle is obliged to obtain an insurance for the vehicle to cover the third party risk. Section 147 deals with the requirements of policies and limits of liability. Section 147 (1) which is relevant for the present purpose is reproduced below:-*
>
> *"147. Requirements of policies and limits of liability. -*

(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which -

(a) is issued by a person who is an authorised insurer; and

(b) insurers the person or classes of persons specified in the policy to the extent specified in sub - section (2) -

(i) against any liability which may be incurred by him in respect of the death of or bodily [injury to any person, including owner of the goods or his authorised representative carried in the vehicle] or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place ;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place; Provided that a policy shall not be required -

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee -

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle, engaged as a conductor of the vehicle or in examining tickets on the vehicle or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

Explanation. - For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place."

On a scanning of the aforesaid provision, it is evident that the policy of insurance must be a policy which complies with the conditions enumerated under Section 147 (1) (a) & (b). It also provides where a policy is not required and also stipulates to cover any contractual liability.

11 to 18 …….. …….. …….

19. On a perusal of the aforesaid paragraph, it is clear as crystal that the decisions that have been referred to in Bhagyalakshmi (supra) involved only "Act Policies". The Bench felt that the matter would be different if the Tariff Advisory Committee seeks to enforce its decision in regard to coverage of third party risk which would include an occupant in a vehicle. It is worth noting that the Bench referred to certain decisions of Delhi High Court and Madras High Court and thought it appropriate to refer the matter to a larger Bench. Be it noted, in the said case, the Court was dealing with comprehensive policy

which is also called a package policy. In that context, in the earlier part of the judgment, the Bench had stated thus:-

"The policy in question is a package policy. The contract of insurance if given its face value covers the risk not only of a third party but also of persons travelling in the car including the owner thereof. The question is as to whether the policy in question is a comprehensive policy or only an Act policy."

20. ....

21. At this stage, it is apposite to note that when the decision in Bhagyalakshmi was rendered, a decision of High Court of Delhi dealing with the view of the Tariff Advisory Committee in respect of "comprehensive/package policy" had not come into the field. We think it apt to refer to the same as it deals with certain factual position which can be of assistance. The High Court of Delhi in Yashpal Luthra and Anr. v. United India Insurance Co. Ltd. and Another[2011 ACJ 1415], after recording the evidence of the competent authority of Tariff Advisory Committee (TAC) and Insurance Regulatory and Development Authority (IRDA), reproduced a circular dated 16.11.2009 issued by IRDA to CEOs of all the Insurance Companies restating the factual position relating to the liability of Insurance companies in respect of a pillion rider on a two-wheeler and occupants in a private car under the comprehensive/package policy.

22 to 25. ....

26. In view of the aforesaid factual position, there is no scintilla of doubt that a "comprehensive/package policy" would cover the liability of the insurer for payment of compensation for the occupant in a car. There is no cavil that an "Act Policy" stands on a different footing from a "Comprehensive/Package Policy". As the circulars have made the position very clear and the IRDA, which is presently the statutory authority, has commanded the insurance companies stating that a "Comprehensive/Package Policy" covers the liability, there cannot be any dispute in that regard. We may hasten to clarify that the earlier pronouncements were rendered in respect of the "Act Policy" which admittedly cannot cover a third party risk of an occupant in a car. But, if the policy is a "Comprehensive/Package Policy", the liability would be covered. These aspects were not noticed Bhagyalakshmi and, therefore, the matter was referred to a larger Bench. We are disposed to think that there is no necessity to refer the present matter to a larger Bench as the IRDA, which is presently the statutory authority, has clarified the position by issuing circulars which have been reproduced in the judgment by the Delhi High Court and we have also reproduced the same."

13. Having said so, it cannot be said that the deceased was traveling in the offending vehicle as a gratuitous passenger. Accordingly, the insurer has to satisfy the award.

14. It is apt to record herein that this Court in FAO **No. 427 of 2009**, titled as Bajaj Allianz General Insurance Company Limited and another versus Smt. Sumila Devi & others, decided on 16.10.2015, which was outcome of the same accident, has held the insurer liable. The said findings have attained finality.

15. Viewed thus, the findings returned on issue No. 7 are set aside and the insurer is saddled with the liability.

Issue No. 2.

16. I have gone through the impugned award. The Tribunal has rightly assessed the compensation and returned the findings on this issue. Accordingly, the finding returned on this issue are upheld.

17. The insurer is held liable and has to satisfy the compensation amount to the tune of Rs.14,39,985/- with interest at the rate of 7.5% per annum from the date of the claim petition, is directed to deposit the award amount within eight weeks from today before the Registry. On deposition, the Registry is directed to release the same in favour of the claimants, through payees' account cheque.

18. Send down the record after placing a copy of the judgment.

****

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

Union of India. ...Appellant

Versus

Jagat Ram and another. ...Respondents.

RFA No. 310 of 2007
Reserved on: 5.11.2015
Decided on: 6.11.2015

Land Acquisition Act, 1894- Section 18- Land of respondents was acquired for setting up Army Transit Camp- the Court after appreciation of evidence assessed the compensation @ Rs.11,160/- per biswa- appellant felling aggrieved filed the present appeal- held, that there was ample evidence on record to show that acquired land was situated near National Highway No. 21- sale deeds produced in evidence pertaining to the year 1992-93 prove that the value of the land was Rs.15,000 and Rs.18,500/- per biswa respectively in the area- the Court had rightly given 10% appreciation and had assessed the value of land as Rs. 22,200/- per biswa- further held, that since proved sale transactions pertain to small pieces of land, as such, the Court had rightly deducted 40% towards development charges - order passed by the Court below is well reasoned- appeal dismissed. (Para-6 to 12)

For the Appellant : Mr. Nipun Sharma, Advocate vice Mr. Ashok Sharma, Asstt. Solicitor General of India.

For the Respondents: Mr. Vivek Singh Thakur, Advocate for respondent No.1.
Mr. Parmod Thakur, Addl. A.G. for respondent No.2.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular First Appeal is directed against the award dated 28.9.2006 rendered by the Additional District Judge, Fast Track Court, Kullu in Reference No. 15 of 2003 RBT No. 139/2004.

2. "Key facts" necessary for the adjudication of this appeal are that notification under section 4 of the Land Acquisition Act (hereinafter referred to as the "Act" for brevity sake) was issued on 23.12.1993 for Phati Barua. The notification was published in Rajpatra Himachal Pradesh Extraordinary on 3.1.1994 and was also published in the local area vide separate notification. The notifications under sections 6 and 7 were issued on 27.11.1995. These were published locally. The notice was also published in newspapers Jansatta, Vir Pratap, Jallandhar, Dainik Tribune and Hindi Milap. Inquiry was conducted by the revenue staff on the spot. Notices under section 9 of the Act were also issued.

3. The respondents filed objections. Award was made by the Collector on 24.11.1997. The Collector has assessed the following rates of Phati Barua:

1. Bagicha Rs. 10,000/- per biswa (Rs. 2 lac per bigha);
2. Bathal Doem Rs. 3,500/- per biswa (0.70 lac per bigha);
3. Bathal Chehram Rs. 2,000/- per biswa (0.40 lac per bigha);
4. Gair Mumkin Rs. 1,000/- per biswa (0.20 lac per bigha).

4. Accordingly, market Value of the acquired land was worked out on the basis of above rate as under:

1. Market value of 371-09-00 bigha land = Rs. 169.245
2. Solatium 30% of above = Rs. 50.77350
3. Payment u/s 23-1 (A) w.e.f. 23.12.93 to 23.11.97 @ 12% p.a. = Rs. 79.54515

= Rs.299.56365

5. Respondent No.1 feeling aggrieved by the award made by the Collector made a reference. It was referred to the learned Additional District Judge, Fast Track Court, Kullu. He made the award on 28.9.2006. He assessed the compensation amount for Phati Barua at Rs. 11,160/- per biswa for the acquired land. Appellant has approached this Court assailing the award dated 28.9.2006.

6. Mr. Nipum Sharma has vehemently argued that the award is excessive. The parameters laid down for assessment of the compensation have not been taken into consideration by the learned Additional District Judge, Fast Track Court. The evidence led by his client have not been considered in right perspective, more particularly, qua sale deeds.

7. Mr. Vivek Singh Thakur has supported the award dated 28.9.2006.

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

9. Dile Ram has deposed that the land was acquired by the Government of India to construct Army Transit Camp at Phati Palchan and Phati Barua. It was acquired in the year 1993. The acquired land is situated near National Highway-21. Manali Bazaar is situated on the lower side of the land and Solang Nullah and Rohtang Pass are situated on the upper side of the land. Solang Nullah is a famous tourist spot. There is huge flow of tourists to Rohtang Pass. Whispering Rock Resort is also situated adjacent to the land. Hotel of Rama Nand Sagar is also situated there. Value of the land was Rs. one lakh per biswa at the time of acquisition. There was increasing trend in the price of land. The Land Acquisition Collector has granted inadequate compensation. The award was made in their absence. The evidence led by Dile Ram has remained unrebutted.

10. The landholders have relied upon two sale transactions to assess the market value of Phati Barua vide Ex.PW-1/A and Ex.PW-4/A. According to Ex.PW-1/A, two biswas of land in Phati Barua was sold for consideration of Rs. 30,000/-. It was executed on 20.12.1993. Three biswas of land was sold in Phati Barua for consideration of Rs. 55,500/- vide sale deed Ex.PW-4/A. It was executed on 1.2.1992. Appellant has not led any evidence that sale transactions Ex.PW-1/A and Ex.PW-4/A were not bona fide. The sale deeds were executed voluntarily. The vendee of Ex.PW-4/A was Cooperative Society. Therefore, genuineness of this sale transaction cannot be doubted. According to Ex.PW-1/A the value of one biswa of land in the year 1993 in Phati Barua was to the tune of Rs. 15,000/- whereas the price of one biswa of land as per sale deed Ex.PW-4/A was to the tune of Rs. 18,500/- in the year 1992. Learned Additional District Judge has rightly given 10% appreciation and assessed the value of one biswa of land at Rs. 22,200/-. However, fact of the matter is that these sale transactions pertain to small pieces of land, as such, the Additional District Judge has deducted 40% towards development charges and the market value after 40% deduction came to Rs. 11,660/- per biswa. The Collector has assessed the market value of the land at Phati Barua at Rs. 4,125/- per biswa. The same was inadequate.

11. The Additional District Judge has correctly assessed the market value @ Rs. 11,660/- per biswa of land acquired in Phati Barua alongwith statutory benefits. The acquired land was to be used for setting up Army Transit Camp. The acquired land is situated near National Highway-21. Famous resorts are also near the vicinity of acquired land.

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

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

United India Insurance Company Ltd. .....Appellant

Versus

Het Ram and others ..... Respondents

FAO No.341 of 2008

Date of decision: 06.11.2015

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid and effective driving licence and injured was a gratuitous passenger- no evidence was led to prove that injured was travelling in the vehicle as a gratuitous passenger and that the driver did not have a valid and effective driving licence- held, that insurer was liable to pay compensation- appeal dismissed. (Para-8 to 10)

For the appellant: Mr.Sanjeev Kuthiala, Advocate.

For the respondents: Nemo for respondents No.1 and 3.
Mr.H.R. Bhardwaj, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 28th April, 20108, passed by the Motor Accident Claims Tribunal, Fast Track Court, Shimla, H.P., (for short, "the

Tribunal"), in MAC Petition RBT No.156-S/2 of 2005/2000, titled Het Ram vs. Rajesh Kumar Kapil and others, whereby compensation to the tune of Rs.47,000/-, with interest at the rate of 9% per annum from the date of the claim petition till realisation, came to be awarded in favour of the claimant and the insurer was saddled with the liability, (for short the "impugned award").

2. The claimant, the owner and the driver have not questioned the impugned award on any count. Thus, the same has attained finality so far it relates to them.

3. Feeling aggrieved, the insurer has questioned the impugned award by the medium of the instant appeal, on the ground taken in the memo of appeal.

Brief facts:

4. The claimant became victim of vehicular accident on 1st May, 1998, while traveling in the Tempo bearing No.HP-07-3785, being driven by its driver namely, Roop Chand rashly and negligently. The said vehicle met with an accident, as a result of which the claimant sustained injuries, was taken to Civil Hospital, Karsog, fromwhere he was referred to IGMC, Shimla, where he remained admitted from 1st May, 1998 to 7th May, 1998. Thus, the claimant filed the claim petition claiming compensation to the tune of Rs.1.00 lac, as per the break-ups given in the Claim Petition.

5. Respondents resisted the claim petition and following issues came to be framed by the Tribunal:

> *"1.Whether petitioner has suffered injury on his person as a result of rash and negligent driving of the driver of vehicle HP-07-3785? OPP*
>
> *2. To what compensation petitioner is entitled? OPP*
>
> *3. Whether vehicle was being driven in the breach of insurance policy and Motor Vehicle Act? OPR*
>
> *4. Whether the driver had no valid and effective driving licence? OPR*
>
> *5. Whether petitioner was unauthorized passenger? OPR*
>
> *6. Relief."*

6. There is no dispute about the findings recorded by the Tribunal on issue No.1. Accordingly, the said findings are upheld.

7. Before issue No.2 is dealt with, I deem it proper to deal with issues No.3, 4 and 5 at the first place.

8. It was for the insurer to plead and prove that the insured had committed willful breach, has not led any evidence to that effect and has failed to prove that the driver was not having a valid and effective driving licence. Accordingly, the findings returned by the Tribunal on issues No.3 and 4 are upheld.

9. It has been recorded by the Tribunal that issue No.3 was not pressed by the insurer. Therefore, by no stretch of imagination it can be said that the owner had committed willful breach of the terms and conditions contained in the policy. The Tribunal has discussed all aspects while determining issues No.2 and 5 and awarded a meager compensation.

10. Now coming to issue No.5, the learned counsel for the appellant-insurer argued that the injured was a gratuitous passenger. No such evidence has been led by the insurer to prove that the injured was traveling in the offending vehicle as gratuitous

passenger. The Tribunal has rightly made discussion while recording findings on issue No.5.

11. Having said so, no interference is required in the impugned award and the same is upheld. The Registry is directed to release the amount in favour of the claimant strictly in terms of the impugned award, after proper identification.

12. The appeal stands disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAOs No. 249 & 504 of 2009
Date of decision: 06.11.2015

FAO No. 249 of 2009

United India Insurance Company Ltd. .....Appellant.

Versus

Smt. Sanyogita Devi & others .....Respondents.

FAO No. 504 of 2009

United India Insurance Company Ltd. .....Appellant.

Versus

Sh. Rajesh Kumar & others .....Respondents.

Motor Vehicles Act, 1988- Section 166- Insurer challenged the award on the ground that driver of offending vehicle was not having a valid and effective driving licence, owner has committed willful breach of the terms and conditions of the policy and award amount is excessive- held, that no evidence was led by the insurer to prove that offending driver did not possess a valid and effective driving licence- deceased was bachelor of 18 years of age- his monthly income by way of guess work can be considered to be Rs.4,000/- per month- 50% of the monthly income was to be deducted towards his personal expenses and the claimants have lost source of dependency of Rs. 2,000/-- multiplier of '16' is applicable and total amount of Rs.4,24,000/- with 7.5% interest per annum awarded. (Para-15 to 23)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120

FAO No. 249 of 2009

For the appellant : Mr. Ashwani K. Sharma, Senior Advocate, with Ms. Monika Shukla, Advocate.

For the respondents: Mr. Ajay Sharma, Advocate, for respondents No. 1 & 2.
Mr. Vijay Bhatia, Advocate, for respondent No. 3.
Nemo for respondent No. 4.

FAO No. 504 of 2009

For the appellant : Mr. Ashwani K. Sharma, Senior Advocate, with Ms. Monika Shukla, Advocate.

For the respondents: Mr. Dinesh Thakur, Advocate, for respondents No. 1.
Nemo for respondent No. 2.
Mr. Vijay Bhatia, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Both these appeals are outcome of a motor vehicular accident, which was allegedly caused by driver, namely, Raj Kumar, while driving vehicle i.e. bus bearing registration No. HP-67-7570, rashly and negligently, on 16.02.2006, at about 8.36 a.m., at Aghaj, Tehsil and District Hamirpur. Thus, I deem it proper to determine both these appeals by this common judgment.

2. **FAO No. 249 of 2009** is directed against the award dated 26th March, 2009, passed by the Motor Accident Claims Tribunal, Hamirpur, H.P. (hereinafter referred to as "the Tribunal") in MAC Petition No. 32 of 2006, whereby compensation to the tune of Rs.5,50,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimants and the insurer was saddled with liability (for short, "the impugned award-I").

3. Subject matter of **FAO No. 504 of 2009** is the award dated 15th November, 2009, passed by the Tribunal, in MAC Petition No. 44 of 2007, whereby compensation to the tune of Rs.6,44,697/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimant and the insurer was saddled with liability (for short, "the impugned award-II").

4. By the medium of these appeals, the insurer has questioned both the impugned awards, on the grounds taken in the memo of appeals.

5. The owner-insured, driver and claimants have not questioned the impugned awards, on any count. Thus, have attained finality, so far as those relate to them.

6. Learned Counsel for the appellant-insurer argued that the insurer has questioned the impugned awards on three grounds; (i) driver Raj Kumar was not having a valid and effective driving licence; (ii) the owner has committed willful breach and (iii) the amount awarded in both the claim petitions is excessive.

7. Learned Counsel for the insured argued that the driver was having a valid and effective driving licence at the time of accident and the owner has not committed any breach.

8. There is no dispute on the other issues.

9. Claimants being victims of the motor vehicular accident filed two claim petitions, i.e. MAC Petition No. 32 of 2006 & MAC Petition No. 44 of 2007, separately, before the Tribunal, for grant of compensation to the tune of Rs.10,00,000/- each, as per the break-ups given in the claim petitions.

10. The respondents resisted the claim petitions on the grounds taken in their respective memo of objections.

11. The Tribunal, on the pleadings of the parties, framed similar set of issues. It is apt to reproduce the issues framed in one of the claim petitions herein.

> *" 1. Whether the petitioner has suffered injuries due to rash and negligent driving of Bus No. HP-67-7570 by Raj Kumar, respondent No. 1, as alleged? …OPP*

2. *If issue No. 1 is proved, what amount of compensation the petitioner is entitled to and from whom? ….OPP*

3. *Whether the Bus in question was being plied in violation of the terms and conditions of the insurance policy and provisions of Motor Vehicles Act, 1988, as alleged? …OPR-3 (in claim petition No. 44 of 2007)*

4. *Whether the respondent No. 1 was not holding a valid and effective driving licence to drive the vehicle in question at the time of accident? ….OPR-3*

5. *Relief."*

12. The parties have led evidence. The Tribunal after scanning the evidence, oral as well as documentary, held that driver Raj Kumar, has driven the offending vehicle, rashly and negligently, on 16.02.2006, at about 8.36 a.m., at Aghaj, Tehsil and District Hamirpur, caused the accident, as a result of which, deceased Pankaj Thakur, sustained injuries and succumbed to the same and claimant Rajesh Kumar suffered grievous injuries.

Issue No. 1.

13. The findings returned by the Tribunal on this issue are not in dispute. Accordingly, the same are upheld.

Issues No. 3 & 4.

14. The Tribunal has rightly discussed and held that driver was competent to drive the offending vehicle, for the reason that he was having valid and effective driving licence (Mark-A, on the file of Claim Petition No. 32 of 2006), which does disclose that driver Raj Kumar was competent to drive the bus-offending vehicle.

15. The insurer has not led any evidence to prove that the driver was not having a valid and effective driving licence at the relevant time and the owner has committed any willful breach. Accordingly, the findings returned by the Tribunal on issues No. 3 & 4 are upheld. **Issue No. 2.**

16. It appears that the Tribunal has fallen in an error in awarding compensation in Claim Petition No. 32 of 2006, which is subject matter of **FAO No. 249 of 2009**.

17. Admittedly, the deceased was a bachelor boy of 18 years. Thus, it can be safely held, by exercising guess work, that his monthly income was not less than Rs.4,000/- . In view of the ratio laid down by the apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104** read with **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120,** 50% of the monthly income was to be deducted towards his personal expenses and the claimants were to be held entitled to rest 50%. Thus, the claimants have lost source of dependency to the tune of Rs.2,000/- per month.

18. The multiplier of '16' is applicable in this case, in view of the 2nd Schedule appended to the Motor Vehicles Act, 1988 read with the ratio laid down by the Apex Court in ***Sarla Verma's*** case, *supra*.

19. Accordingly, it is held that the claimants are entitled to Rs.2,000/- x 12 = Rs.24,000 x 16 = 3,84,000/-, under the head ' loss of dependency', Rs.10,000/- under the head 'loss of consortium' , Rs.10,000/- under the head 'loss of estate', Rs.10,000/- under the head 'loss of love and affection' and Rs.10,000/- under the head 'funeral expenses'.

20. Having said so, it is held that, the claimants are entitled to compensation to the tune of Rs.3,84,000/- + 10,000/- + 10,000/- + 10,000/- +10,000/-, total amounting to Rs.4,24,000/- with 7.5% interest per annum form the date of filing of the claim petition.

21. In FAO No. 249 of 2009, the amount of compensation is reduced, as indicated above.

22. **In FAO No. 504 of 2009**, the claimant-injured was 23 years of age at the time of accident. He suffered 70% disability, which has shattered his physical frame and has rendered his life miserable. He is deprived of all charms of his life.

23. The Tribunal has discussed this issue from paras 29 to 38 of impugned award-II. I am of the considered view that the Tribunal has rightly returned the findings on the said issue and awarded the compensation, which is reasonable. Hence, no interference is required.

24. Having said, impugned award-I is modified, as indicated above and impugned award-II is upheld.

25. The Registry is directed to release the amount to the claimants and the balance amount, if any, in FAO No. 249 of 2009, be released in favour of the appellant through payees' account cheque.

26. Send down the records after placing a copy of the judgment on each file of the claim petitions.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAOs No. 23 & 291 of 2010
Decided on: 06.11.2015

FAO No. 23 of 2010

Vijay Kumar ...Appellant.

Versus

Pawna Devi and others ...Respondents.

FAO No. 291 of 2010

Kamal Kumar ...Appellant.

Versus

Pawna Devi and others ...Respondents.

Motor Vehicles Act, 1988- Section 149- Tribunal held that registered owner and the person who had purchased the vehicle through an agreement were liable to pay the awarded amount – appeal by both the persons- held, that as per settled law the person who has purchased on the basis of the hire-purchase agreement is considered to be the owner – in this case the person having purchased the vehicle through agreement contended that owner had taken back the vehicle from him as he could not make the payment of the agreed amount- plea not made out from the record as this person had applied for releasing of the vehicle in the Court- thus, registered owner exonerated from the liability and the owner through agreement saddled with the liability. (Para-12 to 22)

Case referred:

HDFC Bank Ltd. versus Kumari Reshma and Ors., 2014 AIR SCW 6673

FAO No. 23 of 2010

For the appellant:	Mr. Bimal Gupta, Senior Advocate, with Mr. Vineet Vashisth, Advocate.
For the respondents:	Mr. Janesh Mahajan, Advocate, for respondents No. 1 to 3 and 5. Name of respondent No. 4 stands deleted. Mr. V.D. Khidtta, Advocate, for respondent No. 6. Nemo for respondent No. 7. Mr. Praneet Gupta, Advocate, for respondent No. 8.

FAO No. 291 of 2010

For the appellant:	Mr. V.D. Khidtta, Advocate.
For the respondents:	Mr. Janesh Mahajan, Advocate, for respondents No. 1 to 3 and 5. Name of respondent No. 4 stands deleted. Mr. Bimal Gupta, Senior Advocate, with Mr. Vineet Vashisth, Advocate, for respondent No. 6. Nemo for respondent No. 7. Mr. Praneet Gupta, Advocate, for respondent No. 8.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Both these appeals are outcome of one motor vehicular accident, thus, I deem it proper to determine both these appeals by this common judgment.

2. These appeals are directed against the judgment and award, dated 19.09.2009, made by the Motor Accident Claims Tribunal (I), Kangra at Dharamshala (for short "the Tribunal") in M.A.C.P. No. 99-G/II-2005, titled as Smt. Pawna Devi and others versus Vijay Kumar and others, whereby compensation to the tune of Rs.2,88,012/- with interest @ 9% per annum from the date of filing of the petition till its finalization came to be awarded in favour of the claimants and against both the appellants, (for short "the impugned award").

3. The claimants, the driver and the insurer of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

4. The appellants in both the appeals, i.e. registered owner-Vijay Kumar and Kamal Kumar, i.e. the person, who had purchased the offending vehicle in terms of agreement, Mark-A, have questioned the impugned award on the grounds taken in the respective memo of appeals.

5. Precisely, the ground of attack in both the appeals is that the Tribunal has fallen in an error in saddling both the appellants-owners of the offending vehicle with liability.

6. Heard.

7. The claimants, being the victims of the motor vehicular accident, which was caused by the driver, namely Shri Balwant Singh, while driving bus, bearing registration No. HP-55-3486, rashly and negligently on 16.09.2005 at about 1.45 P.M., in

which the deceased sustained injuries and succumbed to the injuries, filed claim petition before the Tribunal for grant of compensation to the tune of Rs.8,50,000/-, as per the break-ups given in the claim petition.

8. The respondents resisted the claim petition on the grounds taken in the respective memo of objections.

9. Following issues came to be framed by the Tribunal on 30.06.2007:

"1. Whether Bali Ram had died due to rash and negligent driving of Bus No. HP-55-3486 by respondent No. 2? OPP

2. If issue No. 1 is proved in affirmative to what amount of compensation the petitioners are entitled to and from whom? OPP

3. Whether the petition is not maintainable? OPR-1

4. Whether the petition is bad for non-joinder of necessary parties? OPR-1

5. Whether the said vehicle has been insured with respondent No. 3 at the time of accident? OPR-1

6. Whether the respondent o. 2 was not holding a valid and effective driving licence to drive the vehicle in question at the time of accident? OPR-3

7. Relief."

10. Parties have led evidence.

11. There is no dispute about the findings returned by the Tribunal on any of the issues except issue No. 2 so far it relates to saddling both the owners with liability, thus, have attained finality and are accordingly upheld.

12. The bone of contention in both the appeals is - whether the registered owner is to be saddled with liability or the person who had purchased the vehicle is to be saddled with liability?

13. The Tribunal has fallen in an error in saddling the registered owner with liability for the following reasons:

14. Vijay Kumar was the registered owner, who had sold the offending vehicle to Kamal Kumar in terms of agreement, dated 02.07.2002 (Mark-A). Moreover, in paras 1 and 3 of the affidavit, dated 29.09.2006 (Ext. RW-3/A), which stands duly proved, Kamal Kumar has admitted that he had purchased the vehicle from Vijay Kumar and was responsible for any kind of taxes, challan and claims arising out of the accident.

15. However, Kamal Kumar has taken u-turn by taking a ground in the reply and while appearing in the witness box before the Tribunal that he had not paid the consideration amount to Vijay Kumar, who had taken the possession of the vehicle from him within a period of three months from 02.07.2002, i.e. from the date of entering into the agreement.

16. The said defence of Kamal Kumar is not tenable for the following reason:

17. Kamal Kumar has appeared in the witness box as RW-2 and has stated in his cross-examination that it is a fact that he had applied for release of the offending vehicle before the Court of competent jurisdiction which was seized in the case relating to the accident, which has given birth to the claim petition. The said statement of Kamal Kumar has also been discussed by the Tribunal in para 16 of the impugned award.

18. Learned counsel for Kamal Kumar was asked to justify and explain what were the reasons for filing an application for release of the said vehicle before the Court of competent jurisdiction, was not in a position to do so.

19. The Apex Court in the case titled as **HDFC Bank Ltd. versus Kumari Reshma and Ors.,** reported in **2014 AIR SCW 6673,** held that if a person has purchased a vehicle by hire-purchase agreement or an agreement of hypothecation, the person in possession of the vehicle under that agreement is the owner. It is apt to reproduce paras 10, 23 and 24 of the judgment herein:

> *"10. On a plain reading of the aforesaid definition, it is demonstrable that a person in whose name a motor vehicle stands registered is the owner of the vehicle and, where motor vehicle is the subject of hire-purchase agreement or an agreement of hypothecation, the person in possession of the vehicle under that agreement is the owner. It also stipulates that in case of a minor, the guardian of such a minor shall be treated as the owner. Thus, the intention of the legislature in case of a minor is mandated to treat the guardian of such a minor as the 'owner'. This is the first exception to the definition of the term 'owner'. The second exception that has been carved out is that in relation to a motor vehicle, which is the subject of hire-purchase agreement or an agreement of lease or an agreement of hypothecation, the person in possession of vehicle under that agreement is the owner. Be it noted, the legislature has deliberately carved out these exceptions from registered owners thereby making the guardian of a minor liable, and the person in possession of the vehicle under the agreements mentioned in the dictionary clause to be the owners for the purposes of this Act.*
>
> *11. to 22. .....*
>
> *23. In the present case, as the facts have been unfurled, the appellant bank had financed the owner for purchase of the vehicle and the owner had entered into a hypothecation agreement with the bank. The borrower had the initial obligation to insure the vehicle, but without insurance he plied the vehicle on the road and the accident took place.*
>
> *Had the vehicle been insured, the insurance company would have been liable and not the owner. There is no cavil over the fact that the vehicle was subject of an agreement of hypothecation and was in possession and control under the respondent No. 2. The High Court has proceeded both in the main judgment as well as in the review that the financier steps into the shoes of the owner. Reliance placed on Kachraji Rayamalji (1995 AIR SCW 1491) (supra), in our considered opinion, was inappropriate because in the instant case all the documents were filed by the bank. In the said case, two-Judge Bench of this Court had doubted the relationship between the appellant and the respondent therein from the hire-purchase agreement. Be that as it may, the said case rested on its own facts. The decision in Kailash Nath Kothari (AIR 1997 SC 3444) (supra), the Court fastened the liability on the Corporation regard being had to the definition of the 'owner' who was in control and possession of the vehicle. Similar to the effect is the judgment in Deepa Devi (AIR 2008 SC 735) (supra). Be it stated, in the said case the Court ruled that the State shall be liable to pay the amount of compensation to the claimant and not the registered owner of the vehicle and the insurance company. In the case of Degala Satyanarayanamma (AIR 2008 SC 2493) (supra), the learned Judges distinguished the ratio in Deepa Devi (supra) on the ground that it hinged on*

its special facts and fastened the liability on the insurer. In Kulsum (supra) , the principle stated in Kailash Nath Kothari (supra) was distinguished and taking note of the fact that at the relevant time, the vehicle in question was insured with it and the policy was very much in force and hence, the insurer was liable to indemnify the owner.

24. On a careful analysis of the principles stated in the foregoing cases, it is found that there is a common thread that the person in possession of the vehicle under the hypothecation agreement has been treated as the owner. Needless to emphasise, if the vehicle is insured, the insurer is bound to indemnify unless there is violation of the terms of the policy under which the insurer can seek exoneration."

20. The Apex Court in the latest judgment in **Civil Appeal No. 5293 of 2010,** titled as **Managing Director, K.S.R.T.C. versus New India Assurance Co. Ltd. & Anr.** with **MD Karnataka Road Transport Corpn. & Anr. versus Thippamma & Ors,** decided on 27.10.2015, has laid down the same principle. It is profitable to reproduce relevant portion of para 32, paras 33 and 34 herein:

"32. .....This Court has held that even when there was an agreement of and vehicle has been insured and agreement holder is treated an owner, the insurer cannot escape the liability to make indemnification.

33. In view of the decision in HDFC Bank Limited v. Reshma and Ors., the insurer cannot escape the liability, when ownership changes due to the hypothecation agreement. In the case of hire also, it cannot escape the liability, even if the ownership changes. Even though, KSRTC is treated as owner under Section 2(30) of the Act of 1988, the registered owner continues to remain liable as per terms and conditions of lease agreement lawfully entered into with KSRTC.

34. In view of the aforesaid discussion, we hold that registered owner, insurer as well as KSRTC would be liable to make the payment of compensation jointly and severally to the claimants and the KSRTC in terms of the lease agreement entered into with the registered owner would be entitled to recover the amount paid to the claimants from the owner as stipulated in the agreement or from the insurer."

21. Applying the tests to the instant case, Kamal Kumar was to be saddled with entire liability.

22. Having said so, the impugned award is modified by providing that Kamal Kumar is saddled with entire liability and Vijay Kumar is exonerated.

23. At this stage, learned counsel for the insurer stated at the Bar that the entire awarded amount stand deposited and paid to the claimants and execution is pending.

24. In terms of the observations made hereinabove, the insurer has to press the execution petition before the Executing Court viz-a-viz Kamal Kumar.

25. Accordingly, the impugned award is modified, the appeal filed by Vijay Kumar, i.e. FAO No. 23 of 2010 is allowed and the appeal filed by Kamal Kumar, i.e. FAO No. 291 of 2010, is dismissed, as indicated hereinabove.

26. Send down the record after placing copy of the judgment on Tribunal's file.

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

Dhian Singh & others .....Appellants.

Versus

Shri Kashmir Singh & another ....Respondents.

RSA No. 50 of 2012
Reserved on : 27.10.2015
Decided on : 16.11.2015

Code of Civil Procedure, 1908- Section 100- **Specific Relief Act, 1963-** Section 39- - Plaintiffs filed civil suit for mandatory injunction directing the defendants to remove the blockade caused by them by raising construction over the path- defendants claimed the suit land as Abadi Deh- further claimed that the verandah was raised by them over the suit land- suit and first appeal were both dismissed- in regular second appeal held, that plaintiffs had claimed the encroachment over the path on the basis of demarcation report prepared by the Revenue Officer but the demarcation report was not placed on record- there was no satisfactory evidence to show obstruction by the defendants to the path – suit and appeal were rightly dismissed. (Para-7 to 9)

For the Appellants: Ms. Kanta Thakur, Advocate vice Mr. Rajesh Mandhotra, Advocate.

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

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant Regular Second Appeal is directed against the impugned judgment and decree rendered by the learned Additional District Judge-1, Kangra at Dharamshala, in Civil Appeal RBT No. 57-J/XIII/11/2008 of 31.10.2011, whereby the judgment and decree rendered by the learned Civil Judge (Junior Division), Jawali, District Kangra, H.P. of 15.11.2007 stood affirmed.

2. The brief facts of the case are that the plaintiffs/appellants herein have instituted a suit before the learned Civil Judge (Jr. Divn), Jawali, District Kangra H.P., claiming therein a decree of mandatory injunction directing the defendants/respondents herein to remove the blockage caused by them by raising construction over a path comprised in Khata No. 176 min, Khatauni No. 266 min, Khasra No. 144 measuring 0-16-45 Hms (hereinafter referred to as the "suit land") situated in Mohal Jakhara, Mauza Jhakara, Tehsil Fatehpur, District Kangra, H.P.

3. The defendant No.1/respondent No.1 herein contested the suit and filed written-statement. He in his written-statement has taken preliminary objections inter alia maintainability, cause of action, limitation, locus standi, valuation, jurisdiction, plaintiffs having not approached the Court with clean hands and estoppal etc. On merits, it is averred that the suit land is abadi deh and the verandah has been raised by defendants, respondents herein over the suit land. The defendant No.2/respondent No.2 herein in his written-statement filed by him admitted the claim of the plaintiffs/appellants herein in toto and did not contest the suit and thereafter he was proceeded ex-parte.

4. No replication was filed. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties at contest:-

1. Whether the plaintiff is entitled for relief of mandatory injunction, as prayed for? OPP
2. Whether the plaintiff has cause of action to file the present suit? OPD
3. Relief.

5. On an appraisal of the evidence adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff/appellants herein. An appeal was preferred therefrom by the aggrieved plaintiffs/appellants herein before the learned first Appellate Court. The latter Court on an appraisal of evidence adduced before it affirmed the judgment and decree of the learned trial Court. In sequel, the appeal preferred by the plaintiff/appellants herein before the first Appellate Court came to be dismissed.

6. The appellants herein standing aggrieved by the judgment and decree rendered by the first appellate Court have instituted the instant Regular Second Appeal before this Court.

7. When the appeal came up for admission on 13.9.2012, this Court admitted the appeal on the hereinafter extracted substantial question of law:-

> ***"(1) Whether the findings of the learned courts below are sustainable in view of Ex. P4 and statement of DW3 which shows that the width of the path in question is 6 meters, which has been reduced to one meter by encroaching the path by the defendant."***

Substantial question of Law No. (1):-

8. The plaintiffs/appellants herein in support of the averments constituted in the plaint, of the respondents having, by their raising construction upon the path, reduced its width, hence necessitating the rendition of a decree of mandatory injunction against the defendants/respondents herein for the dismantling of the construction purportedly raised thereupon at their instance, to bring its width to the one as existed prior to the construction raised thereupon by the defendants/respondents herein, have relied upon oral evidence comprised in the testimonies of PW-1, PW-2 and PW-3. The oral evidence in support of the averments aforesaid constituted in the plaint was construed by both the courts below to be insufficient as well as scanty to constrain them to render an executable decree as claimed by the plaintiffs/appellants herein.

9. The reasoning afforded by the both the Courts below in declining the decree of mandatory injunction as claimed by the plaintiffs/appellants herein against the defendants/respondents herein appears not to be suffering from any infirmity, as the oral evidence in proof of the defendants/respondents herein having raised construction upon the purported path, hence its width being reduced, was lacking in specificity with exactitude and precision qua whether the construction as purportedly raised by the defendants/respondents herein was raised upon the purported path hence reducing its width or if raised the specific portion thereof having come to be subjected to encroachment by the defendants/respondents herein by theirs raising a construction thereupon. The specific and precise evidence conveying the factum of the defendants/respondents herein by their act of purportedly raising construction thereupon had hence narrowed its width, was constituted alone in the demarcation report having come to be prepared by a Revenue Officer concerned in sequel to his carrying out a valid demarcation of the suit land. However, there is no demarcation report placed on record by the plaintiffs/appellants herein delineating therein with specificity and exactitude, the precise portion of the path

encroached upon by the defendants/respondents herein by theirs raising a construction thereupon. The plaintiffs/appellants herein having omitted to adduce into evidence the demarcation report prepared by the Revenue Officer concerned after his having carried out a lawful demarcation of the suit land portraying therein or lending sustenance to the factum porbandum of the defendants having raised construction upon any specific portion of path comprised in khasra No. 144, obviously rendered the oral evidence relied upon by the plaintiffs/appellants herein in proof of the factum probandum, of the defendants/respondents herein having raised construction upon any specific portion of Khasra No. 144 whereupon a path exists and whose width has been purportedly narrowed by construction thereupon having been raised by the defendants/respondents herein to be in its entirety nebulous as well as hazy to constrain both the Courts below to render a decree with a depiction therein of the specific portion of Khasra No. 144 whereupon a path exists and whose width has been purportedly narrowed by the respondents by theirs raising construction thereupon. Moreover, the omission of the aforesaid evidence also constrained the learned courts below to render a decree qua any specific portion of Khasra No. 144 being liable to be dismantled by the defendants/respondents herein. Since the ascription of a specific portion of Khasra No. 144 in the decree of mandatory injunction was imperative for its attaining executable force necessarily then, the oral evidence of the plaintiffs/appellants herein in support of the averments in the plaint of the respondents having narrowed the width of the path comprised in khasra No. 144 by their raising construction thereupon, trammeled as well as constrained both the Courts below to with specificity ascribe with precision in its decree for mandatory injunction the apposite portion of khasra No. 144. The constraint which hence beset both the courts below, to render a decree for mandatory injunction, may have been overcome by documentary evidence comprised in a valid demarcation report prepared and proven by the Revenue Officer concerned, yet it being amiss precluded both the Courts below to with specificity ascribe with precision the exact portion of Khasra No. 144 qua which a decree for mandatory injunction was renderable by them. Concomitantly then with a constraint besetting both the courts below to render an executable decree for mandatory injunction, the judgments and decrees of both the Courts below therein declining to the plaintiffs/appellants herein the relief of mandatory injunction, cannot be construed to be suffering from any perversity or absurdity arising from any mis-appreciation of evidence on record or non-appreciation of germane and relevant evidence on record. The substantial question of law is answered accordingly. Consequently, I find no merit in this appeal, which is accordingly dismissed and the judgment and decree of the learned trial Court as affirmed by the appellate Court is maintained and affirmed. Records be sent back forthwith. All pending applications stand disposed of accordingly.

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

Hans Raj .....Petitioner.

Versus

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

Cr.MMO No. 162 of 2015.
Reserved on: 13.10.2015.
Date of Decision : 16th November, 2015.

Code of Criminal Procedure, 1973- Section 482- Petitioner sought quashing of FIR registered for the commission of offences punishable under Sections 420 and 120-B of the Indian Penal Code and Section 13(2) of the Prevention of Corruption Act- it was alleged in

the FIR that petitioner had entered a false report in rapat roznamcha regarding exchange of the land and mutation was attested on the basis of this rapat roznamcha- it was contended that rapat roznamcha was entered at the instance of one 'L' in accordance of H.P. Land Records Manual- report was verified by Field Kanungo- Field Kanungo and Tehsildar had been arrayed as accused along with petitioner, which clearly shows that there was conspisracy/collusion between the parties- submission that allegations made in the FIR are not true was not established on record- petition dismissed. (Para-2 to 7)

For the Petitioners: Mr. Ajay, Sharma, Advocate.
For the Respondents: Mr. Vivek Singh Attri, Dy. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The petitioner herein through the instant petition has sought quashing of FIR No. 13 of 6.09.2012 registered at Police Station, Anti Corruption Bureau, Solan, District Solan, Himachal Pradesh, wherein he along with other co-accused, is alleged to have committed offences punishable under Sections 420 and 120-B of the Indian Penal Code and Section 13(2) of the Prevention of Corruption Act, 1988.

2. The allegations constituted in the F.I.R aforesaid lodged against the petitioner herein besides against the others, named therein as co-accused are of the petitioner herein having entered false Rapat No.8 on 04.09.2008 in the Roznamcha of Patwar Circle Bhud, Tehsil Nalagarh,District Solan, Himachal Pradesh at the instance of Shri Layak Ram son of Shri Banta Ram portraying therein the factum of his having exchanged his land measuring 6 bighas comprised in Khata Khatoni NO. 40/41 situated at Village Koli Majra with S/Shri Karam Chand, Joginder Singh and Layak Ram all sons of Shri Ram Kishan at village Makhnumajra under Patwar Circle, Thana. The petitioner herein having purportedly recorded false rapat No.8 sequelled attestation of mutation bearing No.350 by Shri Bagga Ram, Tehsildar, Nalagarh on the recommendation of Shri Dharam Pal, Kanungo. Both, Shri Bagga Ram, Tehsildar, Nalagarh and Shri Dharam Pal, Kunungo stand named as co-accused alongwith the petitioner herein. The falsity ingraining rapat No.8 entered by the petitioner herein in the Rojnamcha of Patwar Circle Bhud, Tehsil Nalagarh, District Solan, H.P. at the instance of Shri Layak Ram son of Shri Banta Ram portraying therein the factum of the latter having exchanged six bighas of land comrpised in khata khatoni No.40/41 situated at village Koli Majra with S/Shri Karam Chand, Joginder Singh and Layak Ram all sons of Shri Ram Kishan resident of Village Makhnumajra, purportedly sprouts from the factum of no compatible entries qua exchange of land having been recorded in the apposite record of Patwar Circle Thana wherein village Makhanumajra falls. Necessarily, when entries in the apposite rojnamacha of the Patwar Circle concerned by the Patwari concerned manifesting the factum of exchange as displayed in rapat No.8 recorded in the rojnamcha of patwar circle Bhud having factually occurred with the land of S/Sh. Karam Chand, Joginder Singh and Layak Ram all sons of Ram Krishan, residents of Village Makhnumajra, under Patwari Circle, Thana, were hence also required to be recorded therein contemporaneously with the recording by the petitioner herein the fact scribed in rapat No.8 entered by him at the instance of Shri Layak Ram son of Shri Banta Ram in the apposite rojnamacha portraying the fact of the latter having exchanged six bighas of land comprised in Khata Khatoni No. 40/41 situated at Village Kolimajra with the land of the aforesaid at village Makhnu Majra falling in Patwari Circle Thana, for hence the aforesaid recitals recorded by the petitioner to be bereft of any falsity , Necessarily with no such

contemporaneous rapat of exchange occurring in the rojnamacha of Patwar Circle Thana, wherein village Makhnumajra falls, obviously purportedly rendered the act of the petitioner herein to enter rapat No.8 in the rojnamacha of Patwar Circle Bhud portraying the factum of Laiq Ram son of Shri Banta Ram having exchanged 6 bighas of land comprised in khata khatoni No.40/41 situated at village Kolimajra with the land of S/Shri Karam Chand, Joginder Singh and Layak Ram all sons of Ram Krishan, situated at village Makhnumajra, under Patwar Circle Thana, to be false. During the course of investigation of the case, the Investigating Officer uncovered the factum of Sh. Layak Ram son of Shri Banta Ram having subsequent to the attestation of mutation of exchange by Shri Baga Ram, Tehsildar, Nalagarh, alienated his land situated at village Kolimajra under patwar circle Bhud in favour of S/Sh. Karam Chand, Joginder Singh and Layak Ram, all sons of Shri Ram Kishan which factum was concluded by him to be comprising a graphic disclosure of the recording of rapat No.8 by the petitioner herein and the attestation of mutation thereupon by Sh. Baga Ram, Tehsildar being a facilitator to the vendors to avoid payment of stamp duty and registration fee to the tune of Rs.13,34,652 which otherwise was payable by them to the State of Himachal Pradesh. Consequently, he concluded the causing wrongful gain to the vendors aforesaid and wrongful loss to the State exchequer.

3. The learned counsel appearing for the petitioner has with force contended before this Court that the act of the Patwari in entering rapat No.8 in the rojnamcha of Patwar Circle Bhud at the instance of Shri Layak Ram son of Shri Banta Ram manifesting the factum of his having exchanged six bighas of land comprised in Khata/Khatoni No.40/41 situated at village Kolimajra with S/Sh. Karam Chand, Joginder Singh and Layak Ram all sons of Shri Ram Kishan at village Makhnumajra, even if assumingly is either legally flawed or imbued with any vice of falsity, yet when he had in doing so performed his official duties as enjoined upon him by Clause 8.1 existing in Chapter 8 of the H.P. Land Records Manual, relevant portion whereof stand extracted hereinafter, no inculpatory role is fastenable upon him :-

> "8.1. (1) The mutation Register is prescribed in Section 34(3) and 35 of the Land Revenue Act for the entry of every acquisition of any right of interest in an estate as a landowner, assignee or occupancy tenant, and under Section 36 of disputed acquisition of other rights. The mutation register is not a part of the record of rights and its entries do not share in the presumption of truth attached to that record. All mutations of rights of ownership or occupancy including voluntary partitions, shall be entered by the patwari in the register when they are reported to him by the transferee as required by Section 35 of the Land Revenue Act and if not so reported then so soon as they appear to have been acted upon. When he enters a mutation affecting the Shajra Nasb the patwari shall note in pencil the number of the mutation against the entry affected. If and when the mutation is sanctioned, he shall amend the Shajra Nasb in red ink in accordance with the mutation order.
>
> (2) The provisions of sections 54, 107 and 123 of the Transfer of Property Act were made applicable in H.P. vide Deputy Secretary (Rev.) to the Govt. of H.P. letter NO.17-13/66, Rev. I, dated 6.1.1971 whereby registration of sale (S.54) lease (S.107) and gift (S.123) have been made compulsory. In the case of acquisition of rights of such nature, the patwari will enter mutation on the basis of registration memorandum or registered deed.
>
> (3) Other acquisitions of rights or interests based upon oral transactions i.e. without registration shall be entered in the register of mutation by the patwari when reported to him under section 35 of the Act ibid i.e.

> acquisitions through Release, Settlement, Mortgage with possession, Exchange and creation of tenancy etc. but subject to the provisions contained in section 118 of the H.P. Tenancy and Land Reforms Act, 1972 and section 3 of H.P. Transfer of Land (Regulation) Act, 1968 read with paras 18.24, 18.25, 18.26 and 18.29 infra.
>
> (4) The Revenue Officer shall attest such mutations based upon oral transactions in the presence of the parties in accordance with the provisions of section 38 of H.P. Land Revenue Act, 1954 in case the acquisitions are otherwise legal. ....."

He has also contended that his act of recording rapat No.8 in the rojnamacha of Patwar Circle Bhud portraying the factum aforesaid was neither malafide nor it sequeled the attestation of mutation thereupon by the competent Revenue Officer, as the attestation of mutation by Shri Bagga Ram, Tehsildar, Nalagarh on the purported strength of recording of rapat No.8 by the petitioner herein in the roajnamacha of Patwar Circle Bhud at the instance of Layak Ram son of Shri Banta Ram was rather a sequel to Shri Dharam Pal, Kanungo verifying the factum of exchange recorded by him in rapat No.8 in the rojnamacha of Patwar Circle Bhud. The subtle nuance of his submission is of Dharam Pal Kanungo being rather enjoined to verify the truth of the portrayals in rapat No.8 which he omitted to, hence the omission of the latter to carry out an incisive verification for unravelling the truth or falsity of the recording of the apposite rapat No.8 by him in Patwar Circle Bhud does not attract any vice of criminal culpability to his performing the enjoined mandatory duty in recording it especially when its performance by him stood cast upon him by the relevant provisions of the H.P. Land Records Manual besides by Section 35 of the H.P. Land Revenue Act. The provisions of Section 35 of the H.P. Land Revenue Act read as under:-

> " 35 "Making of that part of [periodical] record which relates to land-owners, [etc.] assignees of revenue and occupancy tenants.- (1) Any person acquiring by inheritance, purchase, mortgage, gift or otherwise, any right in an estate as a land-owner [etc.] assignee of land revenue, or tenant having a right of occupancy, shall report his acquisition of the right to the patwari of the estate.
>
> (2) If the person acquiring the right is a minor or otherwise disqualified, his guardian or other person having charge of his property shall make the report to the patwari.
>
> (3) The patwari shall enter in his register of mutations every report made to him under sub-section (1) or sub-section (2) and shall also make an entry therein respecting the acquisition of any such rights as aforesaid which he has reason to believe to have taken place, and of which a report should have been made to him under one or other of those sub sections and has not been so made.
>
> (4) No Revenue Court shall entertain a suit or application by the person so succeeding or otherwise obtaining possession until such person has made the report required by this section
>
> ....."

4. The aforesaid submission of the learned counsel appearing for the petitioner herein to exculpate his liability qua the incriminatory role attributed to him by the Investigating Officer appears attractive, yet the inculpatory role attributed to the petitioner herein by the Investigating Officer when arises, as emanable from a scrutiny of the record maintained by the Investigating Officer and produced before this Court for its perusal, not

only from his while being enjoined to perform his statutory duties his hence having entered rapat No.8 in the rojnamacha of Patwar Circle Bhud, rather from palpable supervening circumstances which pointedly convey the existence of complicity inter se the petitioner with Shri Layak Ram son of Shri Banta Ram, which prodded his recording of rapat No.8 in the rojnamacha of Patwar Circle Bhud, besides collusion with S/Sh. Karam Singh, Joginder Singh and Layak Ram, all sons of Shri Ram Kishan, especially to, as displayed by the Investigating Officer in his report prepared under Section 173 of the Cr.P.C., facilitate the evasion of stamp duty or registration fee by the latter and that too in connivance with Bagga Ram, Tehsildar, Nalagarh, Dharam Pal, Kanungo, who along with the petitioner herein also stand named as accused in the FIR, hence emasculates for the following reasons the strength of his submission:- (a) Karam Chand, Joginder Singh and Layak Ram, all sons of Shri Ram Krishan having subsequently purchased land measuring 8.1 bigha from S/Shri Roshan Lal, Bhag Singh sons of Shri Nikku Ram and Beli Ram son of Shri Lahasnu and 6 bighas of land from Shri Layak Ram son of Shri Banta Ram resident of Koli Majra, Tehsil Baddi, District Solan, H.P. (b) Mutation No. 350 attested by Shri Bagga Ram, Tehsildar Nalagarh on the strength of rapat No.08 recorded by the petitioner herein in rojnamacha of Patwar Circle Bhud and which stood verified by co-accused Dharam Pal, Kunungo having stood on 25.07.2012 cancelled by Tehsildar, Baddi. (c) On 10.09.2008 Rs.13,34,000/- having been, in quick succession to the recording of rapat No.8 by the petitioner herein, withdrawn by Shri Karam Chand from his bank account No.117810011024, Dena Bank, Baddi and Rs.13,33,000 each having been withdrawn by his brothers Shri Joginder Singh and Shri Layak Ram from their bank accounts No.117810011023 and 117810011025 respectively, and (d) on 13.10.2008 Layak Ram son of Shri Banta Ram having purchased 24 kanal and 13 marla of land at village Haripur-Basdar, District Ropar, Punjab for a sale consideration of Rs.39,00,750/- vide sale deed No.1823 of 3.10.2008. Imperatively, the inference which is drawable from the aforesaid facts, is of the petitioner herein having prima facie colluded with Layak Ram son of Shri Banta Ram while accepting his statement qua his having exchanged his 6 bighas of land comprised in Khata Khatoni No.40/41, situated at village Kolimajra with S/Shri Karam Chand, Joginder Singh and Layak Ram all sons of Shri Ram Kishan at village Makhnumajra and his then proceeding to record rapat No.8 in the rojnamacha of Patwar Circle Bhud which further led the Tehsildar, Nalagarh, Shri Baga Ram on the recommendation of Shri Dharam Pal, Kanungo to attest mutation of exchange especially when it was not a bonafide exchange arising from no contemporaneous entries having stood recorded in the apposite record maintained by the patwari concerned manning Patwari Circle, Thana, whereunder the land of Karam Chand, Joginder Singh and Layak Ram, all sons of Ram Kishan is located, manifesting the factum of their land located therein having been exchanged with the land of Layak Ram, son of Shri Banta located at Village Kolimajra under Patwar Circle Bhud, for hence imbuing rapat No.8 recorded by the petitioner herein in the rojnamacha of Patwari Circle Bhud with veracity. Necessarily then, reinforced vigour is lent to the propagation by the Investigating Officer of the petitioner herein along with other accused having facilitated all the aforesaid to evade stamp duty besides registration fees, by his act of recording false rapat No.8 in the rojnamacha of Patwar Circle Bhud, Tehsil Nalagarh, hence empowering the Revenue Officer concerned to attest mutation of exchange qua the land of Shri Layak Ram son of Shri Banta Ram at Village Kolimajra in favour of S/Sh. Karam Chand, Joginder Singh and Layak Ram, all sons of Ram Kishan even when the land of the latter located at Village Makhanumajra falling in Patwar Circle Thana stood unverified at all stages by each of the accused, to have been entered in the apposite rojnamacha by the patwari of Patwar Circle, Thana as standing exchanged by the aforesaid in favour of Layak Ram son of Shri Banta Ram, in lieu of the latter having exchanged his land failing in Patwar Circle Bhud with the former. Obvivously when all the accused derelicted at all the stages since the inception of recording of rapat

No.8 by the petitioner herein in the rojnamacha of Patwar Circle Bhud uptill the attestation of mutation thereupon by Shri Baga Ram, Tehsildar preceding which a prima facie collusive besides an invented verification was carried out by Shri Dharam Pal, Kanungo, in each respectively verifying the truth or falsity of the recitals in rapat No.8 by eliciting from the patwari concerned of Patwar Circle, Thana, contemporaneous entries existing in the apposite record connotative of S/Sh. Karam Chand, Joginder Singh and Layak Ram, all sons of Shri Ram Kishan having exchanged their land falling under Patwar Circle, Thana with the land of Layak Ram falling under Patwar Circle, Bhud, hence attracts penal culpability to their negligence, besides dereliction of duty in regard aforesaid.

5. Cancellation of both mutations No.350 and 351 on 25.07.2012 by the Tehsildar, Baddi, being a sequel to Layak Ram, Joginder Singh and Karam Chand all sons of Ram Kishan having preferred an application before the Tehsildar, concerned even when there was passing of consideration from Joginder Singh, Layak Ram and Karam Chand, all sons of Ram Kishan to Layak Ram son of Shri Banta Ram much prior to the cancellation of mutations No.350 and 351 rather in quick succession to the recording of rapat No.8 by the petitioner herein besides, with the handwriting expert having recorded an opinion qua the factum of the date scribed on the apposite application being in the hands of the petitioner herein, vividly pronounces the fact of his throughout colluding with as also being in complicity with Karam Chand, Joginder Singh and Layak Ram, all sons of Shri Ram Kishan. Consequently, he was even at the stage of recording of rapat No.8 aware of besides, in the know of the fact that he was at the instance of Layak Ram son of Shri Banta Ram entering a false report No.8 in the rojnamacha of Patwar Circle Bhud portraying therein the purported fact of the aforesaid having exchanged land measuring 6 bighas comprised in khata khatoni 40/41 situated at Village Kolimajra with the land of S/Sh. Karam Chand, Joginder Singh and Layak Ram, all sons of Shri Ram Kishan at Village Makhnu Majra.

6. In aftermath, the contention of the learned counsel for the petitioner herein that the latter had in entering rapat No.8 in rojnamacha of Patwar Circle Bhud merely performed his enjoined statutory duty to which no penal culpability is attractable besides, his contention of mutation No.350 attested thereupon by Tehsildar, Nalagarh, Shri Baga Ram, being a sequel to misverification by Shri Dharam Pal, Kunungo, for whose omission to incisively verify the truth or falsity of recitals in rapat No.8 no penal culpability is fastenable upon him, marshals no force or strength. As a concomitant rather with even the Tehsildar, Nalagarh, Shri Baga Ram as well as Shri Dharam Pal, Kanungo having been named as accused along with the petitioner herein begets an inference of there being collusion inter se the petitioner herein as well as the aforesaid co-accused besides, there being collusion and complicity intra se the aforesaid with Layak Ram son of Shri Banta Ram as well as with S/Sh. Karam Chand, Layak Ram and Joginder Singh, all sons of Shri Ram Kishan. Resultantly, with the relevant material prima facie upsurging and portraying complicity intra se the aforesaid, any inertia besides, inaction on the part of the co-accused to ascertain the cardinal fact of contemporaneity inter se the recording of rapat No.8 by the petitioner herein and its sequeling attestation of mutation of exchange carrying No.350 by Shri Baga Ram, Tehsildar, Nalagrah co-accused qua the land of Layak Ram son of Banta Ram located in Patwar Circle Bhud with the lands of Karam Chand, Joginder Singh and Layak Ram, all sons of Shri Ram Kishan located within Patwar Circle, Thana **vis-à-vis** the recording of an apposite rapat by the Patwari concerned of Patwar Circle Thana qua exchange of lands of Karam Chand, Joginder Singh and Layak Ram, all sons of Shri Ram Kishan located within Patwar Circle, Thana with the land of the aforesaid is imminently lacking in any vestige of bonafides, rather prima facie appears to be prompted by malafides. The aforesaid inference constrains this Court to conclude that prima facie the allegations constituted against the petitioner in the final report prepared by the Investigating Officer are

neither unworthwhile nor also they are prima facie ingrained with any falsity, as a corollary then, the submission of the learned counsel appearing for the petitioner herein that prima facie no truth is enjoyed by the allegations constituted by the Investigating Officer in his final report stands effaced.

7. For the foregoing reasons, there is no merit in the instant petition which is accordingly dismissed. However, it is made clear that any observation made hereinabove shall not be taken as an expression of opinion on the merits of the case and the learned trial Court as and when seized of the matter shall proceed to decide the matter remaining uninfluenced by any observations made hereinabove. All the pending applications also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J

Harjinder Singh and others. ...Petitioners.

Versus

Maan Singh ...Respondent.

Civil Revision No. 168 of 2004.
Reserved on: 26.10.2015.
Date of decision : 16th November, 2015.

H.P. Urban Rent Control Act, 1987- Section 14- Petitioner filed a petition for eviction of the tenant on the ground of arrears of rent, which was allowed by the Rent Controller- separate appeals were preferred against this order and the Appellate Court partly set aside the order passed by the trial Court- held that receipts produced by the petitioner showing that agreed rent was Rs.1,200/- per month were not reliable – no agreement was executed to show that rent was agreed to be Rs.1,200/- per month- it was mentioned in the notice that rent was Rs. 1,000/- per month-hence, findings recorded by Appellate Court that rent of premises was Rs.1,000/- per month cannot be faulted- landlord had become owner in the month of March, 1995- therefore, landlord would be entitled to statutory increase after the lapse of five years from March, 1995- appeal partly allowed. (Para-7 to 11)

For the petitioners: Mr.N.K.Thakur, Senior Advocate with Mr.Ramesh Sharma, Advocate.
For the Respondent: Mr.Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, J.

The petitioners/landlords herein had instituted a petition for eviction of the respondent/tenant herein from the demised premises on the ground of the tenant/respondent herein having fallen in arrears of rent from 1.6.1995 to 31.8.2001 at the rate of Rs.1200/- per mensem along with house tax, interest and increase of rent at the rate of 10%. The detailed calculations of the lump sum amount in which the respondent herein has fallen into arrears of rent stand extracted hereinafter:-

i)	Rent from 1.1.95 to 31.8.2001	Rs.90,000/-
ii)	Interest @ 9%	Rs.25,312/-
iii)	House tax from 1995-96	Rs.9,450/-

	to 2000-2001.	
iv)	10% increase of rent from April 2000 to August 2001 i.e.17 months	Rs.2,040/-
v)	Interest at the rate of 9% on the Increased rent from 1.4.2000 to 31.8.2001.	Rs.130/-
	Total recoverable amount	Rs.1,26,932/-

2. The learned Rent Controller on a perusal of the evidence adduced before it discerned therefrom that since the petitioners herein had discharged the onus on the apposite issues, hence it proceeded to render an order of eviction of the respondent herein from the demised premises. Nonetheless, it was mandated therein that the order of eviction shall not be executable, if the arrears of rent w.e.f. April and May 1995 at the rate of Rs.1000/- per month, at the rate of Rs.1100/- per month w.e.f. 1.6.1995 till 30.6.1998, at the rate of Rs.1210/- per month w.e.f. 1.7.1998 to 30.6.2003 and at the rate of Rs.1331/- per month w.e.f. 1.7.2003 till date along with interest at the rate of 9% and costs assessed at Rs.500/- are deposited by the respondent within a period of 30 days of the order of the learned Rent Controller. The respondent herein standing aggrieved by his being ordered to be evicted from the demised premises by the learned Rent Controller, instituted an appeal therefrom before the learned Appellate Authority under the relevant provisions of the H.P. Urban Rent Control Act, 1987 (hereinafter referred to as the 'Act'). The petitioners herein also being aggrieved by the findings recorded by the learned Rent Controller in his impugned order qua the factum of theirs being entitled to the contemplated statutory enhancement of rent @10% under the provisions of Section 5 of the Act w.e.f. 1.6.1995, besides the petitioners herein also standing aggrieved by the order of the learned Rent Controller assessing rent @ Rs.1100/- per mensem qua the demised premises payable by the respondent herein to them contrary to their claim for rent qua it in the sum of Rs.1200/- per mensem as projected by them in the petition for eviction of the respondent herein from the demised premises constrained them to also impugn the aforesaid findings qua the quantum of rent per mensem payable qua the demised premises by the respondent herein to them, by theirs instituting an appeal therefrom before the learned Appellate Authority. Both the appeals instituted by the petitioners herein as well as by the respondent herein before the learned Appellate Authority were decided by a common judgment, whereby Civil Misc. Appeal No.2 of 2003 was partly accepted, whereas Civil Misc. Appeal No.3 of 2003 was dismissed. Concomitantly, the impugned order of the learned Rent Controller was partly set aside, inasmuch as the petitioners herein were held entitled to receive rent from the respondent herein qua the demised premises at the rate of Rs.1000/- per mensem w.e.f. 1.6.1995 and at the rate of Rs.1100/- per mensem from 1.6.2000 till 16.6.2003, the date of order of ejectment, with 9% interest as well as costs of petition as awarded by the ld. Rent Controller. The petitioners are aggrieved by the findings recorded by the learned Appellate Authority assessing rent payable to them by the respondent herein qua the demised premises @Rs.1000/- per mensem besides stand aggrieved by the findings recorded by the learned Appellate Authority whereby benefit of 10% statutory increase has been permitted to be availed of by them from the respondent herein qua the demised premises from 1.6.2000 till 16.6.2003. Apart therefrom the petitioners herein are aggrieved by the factum of the learned Appellate Authority having declined to them the relief of theirs being statutorily entitled to recover arrears of house tax as levied qua the demised premises by the authority concerned besides leviable in future.

3. The brief facts of the case are that the petitioners herein have filed the eviction petition for eviction of the respondent herein from the shop in dispute, situate in

Ward No.1 on Una-Nangal Road, near ITI, Una. The shop was let out to the respondent by Sh. Banta Ram predecessor-in-interest of the petitioners in April, 1995 at the rent of Rs.1200/- per month plus house tax as imposed by the M.C. Una. The shop in dispute was purchased by Banta Ram from its original owner Smt. Krishana wife of Ram Murti. The respondent is in arrears of rent from 1.6.1995 to 31.8.2001, besides the respondent herein is also in arrears of rent on account of 10% increase from April, 2000 to August 2001.

4. The respondent-tenant has contested the petition and averred that the shop in dispute was taken on rent by him from Smt. Krishna in the year 1988 @Rs.1000/- per month including house tax. The respondent made the payment of the rent regularly to Banta Ram till his death and thereafter to petitioner No.1 till May, 2001. The respondent refused to enhance the rent to Rs.1500/- in April, 2001 as requested by the petitioners. Thereafter, the petitioners constructed a store, latrine and bathroom on the first floor and obstructed the flow of water which was seeping through the roof of the shop in dispute. The petitioners also started flowing the water of water tap through the roof of the shop and did not change the tap and flow despite requests. The petitioners did not accept the payment of rent for the period May, 2001 onwards.

5. On the pleadings of the parties, the following issues were framed by the learned Rent Controller:-

1. Whether the respondent is in arrears of rent, if so, to what amount? OPP.

2. Relief.

6. Now the petitioners/landlords have instituted the instant Civil Revision before this Court, assailing the findings, recorded by the learned Appellate Authority in its impugned judgment.

7. Initially the acerbic controversy inter se the parties at contest qua the entitlement of the petitioners herein from the respondent herein of rent qua the demised premises @Rs.1200/- per mensem, is to be set at rest. The learned Appellate Authority had relied upon legal notice Ext.PW.2/A served by the respondent herein through his counsel upon the petitioner No.1 herein, wherein there is a recital of the respondent herein tendering to the petitioners herein rent qua the demised premises @Rs.1000/- per mensem since April 1995 till October 1996 apposite receipts qua tendering of rent by the respondent herein to the petitioners herein stood not issued by the latter to the former. In the reply furnished by the petitioners herein to notice Ext.PW.2/A and which reply of the petitioners herein to Ext.PW-2/A stands comprised in Ext.PW.4/A, a mere recital exists therein of the respondent herein agreeing to tender to the petitioners herein rent qua the demised premises quantified @Rs.1200/- per mensem, which quantum of rent per mensem qua the demised premises stood tendered by the respondent herein to the petitioners herein only for the months of April and May, 1995, whereafter the respondent herein stopped tendering rent qua the demised premises at the aforesaid rate to the petitioners herein. Apart therefrom, there is a recital therein of receipts portraying the factum of tendering of rent by the respondent herein to the petitioners herein qua the demised premises for the months of April and May, 1995, @ Rs.1200/- per mensem having stood issued by the petitioners herein to the respondent herein. However, the aforesaid recital in Ext.PW-4/A is ex facie for the reasons as assigned hereinafter false:- (a) Ext.PW.4/A pronouncing the factum of the petitioners herein not issuing receipts to the respondent herein nor also theirs accepting rent from the respondent herein qua the demised premises subsequent to May 1995, on the score of the respondent herein not tendering the orally agreed rent inter se them qua the demised premises @Rs.1200/- per month per se appearing to be contrived as well as invented/arising from the factum of (i) the petitioners abandoning to receive rent qua the

demised premises from the respondent herein for the period subsequent to May, 1995, even when given the admission of the petitioners herein portrayed in Ext.PW-4/A of the tenant/respondent herein defraying to them rent qua the demised premises, previously quantified @Rs.1200/- per month, unveils an inference of theirs refusal to accept rent comprised in the sum of Rs.1200/- per mensem subsequently tendered to them by the respondent/tenant qua the demised premises, being a pure invention. In sequel, the petitioners refusing to accept rent @Rs.1200/- per mensem qua the demised premises from the respondent herein subsequent to May 1995 gives a boost to an inference of even uptill May 1995, also the respondent/tenant herein defraying to the petitioners/landlords herein rent qua the demised premises quantified @1000/- per mensem especially when only on adduction at the instance of the petitioners/ landlords the apposite receipts though issued by them to the respondent/tenant herein portraying the factum of the latter previously tendering to them rent constituted in the sum of Rs.1200/- per mensem qua the demised premises, would have given sustenance to the propagation aforesaid by the petitioners herein, of the respondent herein tendering to the petitioners rent qua the demised premises quantified @ Rs.1200/- per mensem. However, the withholding by the petitioners herein of the aforesaid receipts constrains an inference of the propagation of the petitioners herein of the tenant/respondent herein defraying to them rent qua the demised premises quantified @Rs.1200/- per mensem uptill May 1995 galvanizing no legal formidability, (b) there being no documentary evidence adduced on record comprised in a rent agreement executed inter se the predecessor-in-interest of the petitioners/landlords or the petitioners with the tenant/respondent herein qua the demised premises obliging the latter to defray to the former rent qua the demised premises comprised in the sum of Rs.1200/- per mensem. In aftermath, it is held that the findings recorded by the learned Appellate Authority of the tenant/ respondent herein being liable to defray to the petitioners/landlords herein them rent qua the demised premises in the sum of Rs.1000/- per mensem beyond May 1995, does not suffer from any legal infirmity arising from any mis-appreciation of apposite evidence or its discarding relevant evidence.

8. Hereinafter, it has to be determined, whether the petitioners/landlords were entitled to the benefit of statutory enhancement of rent in the percentum contemplated in the apposite provisions constituted in the “Act”. The factum of the predecessor-in-interest of the petitioners herein having acquired title to the demised premises in the month of March, 1995 under sale deed Ext.PW.5/A, would clinch the aforesaid factum of the commencement or the initiation of the period wherefrom the benefit of statutory enhancement in rent, in the statutorily envisaged percentum is claimable by the petitioners qua the demised premises from the respondent/tenant herein. The entitlement or the statutory right vesting in the petitioners/landlords to claim the benefit of enhancement in rent qua the demised premises from the respondent/tenant occurs or arises only on theirs being invested with an absolute ownership qua the demised premises. The right statutorily bestowed upon the petitioners/ landlords to claim the benefit of statutory enhancement in rent qua the demised premises in the percentum envisaged in the “Act”, is an individual or a right in personam besides a corporeal right. Its accrual arises or occurs not from the date of induction of the respondent herein as a tenant in the demised premises, rather its benefit is accruable to the landlord besides its occurrence is co-terminus with the acquisition of title to the demised premises by the landlord. In case the conferment of the said right upon the petitioners/landlords is construed to be co-terminus with the inception or initiation of tenancy in favour of the respondent herein, especially when prior to March 1995, the predecessor-in-interest of the petitioners herein did not hold title to the demised premises nor hence the landlord was entitled to receive rent qua the demised premises from the respondent/tenant, it would tantamount to creating the germane statutory right in favour of the landlord even when he did not hold title to the demised premises, besides would concomitantly tantamount to

vestment or bestowment of a right in the landlord to obtain from the tenant qua the demised premises the benefit of statutory enhancement of rent in the percentum envisaged in the apposite provisions of the Act aforesaid, for a period even when he did not hold absolute title to the demised premises also would sequel conferring the benefit of the statutory provisions qua the aforesaid facet in a non-individualistic entity inasmuch as in the demised premises, which bestowment would conflict with a right reserved in the landlord/owner alone to claim the benefit of statutory enhancement in rent qua the demised premises from the tenant in the percentum envisaged in the apposite provisions of the "Act". Consequently, it is held that the findings of the learned Appellate Authority qua the benefit of statutory enhancement in rent from the tenant qua the demised premises though being affordable to the petitioners herein in the statutorily envisaged percentum yet its computation being reckonable on completion of the statutory period commencing from March 1995, whereto the predecessor –in –interest of the petitioners/landlords acquired absolute title to the demised premises besides his having hence become the landlord of the demised premises where onwards he was hence then entitled to receive rent qua it from the respondent/tenant, do not suffer from any infirmity.

9. A perusal of Ext.PW.3/A unfolds the factum of the authority concerned having demanded house tax in the sum of Rs.9450/- from Banta. The underscoring of, in Ext.PW.3/A of the predecessor-in-interest of the petitioners herein being enjoined to defray to the authority concerned house tax in the sum of Rs.9450/- from 1995-96 to 2000-2001 gives leverage for clinching an inference of his while having acquired title to the demised premises under Ext.PW-5/A in March 1995, naturally his being as such for the period commencing from 1995-96 till 2000-01 liable to pay house tax to the authority concerned in the sum recited therein. The learned 1st Appellate Court had refused to afford to the petitioners herein their statutory entitlement to claim house tax from the respondent herein as stood assessed qua the demised premises by the authority concerned under Ext.PW.3/A, besides had disentitled the petitioners herein to demand house tax from the respondent herein as levied/leviable in future qua the demised premises by the authority concerned, on the score of the petitioners herein having not made a demand/claim in writing from the respondent/tenant enjoining the latter to defray to them house tax as stood levied or leviable in future qua the demised premises, by the authority concerned. The aforesaid reasoning as afforded by the learned Appellate Authority in not affording to the petitioners herein their right to demand and receive from the respondent/tenant, house tax as stood levied besides leviable in future by the authority concerned qua the demised premises, is in open and blatant conflict with an inherent right in the aforesaid regard vesting in the petitioners/landlords under Section 10 of the Act, whose provisions stand extracted hereinafter and which envisage the vesting of a statutory right in the landlords to stake a claim for house tax from the respondent/tenant as stood levied besides leviable in future qua the demised premises by the authority concerned.

> **"10. Increase of rent on account of payment of rates etc. of local authority but rent not to be increased on account of payment of other taxes etc**. (1) Notwithstanding anything contained in any other provisions of this Act, the landlord shall be entitled to increase the rent of a building or rented land, and if after the commencement of the tenancy any fresh rate, cess or tax is levied in respect of the building or rented land by the Government or any local authority, or if there is an increase in the amount of such a rate cess or tax being levied at the commencement of tenancy:
>
> Provided that the increase in rent shall notexceed the amount of any such rate, cess or tax or the amount of the increase in such rate, cess or tax, as the case may be.

(2) Notwithstanding anything contained in any law for the time being in force or in any contract, no landlord shall recover from his tenant the amount of any tax or any portion thereof in respect of any building or rented land occupied by such tenant by increase in the amount of the rent payable or otherwise, save as provided in sub section (1)."

The vesting of a statutory right in the petitioners/landlords to receive from the tenant/respondent the amount of cess or local tax as stood levied or leviable in future qua the demised premises by the authority concerned, cannot stand infringement or denudation on the mere ground as untenably communicated by the learned Appellate Authority in its impugned judgment, of it being defrayable by the tenant to the landlord only when the latter makes a demand qua it in writing from the former. A statutory right is an inherent indefeasible right flowing in favour of the beneficiary under the aforesaid relevant provisions of the Act dehors its having been not claimed in writing by the latter from the person upon whom the statutory duty qua its defrayment to the person entitled to receive it, is fastened. Consequently, even when prior to the demand qua the aforesaid statutory benefit having found manifestation in the rent petition, no demand was made in writing by the petitioners qua its defrayment qua the demised premises from the respondent herein, nonetheless the aforesaid omission would not either whittle or defeat the right of the petitioners herein to claim it even in the rent petition, it being a right vested by a statute in the landlords/petitioners.

10. Consequently, it is held that the findings of the learned Appellate Authority denying the aforesaid statutory benefit to the petitioners herein on the ground of theirs having proceeded to stake a claim from the respondent herein qua house tax comprised in a sum of Rs.9450/- as stood levied or leviable in future qua the demised premises by the authority concerned only in the rent petition whereas they were enjoined to also previously claim it in writing from the respondent, infracts and transgresses the mandate of Section 10 of the "Act" and is liable to reversed.

11. The result of the above discussion is that the petition is partly allowed to the extent that the findings of the learned Appellate Authority denying the statutory benefit to the landlords to stake a claim for house tax comprised in a sum of Rs.9450/- qua the demised premises from the respondent herein as stood levied or leviable in future qua it by the authority concerned infracts and transgresses the mandate of Section 10 of the 'Act' and is accordingly set aside. The impugned order is modified to that extent. However, the findings of the learned Appellate Authority qua the petitioners/landlords being entitled to from the respondent herein rent qua the demised premises @Rs.1000/- per mensum w.e.f. 1.6.1995 and at the rate of Rs.1100/- from 1.6.2000 till 16.6.2003 the date of order of ejectment with 9% interest is affirmed.

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

Krishna Devi .....Appellant.

Versus

Ulfat & ors. .....Respondents.

RSA No. 45 of 2006.
Reserved on: 05.11.2015.
Decided on: 16.11.2015.

Code of Civil Procedure, 1908- Section 100- Plaintiff sought injunction against the defendants for restraining them from raising construction on the best portion of the suit land-plaintiff claimed the suit land to be joint and asserted that the defendants were raising construction without partitioning the land-the defendants asserted that co-sharers had sold the suit land to them specifically and had delivered the possession - similarly part of the land was sold to the husband of the plaintiff- the defendants further claimed that separate khatonies were carved out - the trial court decreed the suit - first appellate court allowed the appeal and dismissed the suit- held that the longstanding revenue entries prove that previous co-owner was in exclusive possession of the suit land and had sold specific portion of the suit land - Separate khanaunis were also assigned - A specific portion of the land was sold to husband of the plaintiff and he was put in possession of the same- thus, husband of the plaintiff ceased to be the co-sharer of the suit land- the plaintiff ought to have filed suit for possession instead of injunction- there is no merit in this appeal and the same is dismissed. (Para 16 to 18.)

Case referred:
Bachan Singh vrs. Swaran Singh, AIR 2001 Punjab and Haryana 112

For the appellant(s): Mr. Karan Singh Kanwar, Advocate.
For the respondents: Mr. G.D.Verma, Sr. Advocate, with Mr. B.C.Verma, 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, Sirmaur at Nahan, H.P., dated 5.11.2005, passed in Civil Appeal No.49-CA/13 of 2005.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the appellant-plaintiff (hereinafter referred to as the plaintiff), has instituted suit for permanent prohibitory injunction restraining the respondents-defendants (hereinafter referred to as the defendants) from interfering, digging foundation and raising construction in the land comprised in Khata Khatauni No. 159/253 to 255, Kh. Nos. 504/41 min, measuring 1 bigha 10 biswas, 504/41 min, measuring 2 bighas 3 biswas, 504/41 min, measuring 1 bigha 17 biswas, total land measuring 5-10 bighas, situated in Mauja Kolar, Tehsil Paonta Sahib, Distt. Sirmaur, H.P. (hereinafter referred to as the suit land). The case set up by the plaintiff is that she and defendants are co-sharers in possession of the suit land. The defendants have started changing the nature of the suit land by digging on the best portion thereof despite her opposition on 21.1.2004 without getting the suit land partitioned. The plaintiff would suffer irreparable loss as she will be deprived of the best portion of the suit land.

3. The suit was contested by the defendants by filing written statement. According to them, one Sh. Abdul Gafoor and Shakoor were co-sharers of the suit land alongwith other lands and in the year 1961 Abdul Gafoor sold the possession of whole of the Kh. No. 41 measuring 6.9. bighas i.e. the suit land to three persons namely, Jimmu, Jinda and Banda in equal shares i.e. 2.3 bighas to each and also sold some land out of his share to Sh. Sunder, husband of the plaintiff. Abdul Gafoor sold land from the joint property, so the names of purchasers did not figure in the ownership column of the jamabdndi and were inserted in the possession column by giving them separate khatauni as per land record manual. In consequence thereof, Abdul Gafoor ceased to be the co-sharer of Sunder Singh

after sale of specific field to Jimmu, Jinda and Banda. They have become absolute owners of that khasra number. When these khataunis were registered in favour of Jimmu, Jinda and Banda, their names were inserted in the revenue record by the consent of other co-sharers i.e. Sunder Singh etc., the husband of the plaintiff and at that time they did not object the insertion of those revenue entries in favour of predecessor-in-interest of the defendants. They have not dug up the foundation nor have they raised any construction.

4. The replication was filed. The learned Civil Judge (Jr. Divn.) Court No. 2, Paonta Sahib, framed the issues on 20.4.2004. The suit was decreed vide judgment dated 31.3.2005. The defendants, feeling aggrieved, preferred an appeal against the judgment and decree dated 31.3.2005. The learned District Judge, Sirmaur at Nahan, allowed the same on 5.11.2005. Hence, this regular second appeal.

5. The regular second appeal was admitted on the following substantial question of law on 6.3.2006:

> "1. Whether the learned first appellate Court erred in holding that specific portion of the joint land can be sold by a co-sharer in a joint property without partition of the land in question?"

6. Mr. Karan Singh Kanwar, Advocate, for the appellant has supported the judgment rendered by the trial Court dated 31.3.2005. He contended that the learned first appellate Court has erred in law by holding that specific portion of land could be sold by co-sharer in joint property without partition of land in question. On the other hand, Mr. G.D.Verma, Sr. Advocate, appearing with Mr. B.C.Verma, Advocate, has supported the judgment and decree of the learned first appellate Court dated 5.11.2005.

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

8. PW-1 Krishna Devi deposed that she is owner-in-possession of the half of the suit land after the death of her husband Sunder Singh. It is situated adjoining to Paonta-Nahan road. The defendants on 1.1.2004 at about 10/11:00 AM, started digging foundation and hurling threats of raising construction despite her opposition. She admitted that Sunder Singh after purchasing 1 bighas 7 biswas and 0.9 bighas from Kh. Nos. 95 and 96 has become absolute owner but denied the suggestion that Sunder Singh had no interest in Kh. No. 41.

9. PW-2 Laxmi Chand deposed that the disputed land is joint and plaintiff has her share in the same to the extent of 2 bighas 15 biswas and the same has not been partitioned. The defendants started digging the foundation on 1.11.2004. He admitted that some of the portion of land comprised in Kh. No. 41 had merged in the road but feigned ignorance about its actual area.

10. DW-1 Banda deposed that he along with Jinda and Jimmu purchased land from Abdul Gafoor. The possession was also taken. They have constructed their houses. The mutation was attested on the basis of the sale deed. He denied the suggestion that Sunder Singh was owner of two bighas 15 biswas of land in the suit land.

11. DW-2 Abdul Gafoor deposed that he along with his brother Shakur inherited the property of his father at Kolar, 9 bighas each. They were in separate possession. He sold his share of land adjoining to Nahan Paonta road to Jinda, Banda and Jimmu. The land was also sold to Sunder Singh measuring 1 bigha 7 biswas. The possession was handed over to the purchasers. The land was sold in the year 1961-62. The sale deed was executed in the year 1984-85. The mutation was also attested.

12. DW-3 Hari Singh deposed that Abdul Gafoor sold his land to Banda, Jinda and Jimmu in the year 1955-56 by taking earnest money and the possession was given at the same time but in cross-examination, he admitted that the earnest money was not given in his presence.

13. Initially, Kedar was owner-in-possession of the suit land bearing Kh. No.102 and 103, measuring 6.9 bighas, Kh. No. 351 and 138 measuring 11.11 bighas, total land measuring 18.0 bighas. His sons Abdul Gafoor and Shakoor succeeded to his estate in equal shares and during settlement Kh. No. 41 was carved out of old Kh. Nos. 102 and 103, while Kh. Nos. 95 and 96 were carved out of old Kh. No. 138. Abdul Gafoor sold land measuring 1.7 bighas comprised in Kh. No. 96 to Sunder, the husband of the plaintiff and thus Sunder became absolute owner of Kh. Nos. 95 and 96, measuring 9.0 bighas and 1.7 bighas, respectively. Abdul Gafoor sold 2.3 bighas to Banda, Jimmu and Jinda, each. Separate Khatoni Nos. 188, 189 and 190 were also assigned.

14. PW-1 Krishna Devi has feigned her ignorance as to whether old khasra numbers of the suit land were 102 and 103 and out of Kh. Nos. 351 and 138, new Kh. Nos. 95 and 96 were sold to her husband Sunder and he became the absolute owner of the same. She has shown her inability to depose as to whether Kh. No. 41 was in possession of Gafoor whereas Kh. No. 95 was in possession of Shakoor and whether Gafoor sold Kh. No. 41 to Jimmu, Jinda and Banda. Abdul Gafoor has appeared as DW-2. According to him, the husband of the plaintiff was put in possession of Kh. Nos. 95 and 96. He has sold his share to defendants including Banda, Jimmu and Jinda, measuring 2.3. bighas each, in the year 1961. The possession was also delivered.

15. According to the jamabandi for the year 1950-51, Ext. D-11 Kedar owned Kh. Nos. 102 and 103, measuring 6.9 bighas including other land, whereas in the same jamabandi his sons, Abdul Shakoor and Abdul Gafoor are shown to be owners-in-possession of Kh. Nos. 102, 103 and 138 in khata No. 81/67, khatauni No. 187, total land measuring 15.9 bighas. According to Misal Haquiat for the year 1959-60, the same position is reflected which shows that Kh. No. 41 was carved out of Kh. Nos. 102 and 103, measuring 6.9 bighas while Kh. No. 95 was carved out of Kh. No. 646/138, measuring 9.0 bighas, total land measuring 15.9 bighas of which Abdul Gafoor son of Kadar was shown to be co-owner to the extent of ½ share with late Sunder Singh. According to the jamabandi for the year 1962-63, Ext. D-9 out of Kh. No. 41, Abdul Gafoor sold 2.3 bighas to Jimnu, 2.3 bighas to Jinda and 2.3 bighas to Banda. These vendees are shown to be in physical possession of the respective land on the basis of sale so recorded in column No. 9 of the jamabandi. The same entries were reflected in jamabandi for the year 1967-68 Ext. D-8. It shows that plaintiff's husband Sunder is in physical possession of Kh. No. 95 and 96 on the basis of sale. The same position was reiterated in jamabandi for the year 1972-73 Ext. D-7 which shows defendants-vendees to be in exclusive possession of land. These entries were followed in subsequent jamabandi for the year 1977-78 Ext. D-6 and in jamabandi for the year 1982-83 Ext. D-5, jamabandi for the year 1987-88 Ext. D-3. The vendees Banda, Jimmu and Jinda were shown to be in exclusive possession of Kh. No. 504/41 min, 504/41 min, 504/41 min, measuring 2.3 bighas each on the basis of sale from Abdul Gafoor. The same position is shown in copy of jamabandi for the year 1997-98 Ext. D-2 and D-1, which also show that out of his share defendant Ulfat sold 4 biswas to defendant no. 1 Udey Singh.

16. The defendants have duly proved that Abdul Gafoor has sold specific share to defendants. They were put into possession. It is duly supported by the jamabandies which have not been refuted. Moreover, the plaintiff, being out of possession, could not file suit for permanent injunction, as per ***AIR 2001 Punjab and Haryana 112, Bachan Singh vrs. Swaran Singh***. The learned Division Bench has held as follows:

"18. On a consideration of the judicial pronouncements on the subject, we are of the opinion that:

(i) a co-owner who is not in possession of any part of the property is not entitled to seek an injunction against another co-owner who has been in exclusive possession of the common property unless any act of the person in possession of the property amounts to ouster, prejudicial or adverse to the interest of co-owner out of possession. (ii) Mere making of construction or improvement of, in the common property does not' amount to ouster.

(iii) If by the act of the co-owner in possession the value or utility of the property is diminished, then a co-owner out of possession can certainly seek an injunction to' prevent the diminution of the value and utility of the property.

(iv) If the acts of the co-owner in possession are detrimental to the interest of other co-owners, a co-owner out of possession can seek an injunction to prevent such act which, is detrimental to his interest.

19. In all other cases, the remedy of the co-owner out of possession of the property is to seek partition, but not an injunction restraining the co-owner in possession from doing any act in exercise of his right to every inch of it which he is doing as a co-owner.

20. In this view of the matter, we are unable to agree to the propositions laid down by the learned single Judge of this Court in Nazar Mohd. Khan v. Arshad All Khan and Ors. (supra) wherein his Lordship broadly stated that there is no denying the fact that a co-sharer has no right to raises construction until the land is partitioned by metes and bounds and so even when one of the co-sharers is in exclusive possession of a particular piece of land any other person can seek injunction restraining the other co-owner from raising construction. We accordingly overrule the said decision of the learned single judge of this Court and also the decisions in Mst. Parsini alias Mono v. Mahan Singh, 1982 P.L.J. 280, Om Parkash and Ors. v. Chhaju Ram, (1992-2) 102 P.L.R. 75 and Daulat Ram v. Dalip Singh 1989(1) Rev, L.R. 523."

17. Abdul Gafoor was in exclusive possession of the suit land. It is reiterated that he has sold specific portion of the suit land. Separate khanaunis were also assigned, as noticed hereinabove. A specific portion of the land was sold to Sunder. He was put in possession. Thus, Sunder ceased to be the co-sharer of the suit land. No objection was raised by Sunder at the time when the vendees Banda, Jimmu and Jinda were put into possession and mutation was attested. Similar position is reflected in the jamabandies. It is also settled law that co-sharer out of possession, however, can seek relief of permanent injunction, if by the act of another co-sharer in possession, the value or utility of the property is diminished or such acts of the co-owner in possession are detrimental to the interest of other co-owners out of possession. Mere raising of construction or improvement in the common property does not amount to ouster. Moreover, the plaintiff ought to have filed suit for possession instead of injunction. Abdul Gafoor has already sold specific portion of land by way of sale deed in favour of Sunder Singh. The interest of Abdul Gafoor has already passed to Sunder Singh. Moreover, when he was also put in possession of the suit land, Section 44 of the Transfer of Property Act, would not be attracted. The substantial question of law is answered accordingly.

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

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

Mahender Singh .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 278 of 2015
Reserved on: November 06, 2015.
Decided on: November 16, 2015.

Indian Penal Code, 1860- Sections 302, 341 and 427- Deceased left towards village Kotighat in his car- accused was seen going towards Derthu temple armed with stick- 'L' saw the car parked on the roadside with broken windscreen and windowpane- one person was found lying downside the road- road was obstructed by putting stones- police was informed and FIR was registered- prosecution stated that deceased had illicit relation with the wife of the accused- there was land dispute between the parties- however, wife of the deceased had not stated anything in the FIR regarding the suspicion of illicit relation- she narrated this fact for the first time while making statement under Section 161 Cr.P.C- prosecution witnesses admitted that fencing had been removed 6 months prior to the incident which shows that it could not have been motive to kill the deceased- statement of PW-9 was not recorded immediately after the incident- Medical Officer found that deceased had died as a result of brain injury due to blunt trauma- alcohol concentration in the blood of deceased was found to be 301.30 mg% which shows that deceased was drunk at the time of incident- held, that in view of large concentration of alcohol, the possibility of receiving the injuries by way of fall or the vehicle having been involved in the accident cannot be ruled out- chain of circumstances is not complete- accused acquitted. (Para-21 to 37)

For the appellant: Mr. R.K.Bawa, Sr. Advocate, with Mr. Jeevesh Sharma, Advocate.
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 and order dated 9/10.7.2015, rendered by the learned Sessions Judge, Kinnaur, Sessions Division at Rampur Bushahr, Distt. Shimla, H.P. in Sessions Trial No. 0100040/2013, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offences punishable under Sections 302, 341 and 427 IPC, has been convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs. 50,000/- for the offence punishable under Section 302 IPC. He was further sentenced to undergo simple imprisonment for a term of one month and to pay a fine of Rs. 500/- for the commission of offence punishable under Section 341 IPC. The accused was also sentenced to undergo simple imprisonment for a term of one year and to pay fine of Rs. 5000/- for the commission of offence under Section 427 IPC. All the sentences were ordered to run concurrently.

2. The case of the prosecution, in a nut shell, is that Rajesh Sharma (since deceased) was an agriculturist and horticulturist by profession. He was having his land in Villages Bagain, Jamela and Karyal. He was residing with his family at Village Bagain. On 29.6.2013, at about 9:30 AM, the deceased left alone from his house to visit Village Kotighat. His maruti Car No. HP-06-4084 was parked at village Jamela. He went to Village Jamela to pick up his Car to go to village Kotighat. The deceased could not start his vehicle and thus he sought the help of his son Jitender Kumar and Veer Partap Nepali (labourer) to push and start his vehicle. Thereafter, the deceased left for Kotighat in his Car. The accused, at the same time, was seen going towards Derthu temple armed with a *Danda*. At about 11:30 AM, complainant, Anita Sharma, wife of the deceased called him on his cell phone but failed to get any response. At about 6-7 PM, Lal Hussain Gujjar, while moving along with his herd towards Derath, saw one white Maruti Car parked on the roadside with broken windscreen and windowpane. He also saw that road in front of the vehicle was obstructed by putting stones. He also saw one male lying downside the road. He went to his Dera and informed Ramesh Sharma about this fact on his cell phone at about 8:30 PM. The information was further conveyed by Ramesh Sharma to his brother Prem Dutt and later to Ratti Ram at about 7-8 PM. The information was also conveyed by Prem Dutt to Mool Raj and Virender Sharma, who went to the spot and saw that road towards Narkanda was obstructed by putting stones. One white Maruti Car No. HP-06-4084 was parked on the roadside with broken windscreen and left windowpane with blood stains. The dead body of Rajesh Sharma was found lying below the road in a *Nallah*. Thereafter, these persons informed Sh. Khema Nand Sharma, Pradhan Gram Panchayat, Kotighat, Tehsil Kumarsain. At about 11:45 PM, Sh. Khema Nand reported the matter to police. SI Rajinder Kumar visited the spot at 4:00 AM. On 30.6.2013, in the morning, complainant Anita Sharma, wife of the deceased came to know about the incident and she visited the spot. She got her statement recorded u/s 154 Cr.P.C. vide Ext. PW-1/A to SI Rajinder Kumar. The statement was sent to the Police Station, on the basis of which, FIR No. 75/2013 dated 30.6.2013, under Sections 302, 341 and 427/34 IPC was registered. The post mortem was got conducted. Recoveries were made from the spot. According to the opinion of Dr. Sangeet Dhillon, the cause of death was injury to brain due to blunt trauma, homicidal in nature while his blood alcohol concentration was found to be 301.30 mg%. The accused also made disclosure statement, on the basis of which, *danda* and clothes were recovered. The accused also identified the place of occurrence near Derthu Nallah. On completion of the investigation, challan was put up before the Court after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 26 witnesses. The accused was also examined under Section 313 Cr.P.C. He denied his involvement in the incident and has pleaded his false implication at the behest of Anita Sharma. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. R.K.Bawa, Sr. Advocate with Mr. Jeevesh Sharma, Advocate, for the accused has vehemently argued that the prosecution has failed to prove the case against the accused. On the other hand, Mr. Ramesh Thakur, Asstt. Advocate General, appearing on behalf of the State, has supported the judgment/order of the learned trial Court dated 9/10.7.2015.

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

6. PW-1 Anita Sharma, testified that they had land at three villages, Bagain, Jamela and Karyal. Her husband went to village Karyal in his vehicle on 29.6.2013. When he reached at village Jamela, his car did not start. A cow had died in their family and as

such, she sent her son Jitender to call Nepali Veer Pratap from Jamela. When her son reached Jamela, he alongwith Veer Pratap pushed the vehicle of her husband and it started. Her husband was to go to Kotighat near Narkanda on that day. At around 11:30 AM, she rang up on the cell phone of her husband but there was no response. On 30.6.2013, her sister-in-law (Jeethani) came to her and told that her husband has met with an accident. She accompanied her to Derthu Nallah. The vehicle of her husband was in damaged condition and its windowpane was broken. The blood was splashed on the window. His dead body was lying in the Nallah in the bushes. The matter was reported by Khema Nand Sharma to the Police. Her statement was recorded vide Ext. PW-1/A. She noticed injuries on head, arms, legs and other parts of the body of her husband. She noticed two stones in the vehicle and the police took those stones and wrist watch from the vehicle. She suspected that the accused had murdered her husband. Her husband had fenced his land and at that time the accused had threatened that in case he did not remove the fence, he would kill him. The dead body was brought by the police to Kumarsain and then taken to IGMC, Shimla for post mortem. In her cross-examination, she deposed that Begi Devi was informed by her husband Ratti Ram that her husband had met with an accident. She rang up her husband 3-4 times but he did not pick up the call. Her husband had started from Jamela at about 11:30 AM. No person met her who had seen accused going towards the spot or returning from there. Chuna Ram, Deep Ram, Surat Ram etc. had forcibly taken road from their land. They had fenced their land. The accused did not execute threats to her husband in her presence. Her husband was going to report this incident to the police regarding execution of threats by the accused to the police and at that time, the accused assaulted and murdered him. She told this fact to the I.O. that her husband was going to report this threat advanced by the accused.

7. PW-2 Ratti Ram, deposed that on 29.6.2013, at about 7-8 PM, he received a call of Prem Dutt to the effect that one vehicle had met with an accident near Derthu temple. As such, he told this incident to the villagers including Mool Raj, Prem Dutt and Virender Sharma and then they went to the spot. He found that the road towards Narkanda was blocked by placing boulders across the road. The vehicle of Rajesh was on the road. Its front screen and window pane of left side were broken and stained with blood. The dead body of Rajesh was lying below the road in a Nallah. They informed Pradhan Khema Nand Sharma, who informed the police. Stones were also lying in the vehicle and wrist watch was also lying near the seat. He rang up his wife and his wife went to Anita Sharma to inform her. The accused and others had forcibly taken road from the land of deceased and the deceased had blocked that road by erecting fence. In his cross-examination, he deposed that road was taken from the land of the Rajesh about 1 ½ -2 years before the incident. The fencing was done about six months before. Volunteered that the matter was reported regarding blocking of the path by Chuna Ram, brother of the accused and then fencing was removed in the presence of the police. The fencing was removed about six months before the incident.

8. PW-3 Mool Raj deposed that on 30.6.2013, she joined the investigation. The police lifted blood from the road, packed and sealed it in a box. The police also lifted blood from the left front windowpane of the car as well as stone lying in the vehicle. The blood was taken into possession vide memo Ext. PW-3/A. The broken pieces of windowpanes stained with blood and stone was also taken into possession vide memo Ext. PW-3/B. The wrist watch was also taken into possession vide memo Ext. PW-3/C. The vehicle alongwith the papers was taken into possession vide memo Ext. PW-3/D. In his cross-examination, he admitted that it had rained on 29.6.2013 at around 3-4 PM. There was some moisture.

9. PW-4 Bhoop Ram, deposed that the accused made disclosure statement vide Ext. PW-4/A. He admitted his guilt and told to the police that he has assaulted the deceased with danda and thrown it in the jungle. The accused then led the police party alongwith them to jungle near Derthu temple below the road and took out a danda. He identified it and gave it to the police. Recovery memo Ext. PW-4/B was prepared by the police. The accused also got his clothes recovered vide memo Ext. PW-4/C. Danda is Ext. P-14, Grey Shirt is Ext. P-17, half sweater is Ext. P-18 and lower is Ext. P-19.

10. PW-5 Dinesh deposed that on 7.7.2013, he alongwith Rajinder, remained with police in the investigation of the case at K.N.H., Shimla. The police showed one wrist watch to Narender. Narender was in K.N.H., hospital as his wife was admitted there. On seeing the wrist watch, Narender told that he had sold that watch to Mahender accused for a sum of Rs. 100/- in the year 2008. Memo was prepared in this regard vide Ext. PW-5/A.

11. PW-6 Narender Kumar deposed that his wife was admitted in K.N.H., Shimla on 25.4.2013 and remained there till 13.7.2013. On 7.7.2013, the police visited K.N.H. with Rajinder and Dinesh. They showed him one wrist watch and asked him to identify it. He could not identify that wrist watch. He was declared hostile and cross-examined by the learned Public Prosecutor. He identified his signatures on memo Ext. PW-5/A.

12. PW-7 Gian Chand is the material witness. He told that he was going to village Bagain to the house of Ratti Ram to condole the death of his step mother. He was taking rest near Sarain of Derthu temple. The sarain of temple was below the road. It was around 11/11:15 AM. He saw accused going towards Narkanda side with danda in his hand. After some time, he went to Village Bagain. In the evening he returned to his village. On next day, he heard that Rajesh had died.

13. PW-8 Lal Hussain deposed that 3-4 months in a year, he brings buffaloes to Sishar jungle near Narkanda for grazing. On 29.6.2013, at about 6-7:00 PM, he was bringing his buffaloes back towards Derath as there was fear of wild animals. When he reached near Derthu temple, he saw one white coloured maruti car standing on the road. Its window panes were broken. He also saw stones kept on the road in front of the vehicle. He also saw a body of male lying in the nallah below the road. He did not go near that body. He went to his Dera and rang up Ramesh Kumar on his cell phone who runs Karyana shop at Ekantbari.

14. PW-10 Jitender deposed that on 29.6.2013, cow of his uncle had died. He went to call Veer Pratap, a Nepali labourer. His father was to go to Kotighat in his car. He had parked his car at Jamela. When he reached there, he alongwith Nepali pushed the car of his father and it got started. He also saw Mahender having a danda in his hand and he was going towards Derthu temple. On next day, he came to know that his father died near Derthu temple. He went to the spot and saw windowpanes of the vehicle broken and stones were lying in front of it. The dead body was lying in a Nallah below the road. In his cross-examination, he admitted that his father and accused Mahender were friends. They used to sit together for drinks earlier but not after the incident when the accused and others forcibly constructed a road through their land.

15. PW-12 Dr. Sanjiv Kumar has examined the accused. He issued MLC Ext. PW-12/B.

16. PW-13 Dr. Vikrant Verma has conducted preliminary examination of the dead body. In his cross-examination, he admitted that he did not ascertain the probable time between injuries and death.

17. PW-14 Khema Nand deposed that on 29.6.2013 at 11:45 PM, he received a call from Ratti Ram of Village Bagain who told him that near Derthu temple, there was a damaged maruti car and one body was also lying there. He informed the police telephonically in the PS Kumarsain.

18. PW-22 Naseeb Singh Patial, has proved report Ext. PW-22/A.

19. PW-25 SI Rajinder Kumar was the I.O. in the case. He received information. He reached the spot. On 30.6.2013, he met Mool Raj Sharma, Virender Sharma, Mahender Sharma and Bhoop Ram Sharma. He recorded the statement of Anita Sharma under Section 154 Cr.P.C. vide Ext. PW-1/A, on the basis of which, FIR Ext. PW-23/C was recorded. The case property was taken into possession. On 2.7.2013, accused made disclosure statement under Section 27 of the Indian Evidence Act vide Ext. PW-4/A. The weapon of offence, danda was got recovered. The accused also got his clothes recovered from Village Larki, Kotighat. The blood sample of accused was procured from CHC Kumarsain vide application Ext. PW-12/A. On 7.7.2013, he got recorded statement of Narinder Kumar under Section 161 Cr.P.C. On 13.7.2013, he recorded the statement of Gian Chand Sharma, vide Ext. PW-25/L. He also recorded the statement of Jitender Kumar and Ramesh Kumar on 16.8.2013, under Section 161 Cr.P.C. vide Ext. PW-25/M and PW-25/N, respectively. He also recorded the statement of complainant Anita Sharma under Section 161 Cr.P.C. on 1.7.2013 vide Ext. PW-25/O on 1.7.2013. In his cross-examination, he categorically admitted that the complainant vide statement Ext. PW-1/A did not suspect anyone. He also admitted that he sought the help of dog squad. This fact did not find mention in the investigation as it did not yield any result.

20. PW-26 Sangeet Dhillon, has issued provisional opinion vide Ext. PW-26/C. Final opinion was given vide Ext. PW-26/D after the chemical analysis report. According to her, the deceased died as a result of injury to brain due to blunt trauma, homicidal in nature. The alcohol concentration in blood was 301.30 mg%. The injury could be caused by danda Ext. P-14. She also admitted in her cross-examination that urine sample was taken but she was not aware of its outcome.

21. The case of the prosecution is entirely based on circumstantial evidence. In a case based upon circumstantial evidence, the motive plays a pivotal role. The case projected by the prosecution was that the deceased was having illicit relations with the wife of the accused. The other motive attributed to the accused is that there was land dispute between the parties, more particularly, regarding fencing of the land.

22. The statement of PW-1 Anita Sharma, wife of the deceased was recorded under Section 154 Cr.P.C. vide Ext. PW-1/A on 30.6.2013. She did not suspect anyone on that date. The statement of PW-1 Anita Sharma was also recorded under Section 161 Cr.P.C. on 1.7.2013 vide Ext. PW-25/O. In her statement recorded under Section 161 Cr.P.C. on 1.7.2013 vide Ext. PW-25/O, she has stated that accused used to suspect that her husband had illicit relations with his wife. In case, there was suspicion of this nature, it should have been mentioned in Ext. PW-1/A when the statement of PW-1 Anita Sharma was recorded on 30.6.2013, initially. It was improvement made by her at the time of recording of her statement under Section 161 Cr.P.C and that too on 1.7.2013.

23. Now, as far as the land dispute is concerned, PW-1 Anita Sharma, in her statement has deposed that Chuna Ram, Deep Ram, Surat Ram etc. had forcibly taken road from their land. She also admitted that the accused did not advance threats to her husband in her presence. PW-2 Ratti Ram, in his cross-examination, has admitted that road was taken from the land of Rajesh about 1 ½ -2 years before the incident. The fencing was done

about six months before. Voluntarily deposed that the matter was reported regarding blocking of the path by Chuna Ram, brother of the accused and then fencing was removed in the presence of the police. The fencing was removed about six months before the incident. Since the fencing had already been removed, this could not have been the motive to kill the deceased after 6 months of the removal of the fence.

24. PW-8 Lal Hussain deposed that when he was bringing his buffaloes back and when he reached near Derthu temple, he saw one white coloured maruti car standing on the road. Its window panes were broken. He also saw stones kept on the road in front of the vehicle. He also saw a body of male lying in the nallah below the road. He did not go near that body and he did not know whether he was alive or not. He went to his Dera and rang up Ramesh Kumar on his cell phone who runs Karyana shop at Ekantbari. PW-9 Ramesh Kumar deposed that Lal Hussain rang him up and told that one maruti car was standing near Derthu temple and in front of it, stones had been stacked. He also informed that a man was lying in Derthu nallah and he was not sure whether he was alive or dead. PW-14 Khema Nand deposed that he received call from Ratti Ram on 29.6.2013. He told him that near Derthu temple, damaged maruti car and body was lying. He informed the police. The sequence is that PW-8 Lal Hussain told PW-9 Ramesh Kumar about the incident and thereafter PW-14 Khema Nand was also informed by Ratti Ram PW-2.

25. The statement of PW-9 Ramesh Sharma was recorded, as per the statement of PW-25 SI Rajinder Kumar, under Section 161 Cr.P.C. on 16.8.2013 vide Ext. PW-25/N. The statement of Ramesh Sharma (PW-9) ought to have been recorded immediately after the incident. In order to inspire confidence in the prosecution case, it is must that the statements under Section 161 Cr.P.C. are recorded promptly.

26. PW-1 Anita Sharma deposed that her husband was going to village Kotighat. His vehicle did not start. When her son reached Jamela, he and Veer Pratap, Nepali, pushed the vehicle of her husband and it started. At around 11:30 AM, she rang up on the cell phone of her husband but there was no response. On 30.6.2013, her sister-in-law (Jeethani) came to her and told that her husband met with an accident. PW-10 Jitender Kumar is the son of deceased who had gone to help his father after his Car had developed snag. He saw accused Mahender. He was carrying danda in his hand. He was going towards Derthu temple. The statement of PW-10 Jitender Kumar was recorded, as per the statement of PW-25 SI Rajinder Kumar on 16.8.2013. The incident has taken place on 29.6.2013. There is no explanation put forth as to why the statement of material witness PW-10 Jitender Kumar was recorded on 16.8.2013 vide Ext. PW-25/M, belatedly.

27. Now, we will advert to the statement of PW-7 Gian Chand. He deposed that he was taking rest near Sarain of Derthu temple. The sarain of temple was below the road. It was around 11/11:15 AM. He saw accused going towards Narkanda side with danda in his hand. After some time, he went to Village Bagain. In the evening he returned to his village. On next day, he heard that Rajesh had died. The case of the prosecution, precisely, is that accused had blocked the road with boulders/stones and thereafter assaulted him and broken the windowpanes and thereafter administered beatings to him, resulting in his death and then throwing the body in the Nallah. It is not believable as to how accused came to know that deceased has left his village to go to Kotighat. It is not the case of the prosecution that somebody has told the accused that deceased Rajesh has left his house to go to village Kotighat.

28. The danda was got recovered on the basis of statement Ext. PW-4/A. When the accused has no knowledge about the movement of the deceased, he was not supposed to carry danda in his hand in order to assault him. Moreover, the statement of PW-7 Gian Chand, was also recorded by PW-25 SI Rajinder Kumar vide Ext. PW-25/L on 13.7.2013.

The two most material witnesses, who have seen the accused in the proximity of the deceased, are PW-7 Gian Chand and PW-10 Jitender. The statement of PW-7 Gian Chand, as noticed hereinabove, was recorded under Section 161 Cr.P.C. on 13.7.2013 vide Ext. PW-25/L, though the incident is dated 29.6.2013 and the statement of PW-10 Jitender Kumar was recorded even later on 16.8.2013 vide Ext. PW-25/M. The statements should have been recorded with promptitude to inspire confidence in the version of the prosecution, more particularly, when both of them have allegedly seen accused carrying danda in his hand near the shop.

29. Now, the Court will advert to the recovery of wrist watch. According to PW-5, Dinesh, the police showed one wrist watch to Narender. Narender was in K.N.H., hospital as his wife was admitted there. On seeing the wrist watch, Narender told that he had sold that watch to Mahender accused for a sum of Rs. 100/- in the year 2008. PW-6 Narender Kumar deposed that the police has shown him one wrist watch and asked him to identify it. He could not identify that wrist watch. He was declared hostile and cross-examined by the learned Public Prosecutor. He has admitted his signatures on memo Ext. PW-5/A. The fact of the matter is that the statement of PW-6 Narender Kumar was also recorded by the police on 7.7.2013 vide Ext. PW-25/K under Section 161 Cr.P.C. The recording of the statements under Section 161 Cr.P.C. by the police belatedly has further dented the case of the prosecution, more particularly, when the entire case is based upon circumstantial evidence.

30. The post mortem examination was conducted by PW-26 Dr. Sangeet Dhillon. According to her provisional opinion vide Ext. PW-26/C, the deceased died as a result of injury to brain due to blunt trauma. It was homicidal in nature. According to her final opinion vide Ext. PW-26/D, the deceased died as a result of injury to brain due to blunt trauma, homicidal in nature. The alcohol concentration in blood was found to be 301.30 mg%. It is also evident from Ext. PA, FSL report that the contents of ethyl alcohol in parcel No. 4 i.e. blood was 301.30 mg%. In her cross-examination, PW-1 Anita Sharma has denied that her husband and accused were friends. However, PW-10 Jitender, son of deceased has admitted that accused and deceased were friends and they used to consume liquor together and after the incident when accused and others forcibly constructed a road through their land, they have stopped consuming liquor together.

31. PW-1 Anita Sharma has also deposed in her cross-examination that her husband has not taken drinks on 29.6.2013 when he left the house. However, the fact of the matter is that the quantity of ethyl alcohol in the contents of blood was 301.30 mg%. It clearly establishes that he was drunk at the time when the incident has taken place. He has left the house at 9:30 AM and according to the prosecution case, the accused hit him around Noon by initially placing stones on the road and thereafter breaking the windowpanes and assaulting him at 11:30 PM. It belies the case of the prosecution thoroughly if the contents of the alcohol in the blood of the deceased are taken into consideration. It is not believable that a man could consume liquor to the extent that the contents of the ethyl alcohol could reach 301.30 mg% in his blood at 11:30 AM when as per the prosecution case he had left his house at around 9:30 AM. Thus, the incident has not taken place around 11:30 AM, as projected by the prosecution.

32. According to the prosecution witnesses, the deceased immediately after removing the snag of the vehicle, started his vehicle and left the spot for Kotighat. The distance between the place where the deceased had parked Car at Village Jamela and the place where car was found in damaged condition was only 2 kms. PW-10 Jitender has also denied that his father has taken liquor on that day. But, the fact of the matter is that the content of ethyl alcohol in the blood of deceased was found to be 301.30 mg%.

33. According to Ext. PA, report of the FSL, the quantity of ethyl alcohol in exhibit P/4 (blood) was 301.30 mg%. A person with blood alcohol concentration of 150-300 mg% would be intoxicated, as per Lyon's Medical Jurisprudence and Toxicology, 11th Edition, page 626. Similarly in Medical Jurisprudence and Toxicology by Dr. K.S.Narayan Reddy, Edition 2004 (Reprint), at page 590, a person who has consumed 150-300 mg %, would be drunk. In Parikh's Text book of Medical Jurisprudence and Toxicology at page 855, it is stated that at a concentration of 0.15 per cent (150 mg %), some are under the influence of alcohol and others decidedly would be drunk. With increasing concentrations the symptoms become more intense. In the instant case, the quantity of ethyl alcohol in exhibit P/4 (blood) was 301.30 mg%. Since the accused had very high concentration of ethyl alcohol in blood, the possibility of receiving the injuries by fall or his vehicle involved in an accident cannot be ruled out, more particularly, when there is no eye witness to the incident and no motive is attributed to the accused for killing the deceased.

34. PW-10 Jitender Kumar has also admitted in his cross-examination that he has told the SHO after 3-4 days of the incident about the carrying of danda by the accused. In case, he had seen the accused carrying danda, he would have apprised the SHO immediately when he was student of 10+ 2. Similarly, PW-7 Gian Chand should have told the police that he has seen the accused carrying danda in his hand on 29.6.2013 near Derthu temple. Thus, the presence of the accused on 29.6.2013 near the place of incident is doubtful. The version of PW-8 Lal Hussain is also doubtful. If he had seen the body of male lying in the Nallah, he should have definitely gone down to see whether that person was alive or not.

35. The motive attributed to the accused has not been proved. The recovery of wrist watch from the Car is also doubtful in view of the statement of PW-6 Narender Kumar and the late recording of the statement under Section 161 Cr.P.C. on 7.7.2013. The presence of the accused on the spot as per the statement of PW-7 Gian Chand and PW-10 Jitender Kumar, is also doubtful. The statements of Gian Chand (PW-7) and Jitender Kumar (PW-10) under Section 161 Cr.P.C. were recorded by PW-25 SI Rajinder Kumar on 13.7.2013 and 16.8.2013, respectively, though the incident is dated 29.6.2013. PW-10 Jitender Kumar has also admitted that he has told SHO after 3-4 days of the incident about the carrying of danda by the accused. The dispute regarding fencing of the land was already resolved six months back as per the statement of PW-2 Ratti Ram. The deceased was heavily drunk and the ethyl alcohol in his blood content was 301.30 mg%. No motive was initially imputed by PW-1 Anita Sharma. It is only when her statement was recorded under Section 161 Cr.P.C. and that too on 1.7.2013, she stated that accused used to suspect that her husband was having illicit relations with his wife. The incident has taken place on 29.6.2013. PW-1 Anita Sharma deposed that she called her husband at 11:30 AM but she did not get any response and then in her cross-examination, she deposed that she rang up her husband on that day for 3-4 times, but he did not pick up the call. It is surprising that despite the fact that her husband has not come back in the evening on 29.6.2013, she has not lodged any missing report with any person in the locality to ascertain the whereabouts of her husband. She was told only in the morning on 30.6.2013 that accident has taken place near Derthu temple.

36. Mr. Ramesh Thakur, Asstt. Advocate General for the State has vehemently argued that PW-13 Dr. Vikrant Verma who has conducted the preliminary examination of the body of the deceased has not noticed any smell of alcohol. However, the fact of the matter is that the concentration of alcohol in the blood was 301.30 mg%, as per FSL report Ext. PA.

37. Since, the presence of the accused is doubtful on the spot, the recovery of danda Ext. P-14 and clothes, including DNA profile also will not link the accused with the alleged incident. The prosecution has failed to complete the chain. It is settled law that in order to prove the case based on circumstantial evidence, the entire chain should be complete and it should point towards the guilt of the accused. Thus, the prosecution has failed to prove the case against the accused under Sections 302, 341 and 427 IPC, beyond reasonable doubt.

38. Accordingly, the appeal is allowed. Judgment/order of conviction and sentence dated 9-10.7.2015, rendered by the learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushahar, Distt. Shimla, H.P., in Sessions trial No. 0100040/2013, under Sections 302, 341 and 427 IPC is set aside. The accused is acquitted of the charge framed under Section 302, 341 and 427 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.

Rohit Kalia and ors. .....Petitioners.

Versus

Sangita Sharma .....Respondent.

Cr.MMO No. 275 of 2015.
Reserved on 29.10.2015.
Decided on: 16.11.2015.

Code of Criminal Procedure, 1973- Section 482- The marriage between the petitioner No. 1 and the respondent was solemnized in the year 2012- child was also born from the wedlock- a petition u/s 9 of Hindu Marriage Act was filed by the petitioner No. 1, which was also allowed exparte- respondent filed a complaint against the petitioners under Section 12 of the Act- the process was issued by the Chief Judicial Magistrate- the respondent No. 1 approached the court to quash the proceedings in this complaint being the abuse of the process of law- held that, a prima-facie case for commission of offence is disclosed, as per the averments made in the complaint and the proceedings cannot be stifled or scuttled, at this stage, when the parties have yet to lead their evidence- petition dismissed. (Para 4)

Cases referred:

Amit Kapoor vrs. Ramesh Chander and another, (2012) 9 SCC 460,
Rajiv Thapar and others vrs. Madan Lal Kapoor, (2013) 3 SCC 330

For the petitioners: Mr. Salil Bali and Mr. Ashok Thakur, Advocates.
For the respondent: Mr. Dheeraj K. Vashishta, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This petition under Section 482 Cr.P.C. has been filed for quashing of complaint No. 308 of 2015 under Section 12 of the Domestic Violence Act, 2005 (hereinafter

referred to as the Act), pending before the learned Chief Judicial Magistrate, Una, H.P. and all subsequent proceedings arising thereto.

2. "Key facts" necessary for the adjudication of this petition are that the marriage between petitioner No. 1 and respondent was solemnized according to the Hindu rites and ceremonies on 25.4.2012 at Una. According to the averments contained in the petition, no demand was ever raised for dowry. The petitioner No. 1 alongwith the respondent went to Doha. Respondent came back to India. False allegations were levelled against petitioner No. 1 that he was impotent. The respondent left the matrimonial home on 4.6.2014. A child was born on 28.10.2014 at PGI, Chandigarh. Respondent was discharged from PGI, Chandigarh on 1.11.2014. The petitioner No. 1 filed an application under Section 9 of the Hindu Marriage Act, 1955 bearing No. 182 of 2014 on 4.11.2014. Respondent was proceeded ex-parte. The order was passed by the learned Civil Judge (Jr. Divn.), Chandigarh on 24.8.2015. Respondent was directed to join the company of petitioner No. 1. Thereafter, respondent filed a complaint No. 308 of 2015 against the petitioners under Section 12 of the Act. The process was issued by the learned Chief Judicial Magistrate, Una, H.P. Hence, this petition.

3. Mr. Dheeraj K. Vashishta, Advocate, for the respondent has drawn the attention of the Court to complaint Annexure P-3 filed under Section 12 of the Act. The factum of marriage between petitioner No. 1 and respondent on 25.4.2015 has been admitted. The parents of respondent have spent Rs. 15,00,000/- in the marriage. Petitioner No. 1 left India. Thereafter, petitioners No. 2 to 4 started maltreating respondent for bringing insufficient dowry. They used to make nasty remarks against her. Respondent No. 1 brought these facts to the notice of her parents. The parents of respondent again gave double bed, dressing table, Almirah, Petti, trunk, Micro Oven and other utensils etc. The mother of petitioner No. 1 started taking the entire salary of the respondent. The ATM and PAN Card were also taken by her father-in-law. She was never paid any money for daily needs by her father-in-law and mother-in-law. The petitioner No. 1 was avoiding having sexual relations with respondent. He got himself treated. She was not permitted to meet her parents regularly after three months. She was admitted in the hospital. The petitioners did not look after her. The father of respondent spent around Rs. 70,000/- at the time of delivery. She was also given beatings by petitioner No. 1 at Doha. She was not permitted even to talk with her parents. Petitioner No. 1 also threatened that he would get the DNA test conducted to establish the parentage of the baby. Though petitioner No. 1 was earning Rs. 3,00,000/- per annum but respondent has not been paid any maintenance by him. She has lodged the complaint with the Police Station, Una, but no steps were taken. It is, in these circumstances, the petition has been filed by the respondent under Section 12 of the Act.

4. What emerges from the facts enumerated hereinabove is that the marriage between the parties was solemnized on 25.4.2012. However, the relations between them were strained. The petitioners have been harassing the respondent for bringing insufficient dowry. She was not paid any money. Her ATM and PAN Card were also taken by the parents of petitioner No.1. The petitioner No. 1 did not look after respondent when she was admitted in the hospital and baby was born on 28.10.2014. A sum of Rs. 15,00,000/- was spent by the parents of respondent in the marriage and thereafter also, respondent's family gave expensive gifts to the petitioners. Petitioner No. 1 has made false allegations against the respondent qua the parentage of child and has threatened her even to undertake DNA test of the baby. The petitioners were causing physical and mental cruelty to the respondent. The parents of the respondent have also tried to settle the matter amicably but to no avail. It is, in these circumstances, respondent was constrained to file petition under

Section 12 of the Act against the petitioners before the Court of learned Chief Judicial Magistrate, Una. The learned trial Court, on the basis of the material placed on record, has correctly issued the process against the petitioners in complaint No. 308 of 2015. The issuance of process cannot be termed as misuse of the process of the Court. This Court is satisfied that a prima-facie case for commission of offence is disclosed, as per the averments made in the complaint and the proceedings cannot be stifled or scuttled, at this stage, when the parties have yet to lead their evidence.

5. Their lordships of the Hon'ble Supreme Court in the case of ***Amit Kapoor vrs. Ramesh Chander and another,*** reported in ***(2012) 9 SCC 460,*** have laid down the following principles for quashing proceedings under Section 397 or Section 482 Cr.P.C., as follows:

> "1) Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.
>
> 2) The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.
>
> 3) Where the factual foundation for an offence has been laid down, the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied if there is substantial compliance with the requirements of the offence.
>
> 4) The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.
>
> 5) Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loathe to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.
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> 6) Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.
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> 7) The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.
>
> 8) The process of the Court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.
>
> 9) Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained. It may be purely a civil wrong or purely a

criminal offence or a civil wrong as also a criminal offence constituting both on the same set of facts. But if the records disclose commission of a criminal offence and the ingredients of the offence are satisfied, then such criminal proceedings cannot be quashed merely because a civil wrong has also been committed. The power cannot be invoked to stifle or scuttle a legitimate prosecution. The factual foundation and ingredients of an offence being satisfied, the court will not either dismiss a complaint or quash such proceedings in exercise of its inherent or original jurisdiction.

10) Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a 'civil wrong' with no 'element of criminality' and does not satisfy the basic ingredients of a criminal offence, the Court may be justified in quashing the charge. Even in such cases, the Court would not embark upon the critical analysis of the evidence.

11) Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction, the Court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

12) It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

13) In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed with by the prosecution.

14) Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

15) Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.

16) Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that interest of justice favours, otherwise it may quash the charge. The power is to be exercised ex debito justitiae, i.e. to do real and substantial justice for administration of which alone, the courts exist.

17) These are all the principles which individually and preferably cumulatively (one or more) are to be taken into consideration."

6. Their lordships of the Hon'ble Supreme Court in the case of ***Rajiv Thapar and others vrs. Madan Lal Kapoor,*** reported in ***(2013) 3 SCC 330,*** have held that to determine the veracity of a prayer for quashing of proceedings raised by an accused by

invoking the power vested in the High Court under Section 482 Cr.P.C., the following steps should be followed:

> "(i) **Step one**: whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?
>
> (ii) **Step two**: whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.
>
> (iii) **Step three**: whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?
>
> (iv) **Step four**: whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?
>
> If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal proceedings, in exercise of power vested in it under Section 482 of the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused."

7. Consequently, there is no merit in this petition, the same is dismissed.

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

Dhanwant Singh & ors. .....Appellants.

Versus

Kharak Singh & ors. .....Respondents.

RSA No. 233 of 2005.
Reserved on: 16.11.2015.
Decided on: 17.11.2015.

Specific Relief Act, 1963- Section 34- Plaintiffs pleaded that they and defendant No. 4 constituted joint Hindu Mitakshra Coparcenary Family- defendant No.4 had alienated the property without any legal necessity- hence, a declaration for setting aside the ex-parte decree was sought – record shows that 'G' , predecessor-in-interest of the parties was Adna Malik who had acquired proprietary rights after notification- therefore, land possessed by 'G' was his self acquired property- land was inherited by defendant no. 4 under Section 8 of Hindu Succession Act and would retain the character of self acquired property- Courts had rightly dismissed the suit. (Para-8 to 15)

Cases referred:

Budh Singh alias Nachhatar Singh and others vrs. Shrimati Gurdev Kaur and others, 1968 Curr. L.J. (Pb. & Hyna,.) 27,

Ranvinder Singh vrs. Raghunath Singh and others, 1998(1) S.L.J. 423
Commissioner of Wealth Tax, Kanpur etc. etc. vrs. Chander Sen etc., AIR 1986 SC 1753,
Yudhister vrs. Ashok Kumar, AIR 1987 SC 558

For the appellant(s): Mr. Suneet Goel, Advocate.
For the respondents: Mr. Ramakant Sharma, Sr. Advocate, with Ms. Devyani Sharma, Advocate, for respondents No. 1 to 3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned Addl. District Judge, Solan, H.P., (Camp at Nalagarh), dated 18.2.2005, passed in Civil Appeal No. 11-NL/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), have instituted suit for possession as co-parceners regarding land measuring 1 bigha being 1/11th share of total land measuring 11 bighas comprised in Khewat/Khatauni No. 20/23, bearing Kh. No. 223, situated in village Theda, Pargana Dharampur, Tehsil Nalagarh, Distt. Solan, H.P. and for permanent prohibitory injunction for restraining the respondents-defendants (hereinafter referred to as the defendants) from raising construction or alienating the same. According to the plaintiffs, coparcenary property was headed by defendant No. 4 Rattan Singh. The suit land was earlier owned by Ganga Ram who died on 1.2.1951, which was inherited by Banarsi Dass. Banarasi Dass died on 4.7.1978 and after his death defendant No. 4 Rattan Singh became Karta of the coparcenary property. The suit land is owned jointly by all the coparceners and no partition has taken place. Defendant No. 4 started alienating the coparcenary property without any legal necessity and without any benefit to the estate. He has alienated the suit land in favour of defendants No. 1 to 3 vide sale deed No. 242 dated 27.3.1986 without any legal necessity and without any benefit to the estate for a consideration of Rs. 9500/-. The sale deed was illegal.

3. The suit was contested by defendants No. 1 to 3. According to them, the suit land was earlier owned by Raja Sahib who was ala Malik and Banarsi Dass was adna Malik. The suit land has been alienated for working of their brick kiln under the name and style of Dasmesh Brick Kiln. The land was mortgaged for Rs. 18,000/- and the suit land was alienated for redemption of the same. The defendants had made bonafide enquiries before purchasing the suit land.

4. The learned Sub Judge Nalagarh, framed the issues on 9.2.1999. The suit was dismissed vide judgment dated 21.11.2002. The plaintiffs, feeling aggrieved, preferred an appeal against the judgment and decree dated 21.11.2002. The learned Addl. District Judge, Solan, (Camp at Nalagarh), dismissed the same on 18.2.2005. Hence, this regular second appeal.

5. The regular second appeal was admitted 17.5.2005 by making observation that the substantial questions of law as detailed in the grounds of appeal had arisen for determination.

6. Mr. Suneet Goel, Advocate, appearing on behalf of the appellants, on the basis of the substantial questions of law framed, has vehemently argued that the suit property was coparcenary property. Both the Courts below have not correctly appreciated

the oral as well as documentary evidence on record. He lastly contended that the suit property could not be treated as self acquired property of Banarsi Dass after coming into force of the PEPSU Abolition of Ala Malkiat and Taluqdari Rights Act. On the other hand, Mr. Ramakant Sharma, Sr. Advocate, has supported the judgments and decrees of both the Courts below.

7. Since all the substantial questions of law are inter-connected, hence are taken up together for discussion to avoid repetition of evidence.

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

9. According to the jamabandi for the year 1944-45, Ganga Ram was shown to be Adna Malik and Raja Sahab has been shown to be Ala Malik. In the copy of jamabandi Ext. P-4 for the year 1956-57, Banarsi Dass has been recorded to be the absolute owner. Thereafter he has been recorded to be the owner in possession in the copy of jamabandi for the year 1961-62, Ext. P-5. Ganga Ram has died on 1 Fagun 2007 as per mutation Ext. P-6 and the property was mutated in favour of Banarsi Dass on 3.5.1951. Ext. P-8 also reflects that mutation was attested in favour of Rattan Singh and Kesari Singh. Rattan Singh has to be treated as absolute owner of the property.

10. A Hindu coparcenary is a much narrower body than the joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property. These are the sons, grandsons and great-grandsons of the holder of the joint property for the time being. In other words, the three generations next to the holder is unbroken male descent. The property inherited by a Hindu from his father, father's father or father's father's father, is ancestral property. The property inherited by him from other relations is his separate property. The essential feature of ancestral property is that if the person inheriting it has sons, grandsons or great-grandsons, they become joint owner's coparceners with him. They become entitled to it due to their birth.

11. Sh. Ganga Ram, predecessor-in-interest of the parties was recorded to be in exclusive possession of the land measuring 62 bighas as Adna Malik in Ext. P-4, copy of jamabandi for the year 1944-45 and land measuring 46-11 bighas in Ext. P-7 copy of jamabandi for the year 1948=49. After the death of Ganga Ram, Banarsi Dass was in possession of the land as Adna Malik. In revenue record, the name of only Ganga Ram was mentioned and not Banarsi Dass. Even after the enforcement of abolition of the PEPSU Abolition of Ala Malkiat and Taluqdari Rights Act, Sh. Banarsi Dass was recorded as owner-in-possession of the land measuring 51-9 bighas in Ext. P-4 copy of jamabandi for the year 1956-57. Sh. Banarsi Dass was also recorded owner of Kh. No. 223 measuring 11 bighas in Ext. P-5 copy of jamabandi for the year 1961-62. Thus, the property is proved to be self acquired property and not the coparcenary property.

12. It is also evident from the recitals of sale deed Ext. P-1 (Ext. P-8 copy of jamabandi of Kh. No. 223 for the year 1995-96) makes it clear that Rs. 7,000/- was kept as trust for redemption of Rs. 2500/-. DW-1 Ram Pal has also testified that the land was redeemed by defendant No. 4 and this fact was brought to his notice by him. Thus, the sale was made by defendant No. 4 in favour of defendants No. 1 to 3 for payment of antecedent debt which was valid under the Hindu Law. Defendants No. 1 to 3 were bonafide purchasers for consideration and were recorded in possession of land in suit in Ext. P-2, copy of Jamabandi for the year 1995-96. It was absolute property of defendant No. 4 and thus, the sale deed made in favour of defendants No. 1 to 3 vide Ext. P-1 is valid.

13. In the case of ***Budh Singh alias Nachhatar Singh and others vrs. Shrimati Gurdev Kaur and others,*** reported in ***1968 Curr. L.J. (Pb. & Hyna,.) 27,*** the learned Single Judge of the Punjab and Haryana High Court has held that Ala Malik's rights are merely a burden on the land so far as the Adna Malik is concerned. The abolition of ala Malik's right merely clears off that burden. In no manner the rights of the Adna Malik are enlarged. The analogy of ancestral occupancy rights, becoming the self-acquired property of the occupancy tenant acquiring Malkiat rights has nothing to do with this case. It also does not, in any manner, matter whether the Ala Malkiat rights are of one category or the other.

14. This judgment was considered by this Court in the case of ***Ranvinder Singh vrs. Raghunath Singh and others,*** reported in ***1998(1) S.L.J. 423.*** The learned Single Judge has held as follows:

> "22. The learned Judges at page 542 of the report also examined the provisions of the Act and it has been said that the Act is a clear pointer to show that the 'Adna Malik' could not be termed prior to the abolition of 'Ala Malkiat' rights as full owner of the land which was possessed by him. He became full proprietor only on the appointed date after the extinction of 'Ala Malik' rights. It was only after the abolition of 'Ala Malkiat' rights that he became full owner for all intents and purposes.
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> 23. In para 7, it has been observed that :
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> > "The learned single Judge has found that Adna Malik had full rights of an owner, that the abolition of the Ala Malkiat's rights did not result in the enlargement of the rights of Adna Malik and that by abolition only a burden has been cleared off. With due defence we do not find ourselves in agreement with these findings. We are clearly of the view that an Adna Malik did not have full rights of an owner ....."
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> It was further held in para 7 that :
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> > "The two words 'Ala Malik' and 'Adna Malik' clearly indicate the distinct rights of the two and it would not be correct to say that the rights of the Adna Malik was only a burden on the land held by the Adna Malik and did not, in any manner, affected or curtail his rights of full ownership. By abolition of the Ala Malkiyat rights, the right of the Ala Malik to recover certain percentage of revenue and his title as Ala Malik had been extinguished and the Adna Malik rights in the land have been enlarged and ripened into full ownership ....."
>
> 24. Quite interestingly, in that case the plaintiffs had brought usual declaratory suit laying challenge to the alienation on the ground that the land was ancestral qua them and the alienation in question being without consideration and necessity, would not affect their reversionary rights. The learned trial Court in that case examined the nature of the property and found that the property was non-ancestral and consequently dismissed the suit. The judgments and decree were affirmed on appeal . It was in second appeal that the learned single Judge D.K. Mahajan, J. after considering the matter, held that the abolition of 'Ala Malkiat' rights did not, in any manner, alter the character of the property in the hands of 'Adna Malik', and that if the land was ancestral in the hands of 'Adna Malki', it would remain ancestral.

25. In the given situation, I shall follow the judgment of the Division Bench of the Punjab and Haryana High Court where the question presently involved stands clearly answered.

26. Apart from what has been said above, the learned trial Court, as noticed earlier in the judgment, has held on appreciation of the evidence that the property in question does not constitute Joint Hindu Family coparcenary and ancestral property."

15. In the case of ***Commissioner of Wealth Tax, Kanpur etc. etc. vrs. Chander Sen etc.,*** reported in ***AIR 1986 SC 1753,*** their lordships of the Hon'ble Supreme Court have held that under the Hindu Law, the son would inherit the property of his father as karta of his own family. But, the Hindu Succession Act has modified the rule of succession. The Act lays down the general rules of succession in the case of males. It has been held as follows:

" 19. It is necessary to bear in mind the Preamble to the Hindu Succession Act, 1956. The Preamble states that it was an Act to amend and codify the law relating to intestate succession among Hindus.

20. In view of the preamble to the Act, i.e., that to modify where necessary and to codify the law, in our opinion it is not possible when Schedule indicates heirs in class I and only includes son and does not include son's son but does include son of a predeceased son, to say that when son inherits the property in the situation contemplated by section 8 he takes it as karta of his own undivided family. The Gujarat High Court's view noted above, if accepted, would mean that though the son of a predeceased son and not the son of a son who is intended to be excluded under section 8 to inherit, the latter would by applying the old Hindu law get a right by birth of the said property contrary to the scheme outlined in section 8. Furthermore as noted by the Andhra Pradesh High Court that the Act makes it clear by section 4 that one should look to the Act in case of doubt and not to the pre-existing Hindu law. It would be difficult to hold today the property which devolved on a Hindu under section 8 of the Hindu Succession would be HUF in his hand vis-a-vis his own son; that would amount to creating two classes among the heirs mentioned in class I, the male heirs in whose hands it will be joint Hindu family property and vis-a-vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may be mentioned that heirs in class I of Schedule under section 8 of the Act included widow, mother, daughter of predeceased son etc.

21. Before we conclude we may state that we have noted the observations of Mulla's Commentary on Hindu law 15th Edn. dealing with section 6 of the Hindu Succession Act at page 924-26 as well as Mayne's on Hindu Law, 12th Edition pages 918-919.

22. The express words of section 8 of The Hindu Succession Act, 1956 cannot be ignored and must prevail. The preamble to the Act reiterates that the Act is, inter alia, to 'amend' the law, with that background the express language which excludes son's son but included son of a predeceased son cannot be ignored."

16. In the case of ***Yudhister vrs. Ashok Kumar,*** reported in ***AIR 1987 SC 558,*** their lordships of the Hon'ble Supreme Court have held that the property devolved on Hindu under Section 8 would not be HUF in his hand vis-à-vis his own sons. It has been held as follows:

"10. This question has been considered by this Court in Commissioner of Wealth Tax, Kanpur and Others v. Chander Sen and Others, [1986] 3 SCC 567 where one of us (Sabyasachi Mukharji, J) observed that under the Hindu Law, the moment a son is born, he gets a share in father's property and become part of the coparcenary. His fight accrues to him not on the' death of the father or inheritance from the father but with the very fact of his birth. Normally, therefore whenev- er the father gets a property from whatever source, from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. This Court observed that this position has been affect- ed by section8 of the Hindu Succession Act, 1956 and, there- fore, after the Act, when the son inherited the property in the situation contemplated by section 8, he does not take it as Kar of his own undivided family but takes it in his individual capacity. At pages 577 to 578 of the report, this Court dealt with the effect of section 6 of the Hindu Succession Act, 1956 and. the commentary made by Mulla, 15th Edn. pages 924-926 as well as Mayne's on Hindu Law 12th Edition pages 918919. Shri Banerji relied on the said obser- vations of Mayne on 'Hindu Law', 12th Edn. at pages 918-919. This Court observed in the aforesaid decision that the views expressed by the Allahabad High Court, the Madras High Court, the Madhya Pradesh High Court and the Andhra Pradesh High Court appeared to be correct and was unable to accept the views of the Gujarat High Court. To the similar effect is the observation of learned author of Mayne's Hindu Law, 12th Edn. page 919. In that view of the matter, it would be difficult to hold that property which developed on a Hindu under section 8 of the Hindu Succession Act, 1956 would be HUF in his hand vis-a- vis his own sons. If that be the position then the property which developed upon the father of the respondent in the instant case on the demise of his grandfather could not be said to be HUF property. If that is so, then the appellate authority was fight in holding that the respondent was a licensee of his father in respect of the ancestral house."

17. In view of the ratio of these judgments, after the abolition of PEPSU Ala Malkiat Rights Act, where the Adna Malik has acquired absolute rights in the property, the property has been held to be his self acquired property and it cannot be held to be Joint Hindu Family property and Coparcenary property. Both the Courts below have correctly appreciated the oral as well as documentary evidence on record. The substantial questions of law are answered accordingly.

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

****

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

Dhanwant Singh & ors. .....Appellants.

Versus

Smt. Prem Kaur & ors. .....Respondents.

RSA No. 122 of 2008.
Reserved on: 16.11.2015.
Decided on: 17.11.2015.

Specific Relief Act, 1963- Section 34- Plaintiffs pleaded that they and defendant No. 2 constituted joint Hindu Mitakshra Coparcenary Family- defendant No. 2 had alienated the property without any legal necessity- hence, a declaration for setting aside the ex-parte decree was sought – record shows that 'G' , predecessor-in-interest of the parties was Adna Malik who had acquired proprietary rights after notification- therefore, land possessed by 'G' was his self acquired property- land was inherited by defendant no. 2 under Section 8 of Hindu Succession Act and would retain the character of self acquired property- Courts below had rightly dismissed the suit. (Para-8 to 15)

Cases referred:

Budh Singh alias Nachhatar Singh and others vrs. Shrimati Gurdev Kaur and others, 1968 Curr. L.J. (Pb. & Hyna,.) 27

Ranvinder Singh vrs. Raghunath Singh and others, 1998(1) S.L.J. 423

Commissioner of Wealth Tax, Kanpur etc. etc. vrs. Chander Sen etc., AIR 1986 SC 1753

Yudhister vrs. Ashok Kumar, AIR 1987 SC 558

For the appellant(s):	Mr. Suneet Goel, Advocate.
For the respondents:	Mr. Mehar Chand Thakur, Advocate, for respondents No. 1 to 3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned Addl. District Judge, Solan (FTC), H.P., (Camp at Nalagarh), dated 23.11.2007, passed in Civil Appeal No. 4 FTN/13 of 2007.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the appellants-plaintiffs (hereinafter referred to as the plaintiffs), have instituted suit for permanent prohibitory injunction against the respondents-defendants (hereinafter referred to as the defendants). According to the averments made in the plaint, the land measuring 3 bighas 10 biswas being 70/220 share out of total land measuring 11 bighas presently comprised in Khewat Khatauni No. 20/23, bearing Kh. No. 223, Kita 1, as entered in the copy of Jamabandi for the year 1995-96 is situated in village Theda, Pargana Dharampur, Tehsil Nalagarh, Distt. Solan, H.P. (hereinafter referred to as the suit land). The plaintiffs and defendant No. 2 are Hindu Rajput and constitute joint Hindu Mitakshra Coparcenary Family. The pedigree table was also reproduced in the plaint. The property was previously owned by the common ancestor Ganga Ram. He died on 1.2.1951 and suit land was inherited by Banarsi Dass, son of Ganga Ram. Banarsi Dass died on 4.7.1978. The property in the hands of Banarsi Dass was joint Hindu coparcenary property and the plaintiffs have acquired the right in the coparcenary property at the time of their birth. Defendant No. 2 Rattan Singh was Karta of Joint Hindu Family and he was performing all responsibilities as Karta. No partition has taken place. Defendant No. 2 was spendthrift and habitual drinker. After the death of Banarsi Dass, defendant No. 2 conspired and colluded with defendant No. 1 by taking undue advantage of the revenue entries and executed sale deed No. 566 dated 11.7.1986 without any legal necessity and benefit of the estate for consideration of Rs. 30,000/-. The sale deed executed in favour of defendant No. 1 was wrong, illegal and void.

3. The suit was contested by defendant No. 1 (since deceased). According to him, the plaintiffs and defendant No. 2 were living jointly and have derived benefit from the sale consideration of suit land by way of its investment in M/S Dashmesh Brick Kiln Association, Theda, PO Manpura, Tehsil Nalagarh, Distt. Solan, H.P. It was denied that plaintiffs constitute a joint Hindu family with defendant No. 2. It was denied that suit land was previously owned by Ganga Ram. It was also denied that after the death of Ganga Ram, the suit land was inherited by Banarsi Dass. Defendant No. 2 was absolute co-owner in possession to the extent of half share of the suit land at the relevant time of sale deed.

4. Replication was filed. The learned Civil Judge (Sr. Divn.) Nalagarh, framed the issues on 9.2.1999 and additional issues were framed on 2.6.2000. The suit was dismissed vide judgment dated 30.3.2007. The plaintiffs, feeling aggrieved, preferred an appeal against the judgment and decree dated 30.3.2007. The learned Addl. District Judge, (FTC) Solan, (Camp at Nalagarh), dismissed the same on 23.11.2007. Hence, this regular second appeal.

5. The regular second appeal was admitted 13.10.2008 on the following substantial question of law:

> "1. Whether the impugned judgment and decree as passed is the result of complete misreading and misinterpretation of the evidence on record, especially in view of the proved fact that the suit property had devolved upon Banarsi Dass from his father Ganga Singh and there upon his son Rattan Singh who formed a coparcenary alongwith the defendants?"

6. Mr. Suneet Goel, Advocate, appearing on behalf of the appellants, on the basis of the substantial question of law framed, has vehemently argued that both the Courts below have misconstrued the oral as well as documentary evidence. According to him, the property in the hands of Rattan Singh was not self acquired property. On the other hand, Mr. Mehar Chand Thakur, Advocate, has supported the judgments and decrees of both the Courts below.

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

8. It is evident from the notification dated 7.6.1951 issued by the Government of Patiala and East Punjab States Union that Ala Malkiat rights were relinquished w.e.f. 20.8.1948 in favour of Adna Malkiat. Admittedly, Ganga Ram was Adna Malik and he acquired the full proprietary rights after the notification dated 7.6.1951. Thus, the land in the hands of Ganga Ram was self acquired property. After the death of Banarsi Dass, mutation No. 304 was sanctioned and defendant No. 2 Rattan Singh alongwith his brother Kesari Singh inherited the estate of Banarsi Dass on the basis of oral Will. Purportedly, this was done under Section 8 of the Hindu Succession Act, 1956. After the death of Ganga Ram, the property was inherited by Banarsi Dass. Rattan Singh has alienated the suit property vide sale deed dated 11.7.1986. The plaintiffs have failed to prove that the property was coparcenary property. It was self acquired property of Rattan Singh. The sale deed is Ext. D-1. Thus, the suit land cannot be held to be Coparcener property.

9. A Hindu coparcenary is a much narrower body than the joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property. These are the sons, grandsons and great-grandsons of the holder of the joint property for the time being. In other words, the three generations next to the holder is unbroken male descent. The property inherited by a Hindu from his father, father's father or father's father's father, is ancestral property. The property inherited by him from other

relations is his separate property. The essential feature of ancestral property is that if the person inheriting it has sons, grandsons or great-grandsons, they become joint owner's coparceners with him. They become entitled to it due to their birth.

10. PW-1 Dhanwant Singh, during the course of cross-examination has admitted that defendant No. 2 never played gambling nor he used to take any alcohol in his presence. He admitted that his father had floated a firm in the name and style of M/S Dashmesh Brick Kiln in the year 1984. It was also admitted by PW-2 that Rattan Singh was in government service and he had raised loan from Punjab National Bank in the name of M/S Dashmesh Brick Kiln. DW-2 Thona Ram testified that prior to sale Rattan Singh contacted him and expressed his willingness to sell the suit land. DW-3 Ram Prakash Sharma deposed that on 11.7.1986, the sale deed Ext. D-1 was scribed by him on the instructions of Rattan Singh and Rattan Singh has sold 3 bighas 10 biswas of land to Jeet Singh for consideration of Rs. 30,000/- in the presence of Hukan Chand (Lumberdar) and Beli Ram. He also produced the entry in the original register of sale deed Ext. D-1. It is evident from the recitals of sale deed Ext. D-1 that it was executed to meet out the family expenses. PW-1 Dhanwant Singh, in his cross-examination has also admitted that his marriage and the marriage of his sister were performed by his father late Rattan Singh during his life time. The plaintiffs have not led any cogent and reliable evidence to prove that defendant No. 2 was spendthrift. The sale deed was executed on 11.7.1986 and the suit was filed on 10.7.1998. The defendants have duly proved that the sale deed was for legal necessity as defendant No. 2 was running Brick Kiln in the name and style of M/S Dashmesh Brick Kiln and he had also raised loan for that purpose. The factum of Will has been mentioned in mutation Ext. P-5. Late Jeet Singh is proved to be the bonafide purchaser of the suit land and has purchased the same for consideration of Rs. 30,000/-.

11. In the case of ***Budh Singh alias Nachhatar Singh and others vrs. Shrimati Gurdev Kaur and others,*** reported in ***1968 Curr. L.J. (Pb. & Hyna,.) 27,*** the learned Single Judge of the Punjab and Haryana High Court has held that Ala Malik's rights are merely a burden on the land so far as the Adna Malik is concerned. The abolition of Ala Malik's right merely clears off that burden. In no manner, the rights of the Adna Malik are enlarged. The analogy of ancestral occupancy rights, becoming the self-acquired property of the occupancy tenant acquiring Malkiat rights has nothing to do with this case. It also does not, in any manner, matter whether the Ala Malkiat rights are of one category or the other.

12. This judgment was considered by this Court in the case of ***Ranvinder Singh vrs. Raghunath Singh and others,*** reported in ***1998(1) S.L.J. 423.*** The learned Single Judge has held as follows:

> "22. The learned Judges at page 542 of the report also examined the provisions of the Act and it has been said that the Act is a clear pointer to show that the 'Adna Malik' could not be termed prior to the abolition of 'Ala Malkiat' rights as full owner of the land which was possessed by him. He became full proprietor only on the appointed date after the extinction of 'Ala Malik' rights. It was only after the abolition of 'Ala Malkiat' rights that he became full owner for all intents and purposes.
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> 23. In para 7, it has been observed that :
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> > "The learned single Judge has found that Adna Malik had full rights of an owner, that the abolition of the Ala Malkiat's rights did not result in the enlargement of the rights of Adna Malik and that by abolition only a burden has been cleared off. With due defence we do not find ourselves in agreement with these findings. We are clearly of

> the view that an Adna Malik did not have full rights of an owner ....."
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> It was further held in para 7 that :
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> "The two words 'Ala Malik' and 'Adna Malik' clearly indicate the distinct rights of the two and it would not be correct to say that the rights of the Adna Malik was only a burden on the land held by the Adna Malik and did not, in any manner, affected or curtail his rights of full ownership. By abolition of the Ala Malkiyat rights, the right of the Ala Malik to
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> recover certain percentage of revenue and his title as Ala Malik had been extinguished and the Adna Malik rights in the land have been enlarged and ripened into full ownership ....."
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> 24. Quite interestingly, in that case the plaintiffs had brought usual declaratory suit laying challenge to the alienation on the ground that the land was ancestral qua them and the alienation in question being without consideration and necessity, would not affect their reversionary rights. The learned trial Court in that case examined the nature of the property and found that the property was non-ancestral and consequently dismissed the suit. The judgments and decree were affirmed on appeal . It was in second appeal that the learned single Judge D.K. Mahajan, J. after considering the matter, held that the abolition of 'Ala Malkiat' rights did not, in any manner, alter the character of the property in the hands of 'Adna Malik', and that if the land was ancestral in the hands of 'Adna Malki', it would remain ancestral.
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> 25. In the given situation, I shall follow the judgment of the Division Bench of the Punjab and Haryana High Court where the question presently involved stands clearly answered.
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> 26. Apart from what has been said above, the learned trial Court, as noticed earlier in the judgment, has held on appreciation of the evidence that the property in question does not constitute Joint Hindu Family coparcenary and ancestral property."

13. In the case of ***Commissioner of Wealth Tax, Kanpur etc. etc. vrs. Chander Sen etc.,*** reported in ***AIR 1986 SC 1753,*** their lordships of the Hon'ble Supreme Court have held that under the Hindu Law, the son would inherit the property of his father as karta of his own family. But, the Hindu Succession Act has modified the rule of succession. The Act lays down the general rules of succession in the case of males. It has been held as follows:

> " 19. It is necessary to bear in mind the Preamble to the Hindu Succession Act, 1956. The Preamble states that it was an Act to amend and codify the law relating to intestate succession among Hindus.
>
> 20. In view of the preamble to the Act, i.e., that to modify where necessary and to codify the law, in our opinion it is not possible when Schedule indicates heirs in class I and only includes son and does not include son's son but does include son of a predeceased son, to say that when son inherits the property in the situation contemplated by section 8 he takes it as karta of his own undivided family. The Gujarat High Court's view noted above, if accepted, would mean that though the son of a predeceased son and not the son of a son who is intended to be excluded under section

8 to inherit, the latter would by applying the old Hindu law get a right by birth of the said property contrary to the scheme outlined in section 8. Furthermore as noted by the Andhra Pradesh High Court that the Act makes it clear by section 4 that one should look to the Act in case of doubt and not to the pre-existing Hindu law. It would be difficult to hold today the property which devolved on a Hindu under section 8 of the Hindu Succession would be HUF in his hand vis-a-vis his own son; that would amount to creating two classes among the heirs mentioned in class I, the male heirs in whose hands it will be joint Hindu family property and vis-a-vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may be mentioned that heirs in class I of Schedule under section 8 of the Act included widow, mother, daughter of predeceased son etc.

21. Before we conclude we may state that we have noted the observations of Mulla's Commentary on Hindu law 15th Edn. dealing with section 6 of the Hindu Succession Act at page 924-26 as well as Mayne's on Hindu Law, 12th Edition pages 918-919.

22. The express words of section 8 of The Hindu Succession Act, 1956 cannot be ignored and must prevail. The preamble to the Act reiterates that the Act is, inter alia, to 'amend' the law, with that background the express language which excludes son's son but included son of a predeceased son cannot be ignored."

14. In the case of ***Yudhister vrs. Ashok Kumar,*** reported in ***AIR 1987 SC 558,*** their lordships of the Hon'ble Supreme Court have held that the property devolved on Hindu under Section 8 would not be HUF in his hand vis-à-vis his own sons. It has been held as follows:

"10. This question has been considered by this Court in Commissioner of Wealth Tax, Kanpur and Others v. Chander Sen and Others, [1986] 3 SCC 567 where one of us (Sabyasachi Mukharji, J) observed that under the Hindu Law, the moment a son is born, he gets a share in father's property and become part of the coparcenary. His fight accrues to him not on the' death of the father or inheritance from the father but with the very fact of his birth. Normally, therefore whenev- er the father gets a property from whatever source, from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. This Court observed that this position has been affect- ed by section8 of the Hindu Succession Act, 1956 and, there- fore, after the Act, when the son inherited the property in the situation contemplated by section 8, he does not take it as Kar of his own undivided family but takes it in his individual capacity. At pages 577 to 578 of the report, this Court dealt with the effect of section 6 of the Hindu Suc- cession Act, 1956 and. the commentary made by Mulla, 15th Edn. pages 924-926 as well as Mayne's on Hindu Law 12th Edition pages 918919. Shri Banerji relied on the said obser- vations of Mayne on 'Hindu Law', 12th Edn. at pages 918-919. This Court observed in the aforesaid decision that the views expressed by the Allahabad High Court, the Madras High Court, the Madhya Pradesh High Court and the Andhra Pradesh High Court appeared to be correct and was unable to accept the views of the Gujarat High Court. To the similar effect is the observation of learned author of Mayne's Hindu Law, 12th Edn. page 919. In that view of the matter, it would be difficult to hold

that property which developed on a Hindu under section 8 of the Hindu Succession Act, 1956 would be HUF in his hand vis-a- vis his own sons. If that be the position then the property which developed upon the father of the respondent in the instant case on the demise of his grandfather could not be said to be HUF property. If that is so, then the appellate authority was fight in holding that the respondent was a licensee of his father in respect of the ancestral house."

15. In view of the ratio of these judgments, after the abolition of PEPSU Ala Malkiat Rights Act, where the Adna Malik has acquired absolute rights in the property, the property has been held to be his self acquired property and it cannot be held to be Joint Hindu Family property and Coparcenary property. Both the Courts below have correctly appreciated the oral as well as documentary evidence on record. The plaintiffs have failed to discharge onus that the suit property was coparcenary property. The substantial question of law is answered accordingly.

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

****

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

Dhanwant Singh & ors. .....Appellants.
Versus
Smt. Punni & ors. .....Respondents.

RSA No. 132 of 2005.
Reserved on: 16.11.2015.
Decided on: 17.11.2015.

Specific Relief Act, 1963- Section 34- Plaintiffs pleaded that they and defendants No. 2 and 3 constituted joint Hindu Mitakshra Coparcenary Family- defendants No. 2 and 3 had alienated the property without any legal necessity- hence, a declaration for setting aside the ex-parte decree was sought – record shows that 'G' , predecessor-in-interest of the parties was Adna Malik who had acquired proprietary rights after notification- therefore, land possessed by 'G' was his self acquired property- land was inherited by defendants no. 2 and 3 under Section 8 of Hindu Succession Act and would retain the character of self acquired property- Courts below had rightly dismissed the suit. (Para-8 to 15)

Cases referred:
Budh Singh alias Nachhatar Singh and others vrs. Shrimati Gurdev Kaur and others, 1968 Curr. L.J. (Pb. & Hyna,.) 27,
Ranvinder Singh vrs. Raghunath Singh and others, 1998(1) S.L.J. 423
Commissioner of Wealth Tax, Kanpur etc. etc. vrs. Chander Sen etc., AIR 1986 SC 1753,
Yudhister vrs. Ashok Kumar, AIR 1987 SC 558

For the appellant(s): Mr. Suneet Goel, Advocate.
For the respondents: Mr. B.C.Verma, Advocate, for respondents No. 1 to 3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned Addl. District Judge, Solan, H.P., (Camp at Nalagarh), dated 15.12.2004, passed in Civil Appeal No. 52-NL/13 of 2001.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the appellants-plaintiffs (hereinafter referred to as the plaintiffs), have instituted suit for possession as coparceners regarding land measuring 1 bigha 9 biswas, being 1/4th share of land measuring 5 bighas 4 biswas, comprised in Khewat/Khatauni No. 21/27, bearing Kh. No. 194, situated in village Theda, Pargana Dharampur, Tehsil Nalagarh, Distt. Solan, H.P against the respondents-defendants (hereinafter referred to as the defendants). According to the plaintiffs, Ganga Ram was grandfather of defendants No. 2 & 3 and father of Banarsi Dass. Ganga Ram constituted a Joint Hindu Family Property. Sh. Banarsi Dass was the Karta of the same. The defendants No. 2 & 3 were also the coparceners of the Hindu Family Property. The plaintiffs acquired birth right in the same. Ganga Ram and Banarsi Dass had incurred debts for immoral purposes. Rattan Singh and Kesri Singh defendants no. 2 & 3 had also incurred debts for immoral purposes. Banarasi Dass died on 4.7.1978 and defendants No. 2 & 3 inherited the estate. Defendant No. 2 had sold the suit land vide sale deed No. 243 dated 20.5.1985 for a sale consideration of Rs. 6,000/-, which was without any legal necessity.

3. The suit was contested by defendants. It was specifically denied that the suit land was joint Hindu Family Property. The sale deed was for valid and legal necessity.

4. Replication was filed. The learned Sub Judge Nalagarh, framed the issues on 15.10.1998. The suit was dismissed vide judgment dated 21.6.2001. The plaintiffs, feeling aggrieved, preferred an appeal against the judgment and decree dated 21.6.2001. The learned Addl. District Judge, Solan, (Camp at Nalagarh), dismissed the same on 15.12.2004. Hence, this regular second appeal.

5. The regular second appeal was admitted on 3.5.2005 the ground as to whether the suit property had attained the status of self acquired property after coming into force of the PEPSU Abolition of Ala Malkiat and Taluqdari Rights Act along with various substantial questions of law framed.

6. Mr. Suneet Goel, Advocate, appearing on behalf of the appellants, on the basis of the substantial questions of law framed, has vehemently argued that the suit property was coparcenary property. Both the Courts below have not correctly appreciated the oral as well as documentary evidence on record. He lastly contended that the suit property could not be treated as self acquired property of Banarsi Dass after coming into force of the PEPSU Abolition of Ala Malkiat and Taluqdari Rights Act. On the other hand, Mr. B.C.Verma, Advocate, has supported the judgments and decrees of both the Courts below.

7. Since all the substantial questions of law are inter-connected, hence are taken up together for discussion to avoid repetition of evidence.

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

9. According to the jamabandi for the year 1944-45, Ganga Ram was shown to be Adna Malik and Raja Sahab has been shown to be Ala Malik. In the copy of jamabandi Ext. P-4 for the year 1956-57, Banarsi Dass has been recorded to be the absolute owner. Thereafter he has been recorded to be the owner in possession in the copy of jamabandi for the year 1961-62, Ext. P-5. Ganga Ram has died on 1 Fagun 2007 as per mutation Ext. P-6 and the property was mutated in favour of Banarsi Dass on 3.5.1951. Ext. P-8 also reflects that mutation was attested in favour of Rattan Singh and Kesari Singh. Rattan Singh has to be treated as absolute owner of the property. Thus, the suit land cannot be held to be joint Hindu Coparcener property.

10. A Hindu coparcenary is a much narrower body than the joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property. These are the sons, grandsons and great-grandsons of the holder of the joint property for the time being. In other words, the three generations next to the holder is unbroken male descent. The property inherited by a Hindu from his father, father's father or father's father's father, is ancestral property. The property inherited by him from other relations is his separate property. The essential feature of ancestral property is that if the person inheriting it has sons, grandsons or great-grandsons, they become joint owner's coparceners with him. They become entitled to it due to their birth.

11. Sh. Ganga Ram, predecessor-in-interest of the parties was recorded to be in exclusive possession of the land measuring 13-14 bighas as Adna Malik and in joint possession of land measuring about 108-11 bighas as Adna Malik in Ext. P-5, copy of jamabandi for the year 1944-45. After the death of Ganga Ram, Banarsi Dass was in possession of the land as Adna Malik. In revenue record, the name of only Ganga Ram was mentioned and not Banarsi Dass. Even after the enforcement of abolition of the PEPSU Abolition of Ala Malkiat and Taluqdari Rights Act, Sh. Banarsi Dass was recorded as owner-in-possession of the land in Ext. P-6 copy of jamabandi for the year 1956-57. Sh. Banarsi Dass was also recorded owner of Kh. No. 223 measuring 11 bighas in Ext. P-5 copy of jamabandi for the year 1961-62. Thus, the property is proved to be self acquired property and not the coparcenary property.

12. It is also evident from the recitals of sale deed Ext. P-1 (Ext. P-8 copy of jamabandi of Kh. No. 223 for the year 1995-96) makes it clear that Rs. 7,000/- was kept as trust for redemption of Rs. 2500/-. DW-1 Ram Pal has also testified that the land was redeemed by defendant No. 4 and this fact was brought to his notice by him. Thus, the sale was made by defendant No. 4 in favour of defendants No. 1 to 3 for payment of antecedent debt which was valid under the Hindu Law. Defendants No. 1 to 3 were bonafide purchasers for consideration and were recorded in possession of land in suit in Ext. P-2, copy of Jamabandi for the year 1995-96. It was absolute property of defendant No. 4 and thus, the sale deed made in favour of defendants No. 1 to 3 vide Ext. P-1 is valid.

13. In the case of ***Budh Singh alias Nachhatar Singh and others vrs. Shrimati Gurdev Kaur and others,*** reported in ***1968 Curr. L.J. (Pb. & Hyna,.) 27,*** the learned Single Judge of the Punjab and Haryana High Court has held that Ala Malik's rights are merely a burden on the land so far as the Adna Malik is concerned. The abolition of ala Malik's right merely clears off that burden. In no manner the rights of the Adna Malik are enlarged. The analogy of ancestral occupancy rights, becoming the self-acquired property of the occupancy tenant acquiring Malkiat rights has nothing to do with this case. It also does not, in any manner, matter whether the Ala Malkiat rights are of one category or the other.

14. This judgment was considered by this Court in the case of ***Ranvinder Singh vrs. Raghunath Singh and others,*** reported in ***1998(1) S.L.J. 423.*** The learned Single Judge has held as follows:

> "22. The learned Judges at page 542 of the report also examined the provisions of the Act and it has been said that the Act is a clear pointer to show that the 'Adna Malik' could not be termed prior to the abolition of 'Ala Malkiat' rights as full owner of the land which was possessed by him. He became full proprietor only on the appointed date after the extinction of 'Ala Malik' rights. It was only after the abolition of 'Ala Malkiat' rights that he became full owner for all intents and purposes.
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> 23. In para 7, it has been observed that :
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> > "The learned single Judge has found that Adna Malik had full rights of an owner, that the abolition of the Ala Malkiat's rights did not result in the enlargement of the rights of Adna Malik and that by abolition only a burden has been cleared off. With due defence we do not find ourselves in agreement with these findings. We are clearly of the view that an Adna Malik did not have full rights of an owner ....."
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> It was further held in para 7 that :
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> > "The two words 'Ala Malik' and 'Adna Malik' clearly indicate the distinct rights of the two and it would not be correct to say that the rights of the Adna Malik was only a burden on the land held by the Adna Malik and did not, in any manner, affected or curtail his rights of full ownership. By abolition of the Ala Malkiyat rights, the right of the Ala Malik to
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> > recover certain percentage of revenue and his title as Ala Malik had been extinguished and the Adna Malik rights in the land have been enlarged and ripened into full ownership ....."
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> 24. Quite interestingly, in that case the plaintiffs had brought usual declaratory suit laying challenge to the alienation on the ground that the land was ancestral qua them and the alienation in question being without consideration and necessity, would not affect their reversionary rights. The learned trial Court in that case examined the nature of the property and found that the property was non-ancestral and consequently dismissed the suit. The judgments and decree were affirmed on appeal . It was in second appeal that the learned single Judge D.K. Mahajan, J. after considering the matter, held that the abolition of 'Ala Malkiat' rights did not, in any manner, alter the character of the property in the hands of 'Adna Malik', and that if the land was ancestral in the hands of 'Adna Malki', it would remain ancestral.
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> 25. In the given situation, I shall follow the judgment of the Division Bench of the Punjab and Haryana High Court where the question presently involved stands clearly answered.
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> 26. Apart from what has been said above, the learned trial Court, as noticed earlier in the judgment, has held on appreciation of the evidence that the property in question does not constitute Joint Hindu Family coparcenary and ancestral property."

15. In the case of ***Commissioner of Wealth Tax, Kanpur etc. etc. vrs. Chander Sen etc.,*** reported in ***AIR 1986 SC 1753,*** their lordships of the Hon'ble Supreme Court have held that under the Hindu Law, the son would inherit the property of his father as karta of his own family. But, the Hindu Succession Act has modified the rule of succession. The Act lays down the general rules of succession in the case of males. It has been held as follows:

> " 19. It is necessary to bear in mind the Preamble to the Hindu Succession Act, 1956. The Preamble states that it was an Act to amend and codify the law relating to intestate succession among Hindus.
>
> 20. In view of the preamble to the Act, i.e., that to modify where necessary and to codify the law, in our opinion it is not possible when Schedule indicates heirs in class I and only includes son and does not include son's son but does include son of a predeceased son, to say that when son inherits the property in the situation contemplated by section 8 he takes it as karta of his own undivided family. The Gujarat High Court's view noted above, if accepted, would mean that though the son of a predeceased son and not the son of a son who is intended to be excluded under section 8 to inherit, the latter would by applying the old Hindu law get a right by birth of the said property contrary to the scheme outlined in section 8. Furthermore as noted by the Andhra Pradesh High Court that the Act makes it clear by section 4 that one should look to the Act in case of doubt and not to the pre-existing Hindu law. It would be difficult to hold today the property which devolved on a Hindu under section 8 of the Hindu Succession would be HUF in his hand vis-a-vis his own son; that would amount to creating two classes among the heirs mentioned in class I, the male heirs in whose hands it will be joint Hindu family property and vis-a-vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may be mentioned that heirs in class I of Schedule under section 8 of the Act included widow, mother, daughter of predeceased son etc.
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> 21. Before we conclude we may state that we have noted the observations of Mulla's Commentary on Hindu law 15th Edn. dealing with section 6 of the Hindu Succession Act at page 924-26 as well as Mayne's on Hindu Law, 12th Edition pages 918-919.
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> 22. The express words of section 8 of The Hindu Succession Act, 1956 cannot be ignored and must prevail. The preamble to the Act reiterates that the Act is, inter alia, to 'amend' the law, with that background the express language which excludes son's son but included son of a predeceased son cannot be ignored."

16. In the case of ***Yudhister vrs. Ashok Kumar,*** reported in ***AIR 1987 SC 558,*** their lordships of the Hon'ble Supreme Court have held that the property devolved on Hindu under Section 8 would not be HUF in his hand vis-à-vis his own sons. It has been held as follows:

> "10. This question has been considered by this Court in Commissioner of Wealth Tax, Kanpur and Others v. Chander Sen and Others, [1986] 3 SCC 567 where one of us (Sabyasachi Mukharji, J) observed that under the Hindu Law, the moment a son is born, he gets a share in father's property and become part of the coparcenary. His fight accrues to him not on the' death of the father or inheritance from the father but with the very fact of his birth. Normally, therefore whenev- er the father gets a property from whatever

source, from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. This Court observed that this position has been affect- ed by section8 of the Hindu Succession Act, 1956 and, there- fore, after the Act, when the son inherited the property in the situation contemplated by section 8, he does not take it as Kar of his own undivided family but takes it in his individual capacity. At pages 577 to 578 of the report, this Court dealt with the effect of section 6 of the Hindu Suc- cession Act, 1956 and. the commentary made by Mulla, 15th Edn. pages 924-926 as well as Mayne's on Hindu Law 12th Edition pages 918919. Shri Banerji relied on the said obser- vations of Mayne on 'Hindu Law', 12th Edn. at pages 918-919. This Court observed in the aforesaid decision that the views expressed by the Allahabad High Court, the Madras High Court, the Madhya Pradesh High Court and the Andhra Pradesh High Court appeared to be correct and was unable to accept the views of the Gujarat High Court. To the similar effect is the observation of learned author of Mayne's Hindu Law, 12th Edn. page 919. In that view of the matter, it would be difficult to hold that property which developed on a Hindu under section 8 of the Hindu Succession Act, 1956 would be HUF in his hand vis-a- vis his own sons. If that be the position then the property which developed upon the father of the respondent in the instant case on the demise of his grandfather could not be said to be HUF property. If that is so, then the appellate authority was fight in holding that the respondent was a licensee of his father in respect of the ancestral house."

17. In view of the ratio of these judgments, after the abolition of PEPSU Ala Malkiat Rights Act, where the Adna Malik has acquired absolute rights in the property, the property has been held to be his self acquired property and it cannot be held to be Joint Hindu Family property and Coparcenary property. Both the Courts below have correctly appreciated the oral as well as documentary evidence on record. The substantial questions of law are answered accordingly.

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

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J

Dhanwant Singh & ors. .....Appellants.

Versus

Smt. Punni & ors. .....Respondents.

RSA No. 184 of 2008.
Reserved on: 16.11.2015.
Decided on: 17.11.2015.

Specific Relief Act, 1963- Section 34- Plaintiffs pleaded that they and defendant No. 4 constituted joint Hindu Mitakshra Coparcenary Family- defendant No.4 had alienated the property without any legal necessity- hence, a declaration for setting aside the ex-parte

decree was sought – record shows that 'G' , predecessor-in-interest of the parties was Adna Malik who had acquired proprietary rights after notification- therefore, land possessed by 'G' was his self acquired property- land was inherited by defendant no. 4 under Section 8 of Hindu Succession Act and would retain the character of self acquired property- Courts below had rightly dismissed the suit. (Para-8 to 15)

Cases referred:
Budh Singh alias Nachhatar Singh and others vrs. Shrimati Gurdev Kaur and others, 1968 Curr. L.J. (Pb. & Hyna,.) 27,
Ranvinder Singh vrs. Raghunath Singh and others, 1998(1) S.L.J. 423
Commissioner of Wealth Tax, Kanpur etc. etc. vrs. Chander Sen etc., AIR 1986 SC 1753,
Yudhister vrs. Ashok Kumar, AIR 1987 SC 558

For the appellant(s): Mr. Suneet Goel, Advocate.
For the respondents: Mr. Mehar Chand Thakur, Advocate, for respondents No. 1 to 3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned Addl. District Judge, Solan (FTC), H.P., (Camp at Nalagarh), dated 23.11.2007, passed in Civil Appeal No. 5 FTN/13 of 2007.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the appellants-plaintiffs (hereinafter referred to as the plaintiffs), have instituted suit for possession as coparceners and permanent prohibitory injunction against the respondents-defendants (hereinafter referred to as the defendants). According to the averments made in the plaint, the land measuring 2 bighas 12 biswas being 1/2 share out of total land measuring 5 bighas 5 biswas, presently comprised in Khewat Khatauni No. 22/25, bearing Kh. No. 149, 265, 266 and 267, Kita 4, as entered in the copy of Jamabandi for the year 1995-96 is situated in village Theda, Pargana Dharampur, Tehsil Nalagarh, Distt. Solan, H.P. (hereinafter referred to as the suit land). The plaintiffs and defendant No. 4 are Hindu Rajput and constitute joint Hindu Mitakshra Coparcenary Family. The pedigree table was also reproduced in the plaint. The property was previously owned by the common ancestor Ganga Ram. He died on 1.2.1951 and suit land was inherited by Banarsi Dass, son of Ganga Ram. Banarsi Dass died on 4.7.1978. The property in the hands of Banarsi Dass was joint Hindu coparcenary property and the plaintiffs have acquired the right in the coparcenary property at the time of their birth. Defendant No. 4 Rattan Singh was Karta of Joint Hindu Family and he was performing all responsibilities as Karta. No partition has taken place. Defendant No. 4 was spendthrift and habitual drinker. After the death of Banarsi Dass, defendant No. 4 conspired and colluded with defendant No. 1 by taking undue advantage of the revenue entries and executed sale deed No. 111 dated 3.2.1986 without any legal necessity and benefit of the estate for consideration of Rs. 20,800/-. The sale deed executed in favour of defendant No. 1 was wrong, illegal and void.

3. The suit was contested by defendants No. 1 to 3. According to them, defendant No. 4 was absolute owner in possession of the suit land at the time of sale deed and the suit land was never remained as coparcenary or joint Hindu Family property. Defendant No. 4 intended to install M/S Dashmesh Brick Kiln, Theda, PO Manpura, Tehsil Nalagarh, Distt. Solan, H.P, and for that purpose, he required money. They were bonafide

purchasers of the suit land. Defendant No. 4 was owner-in-possession of the suit land and sold the same for consideration of Rs. 20,000/- to defray his legal necessity and for better management of his estate.

4. Replication was filed. The learned Civil Judge (Sr. Divn.) Nalagarh, framed the issues on 16.10.1998 and additional issues were framed on 10.3.2000. The suit was dismissed vide judgment dated 30.3.2007. The plaintiffs, feeling aggrieved, preferred an appeal against the judgment and decree dated 30.3.2007. The learned Addl. District Judge, (FTC) Solan, (Camp at Nalagarh), dismissed the same on 23.11.2007. Hence, this regular second appeal.

5. The regular second appeal was admitted 23.4.2008 on the following substantial question of law:

> "1. Whether the impugned judgment and decree as passed is the result of complete misreading and misinterpretation of the evidence on record, especially in view of the proved fact that the suit property had devolved upon Banarsi Dass from his father Ganga Singh and there upon his son Rattan Singh who formed a coparcenary alongwith the defendants?"

6. Mr. Suneet Goel, Advocate, appearing on behalf of the appellants, on the basis of the substantial question of law framed, has vehemently argued that both the Courts below have misconstrued the oral as well as documentary evidence. According to him, the property in the hands of Rattan Singh was not self acquired property. On the other hand, Mr. Mehar Chand Thakur, Advocate, has supported the judgments and decrees of both the Courts below.

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

8. It is evident from the notification dated 7.6.1951 issued by the Government of Patiala and East Punjab States Union that Ala Malkiat rights were relinquished w.e.f. 20.8.1948 in favour of Adna Malkiat. Admittedly, Ganga Ram was Adna Malik and he acquired the full proprietary rights after the notification dated 7.6.1951. Thus, the land in the hands of Ganga Ram was self acquired property. After the death of Banarsi Dass, mutation No. 304 was sanctioned and defendant No. 4 Rattan Singh alongwith his brother Kesari Singh inherited the estate of Banarsi Dass on the basis of oral Will. Purportedly, this was done under Section 8 of the Hindu Succession Act, 1956. After the death of Ganga Ram, the property was inherited by Banarsi Dass. Rattan Singh has alienated the suit property vide sale deed dated 11.7.1986. The plaintiffs have failed to prove that the property was coparcenary property. It was self acquired property of Rattan Singh. The sale deed is Ext. D-1.

9. A Hindu coparcenary is a much narrower body than the joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property. These are the sons, grandsons and great-grandsons of the holder of the joint property for the time being. In other words, the three generations next to the holder is unbroken male descent. The property inherited by a Hindu from his father, father's father or father's father's father, is ancestral property. The property inherited by him from other relations is his separate property. The essential feature of ancestral property is that if the person inheriting it has sons, grandsons or great-grandsons, they become joint owner's coparceners with him. They become entitled to it due to their birth.

10. It is evident from the perusal of the sale deed that it contained recital that Rattan Singh sold the suit land to meet the household expenses. The oral evidence has also been produced by the defendants to prove the same. Though plaintiffs have argued that Rattan Singh was spendthrift but no evidence to this effect was led. Rather Dhanwant Singh, plaintiff has admitted in his cross-examination that Rattan Singh was running brick kiln. The land has been sold by Rattan Singh for legal necessity.

11. This judgment was considered by this Court in the case of ***Ranvinder Singh vrs. Raghunath Singh and others,*** reported in ***1998(1) S.L.J. 423.*** The learned Single Judge has held as follows:

> "22. The learned Judges at page 542 of the report also examined the provisions of the Act and it has been said that the Act is a clear pointer to show that the 'Adna Malik' could not be termed prior to the abolition of 'Ala Malkiat' rights as full owner of the land which was possessed by him. He became full proprietor only on the appointed date after the extinction of 'Ala Malik' rights. It was only after the abolition of 'Ala Malkiat' rights that he became full owner for all intents and purposes.
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> 23. In para 7, it has been observed that :
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> > "The learned single Judge has found that Adna Malik had full rights of an owner, that the abolition of the Ala Malkiat's rights did not result in the enlargement of the rights of Adna Malik and that by abolition only a burden has been cleared off. With due defence we do not find ourselves in agreement with these findings. We are clearly of the view that an Adna Malik did not have full rights of an owner ....."
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> It was further held in para 7 that :
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> > "The two words 'Ala Malik' and 'Adna Malik' clearly indicate the distinct rights of the two and it would not be correct to say that the rights of the Adna Malik was only a burden on the land held by the Adna Malik and did not, in any manner, affected or curtail his rights of full ownership. By abolition of the Ala Malkiyat rights, the right of the Ala Malik to recover certain percentage of revenue and his title as Ala Malik had been extinguished and the Adna Malik rights in the land have been enlarged and ripened into full ownership ....."
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> 24. Quite interestingly, in that case the plaintiffs had brought usual declaratory suit laying challenge to the alienation on the ground that the land was ancestral qua them and the alienation in question being without consideration and necessity, would not affect their reversionary rights. The learned trial Court in that case examined the nature of the property and found that the property was non-ancestral and consequently dismissed the suit. The judgments and decree were affirmed on appeal . It was in second appeal that the learned single Judge D.K. Mahajan, J. after considering the matter, held that the abolition of 'Ala Malkiat' rights did not, in any manner, alter the character of the property in the hands of 'Adna Malik', and that if the land was ancestral in the hands of 'Adna Malki', it would remain ancestral.
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> 25. In the given situation, I shall follow the judgment of the Division Bench of the Punjab and Haryana High Court where the question presently involved stands clearly answered.

26. Apart from what has been said above, the learned trial Court, as noticed earlier in the judgment, has held on appreciation of the evidence that the property in question does not constitute Joint Hindu Family coparcenary and ancestral property."

12. In the case of ***Commissioner of Wealth Tax, Kanpur etc. etc. vrs. Chander Sen etc.,*** reported in ***AIR 1986 SC 1753,*** their lordships of the Hon'ble Supreme Court have held that under the Hindu Law, the son would inherit the property of his father as karta of his own family. But, the Hindu Succession Act has modified the rule of succession. The Act lays down the general rules of succession in the case of males. It has been held as follows:

" 19. It is necessary to bear in mind the Preamble to the Hindu Succession Act, 1956. The Preamble states that it was an Act to amend and codify the law relating to intestate succession among Hindus.

20. In view of the preamble to the Act, i.e., that to modify where necessary and to codify the law, in our opinion it is not possible when Schedule indicates heirs in class I and only includes son and does not include son's son but does include son of a predeceased son, to say that when son inherits the property in the situation contemplated by section 8 he takes it as karta of his own undivided family. The Gujarat High Court's view noted above, if accepted, would mean that though the son of a predeceased son and not the son of a son who is intended to be excluded under section 8 to inherit, the latter would by applying the old Hindu law get a right by birth of the said property contrary to the scheme outlined in section 8. Furthermore as noted by the Andhra Pradesh High Court that the Act makes it clear by section 4 that one should look to the Act in case of doubt and not to the pre-existing Hindu law. It would be difficult to hold today the property which devolved on a Hindu under section 8 of the Hindu Succession would be HUF in his hand vis-a-vis his own son; that would amount to creating two classes among the heirs mentioned in class I, the male heirs in whose hands it will be joint Hindu family property and vis-a-vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may be mentioned that heirs in class I of Schedule under section 8 of the Act included widow, mother, daughter of predeceased son etc.

21. Before we conclude we may state that we have noted the observations of Mulla's Commentary on Hindu law 15th Edn. dealing with section 6 of the Hindu Succession Act at page 924-26 as well as Mayne's on Hindu Law, 12th Edition pages 918-919.

22. The express words of section 8 of The Hindu Succession Act, 1956 cannot be ignored and must prevail. The preamble to the Act reiterates that the Act is, inter alia, to 'amend' the law, with that background the express language which excludes son's son but included son of a predeceased son cannot be ignored."

13. In the case of ***Yudhister vrs. Ashok Kumar,*** reported in ***AIR 1987 SC 558,*** their lordships of the Hon'ble Supreme Court have held that the property devolved on Hindu under Section 8 would not be HUF in his hand vis-à-vis his own sons. It has been held as follows:

"10. This question has been considered by this Court in Commissioner of Wealth Tax, Kanpur and Others v. Chander Sen and Others, [1986] 3 SCC 567 where one of us (Sabyasachi Mukharji, J) observed that under the Hindu Law, the moment a son is born, he gets a share in father's property and become part of the coparcenary. His fight accrues to him not on the' death of the father or

inheritance from the father but with the very fact of his birth. Normally, therefore whenev- er the father gets a property from whatever source, from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. This Court observed that this position has been affect- ed by section8 of the Hindu Succession Act, 1956 and, there- fore, after the Act, when the son inherited the property in the situation contemplated by section 8, he does not take it as Kar of his own undivided family but takes it in his individual capacity. At pages 577 to 578 of the report, this Court dealt with the effect of section 6 of the Hindu Succession Act, 1956 and. the commentary made by Mulla, 15th Edn. pages 924-926 as well as Mayne's on Hindu Law 12th Edition pages 918919. Shri Banerji relied on the said obser- vations of Mayne on 'Hindu Law', 12th Edn. at pages 918-919. This Court observed in the aforesaid decision that the views expressed by the Allahabad High Court, the Madras High Court, the Madhya Pradesh High Court and the Andhra Pradesh High Court appeared to be correct and was unable to accept the views of the Gujarat High Court. To the similar effect is the observation of learned author of Mayne's Hindu Law, 12th Edn. page 919. In that view of the matter, it would be difficult to hold that property which developed on a Hindu under section 8 of the Hindu Succession Act, 1956 would be HUF in his hand vis-a- vis his own sons. If that be the position then the property which developed upon the father of the respondent in the instant case on the demise of his grandfather could not be said to be HUF property. If that is so, then the appellate authority was fight in holding that the respondent was a licensee of his father in respect of the ancestral house."

14. In view of the ratio of these judgments, after the abolition of PEPSU Ala Malkiat Rights Act, where the Adna Malik has acquired absolute rights in the property, the property has been held to be his self acquired property and it cannot be held to be Joint Hindu Family property and Coparcenary property. Both the Courts below have correctly appreciated the oral as well as documentary evidence on record. The plaintiffs have failed to discharge onus that the suit property was coparcenary property. The substantial question of law is answered accordingly.

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

****

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

Dhanwant Singh & ors. .....Appellants.

Versus

Ram Nath & ors. .....Respondents.

RSA No. 116 of 2009.
Reserved on: 16.11.2015.
Decided on: 17.11.2015.

Specific Relief Act, 1963- Section 34- Plaintiffs pleaded that they and defendants No. 3 and 4 constituted joint Hindu Mitakshra Coparcenary Family- defendants No. 3 and 4 had

alienated the property without any legal necessity- hence, a declaration for setting aside the ex-parte decree was sought – record shows that 'G' , predecessor-in-interest of the parties was Adna Malik who had acquired proprietary rights after notification- therefore, land possessed by 'G' was his self acquired property- land was inherited by defendants no. 3 and 4 under Section 8 of Hindu Succession Act and would retain the character of self acquired property- Courts had rightly dismissed the suit. (Para-8 to 15)

Cases referred:
Budh Singh alias Nachhatar Singh and others vrs. Shrimati Gurdev Kaur and others, 1968 Curr. L.J. (Pb. & Hyna,.) 27,
Ranvinder Singh vrs. Raghunath Singh and others, 1998(1) S.L.J. 423
Commissioner of Wealth Tax, Kanpur etc. etc. vrs. Chander Sen etc., AIR 1986 SC 1753,
Yudhister vrs. Ashok Kumar, AIR 1987 SC 558

For the appellant(s): Mr. Suneet Goel, Advocate.
For the respondents: Mr. Ramakant Sharma, Sr. Advocate, with Ms. Devyani Sharma, Advocate, for respondents No. 1 & 2.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Solan, H.P., (Camp at Nalagarh), dated 16.12.2008, passed in Civil Appeal No. 11NL/13 of 08/07.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the appellants-plaintiffs (hereinafter referred to as the plaintiffs), have instituted suit for declaration and for possession as coparceners and permanent prohibitory injunction against the respondents-defendants (hereinafter referred to as the defendants). According to the averments made in the plaint, the land measuring 36 bighas 3 biswas, fully described in the plaint, as entered in copy of jamabandi for the year 1994-95, is situated in the village Kaundi, H.B. No. 416, Pargana Kharampur, Tehsil Nalagarh, Distt. Solan, H.P., (hereinafter referred to as the suit land). The plaintiffs and defendants No. 3 & 4 are Hindu Rajput and constitute joint Hindu Mitakshra Coparcenary Family. The pedigree table was also reproduced in the plaint. The property was previously owned by the common ancestor Ganga Ram. He died on 1.2.1951 and suit land was inherited by Banarsi Dass, son of Ganga Ram. Banarsi Dass died on 4.7.1978. The property in the hands of Banarsi Dass was joint Hindu coparcenary property and the plaintiffs have acquired the right in the coparcenary property at the time of their birth. Defendant No. 4 Rattan Singh was Karta of Joint Hindu Family and he was performing all responsibilities as Karta. No partition has taken place. Defendants No. 3 & 4 were spendthrift and habitual drinker. After the death of Banarsi Dass, defendants No. 3 & 4 conspired and colluded with defendants No. 1 & 2 by taking undue advantage of the revenue entries and executed sale deed No. 508 dated 4.9.1985 without any legal necessity and benefit of the estate for consideration of Rs. 11,000/-. The sale deed executed in favour of defendants No. 1 & 2 was wrong, illegal and void.

3. The suit was contested by defendants No. 1 & 2. It was denied that the plaintiffs and defendants No. 3 & 4 constitute a joint Hindu Family. It was denied that after the death of Ganga Ram, suit land was inherited by Banarsi Dass. It was denied that

defendant No. 4 was karta of Joint Family. According to them, defendants No. 3 & 4 were absolute owners to the extent of ½ share of suit land at the relevant time of sale. Defendants No. 3 & 4 had floated their family concern under the name and style of M/S Dashmesh Brick Kiln Association, Theda, PO Manpura, Tehsil Nalagarh, Distt. Solan, H.P.

4. Replication was filed. The learned Civil Judge (Sr. Divn.) Nalagarh, framed the issues on 29.5.1998 and additional issues were framed on 21.2.2000. The suit was dismissed vide judgment dated 26.2.2007. The plaintiffs, feeling aggrieved, preferred an appeal against the judgment and decree dated 26.2.2007. The learned District Judge, Solan, (Camp at Nalagarh), dismissed the same on 16.12.2008. Hence, this regular second appeal.

5. The regular second appeal was admitted 26.3.2009 on the following substantial questions of law:

> "1. Whether the impugned judgment and decree as passed is the result of complete misreading and misinterpretation of the evidence on record, especially in view of the proved fact that the suit property had devolved upon Banarsi Dass from his father Ganga Singh and there upon his son Rattan Singh who formed a coparcenary alongwith the defendants?
>
> 2. Whether the Courts below erroneously held that the suit property attained the status of self acquired property after coming into force of the PEPSU Abolition of Ala Malkiat and Taluqdari Rights Act, when admittedly it came into the hands of Banarsi Dass from his father Ganga Singh and after the death of Banarsi Dass in the hands of his sons i.e. defendants No. 3 & 4?
>
> 3. Whether the impugned judgment and decree is perverse in the circumstances of this case and is thus liable to be reversed?
>
> 4. Whether on proved and undisputed facts as well as both the oral and documentary evidence, the impugned judgment and decree could have been passed while dismissing the suit of the plaintiffs?"

6. Mr. Suneet Goel, Advocate, appearing on behalf of the appellants, on the basis of the substantial question of law framed, has vehemently argued that both the Courts below have misconstrued the oral as well as documentary evidence. According to him, the property in the hands of Rattan Singh was not self acquired property. On the other hand, Mr. Ramakant Sharma, Sr. Advocate, has supported the judgments and decrees of both the Courts below.

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

8. It is evident from the notification dated 7.6.1951 issued by the Government of Patiala and East Punjab States Union that Ala Malkiat rights were relinquished w.e.f. 20.8.1948 in favour of Adna Malkiat. Admittedly, Ganga Ram was Adna Malik and he acquired the full proprietary rights after the notification dated 7.6.1951. Thus, the land in the hands of Ganga Ram was self acquired property. After the death of Banarsi Dass, mutation No. 304 was sanctioned and defendant No. 4 Rattan Singh alongwith his brother Kesari Singh inherited the estate of Banarsi Dass on the basis of oral Will. Purportedly, this was done under Section 8 of the Hindu Succession Act, 1956. After the death of Ganga Ram, the property was inherited by Banarsi Dass. Rattan Singh has alienated the suit property vide sale deed dated 11.7.1986. The plaintiffs have failed to prove that the property was coparcenary property. It was self acquired property of Rattan Singh. The sale deed is Ext. D-1.

9. PW-1 Dhanwant Singh during his cross-examination has admitted that defendants No. 3 & 4 never played gambling or used to take any alcohol in his presence. He admitted that his father and uncle were in government service and they used to take pensions. It is also stated in the impugned sale deed that defendants No. 3 & 4 sold the suit land for consideration of Rs. 11,000/- on account of family necessity. DW-2 Faquir Chauhan deposed that defendants No. 3 & 4 were the sons of Banarsi Dass resident of Village Theda, Pargana Dharampur, Tehsil Nalagarh, Distt. Solan, H.P. They obtained loan from Punjab National Bank, Nalagarh in the name of M/S Dashmesh Brick Kiln in the year 1985. The plaintiffs have not led any evidence to rebut the testimony of DW-2 Faquir Chauhan. It is duly proved by the defendants that money was raised to run brick kiln. The land was sold due to legal necessity.

10. A Hindu coparcenary is a much narrower body than the joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property. These are the sons, grandsons and great-grandsons of the holder of the joint property for the time being. In other words, the three generations next to the holder is unbroken male descent. The property inherited by a Hindu from his father, father's father or father's father's father, is ancestral property. The property inherited by him from other relations is his separate property. The essential feature of ancestral property is that if the person inheriting it has sons, grandsons or great-grandsons, they become joint owner's coparceners with him. They become entitled to it due to their birth.

11. In the case of ***Budh Singh alias Nachhatar Singh and others vrs. Shrimati Gurdev Kaur and others,*** reported in ***1968 Curr. L.J. (Pb. & Hyna,.) 27,*** the learned Single Judge of the Punjab and Haryana High Court has held that Ala Malik's rights are merely a burden on the land so far as the Adna Malik is concerned. The abolition of Ala Malik's right merely clears off that burden. In no manner, the rights of the Adna Malik are enlarged. The analogy of ancestral occupancy rights, becoming the self-acquired property of the occupancy tenant acquiring Malkiat rights has nothing to do with this case. It also does not, in any manner, matter whether the Ala Malkiat rights are of one category or the other.

12. This judgment was considered by this Court in the case of ***Ranvinder Singh vrs. Raghunath Singh and others,*** reported in ***1998(1) S.L.J. 423.*** The learned Single Judge has held as follows:

> "22. The learned Judges at page 542 of the report also examined the provisions of the Act and it has been said that the Act is a clear pointer to show that the 'Adna Malik' could not be termed prior to the abolition of 'Ala Malkiat' rights as full owner of the land which was possessed by him. He became full proprietor only on the appointed date after the extinction of 'Ala Malik' rights. It was only after the abolition of 'Ala Malkiat' rights that he became full owner for all intents and purposes.
>
> 23. In para 7, it has been observed that :
>
> > "The learned single Judge has found that Adna Malik had full rights of an owner, that the abolition of the Ala Malkiat's rights did not result in the enlargement of the rights of Adna Malik and that by abolition only a burden has been cleared off. With due defence we do not find ourselves in agreement with these findings. We are clearly of the view that an Adna Malik did not have full rights of an owner ....."
>
> It was further held in para 7 that :

> "The two words 'Ala Malik' and 'Adna Malik' clearly indicate the distinct rights of the two and it would not be correct to say that the rights of the Adna Malik was only a burden on the land held by the Adna Malik and did not, in any manner, affected or curtail his rights of full ownership. By abolition of the Ala Malkiyat rights, the right of the Ala Malik to recover certain percentage of revenue and his title as Ala Malik had been extinguished and the Adna Malik rights in the land have been enlarged and ripened into full ownership ....."
>
> 24. Quite interestingly, in that case the plaintiffs had brought usual declaratory suit laying challenge to the alienation on the ground that the land was ancestral qua them and the alienation in question being without consideration and necessity, would not affect their reversionary rights. The learned trial Court in that case examined the nature of the property and found that the property was non-ancestral and consequently dismissed the suit. The judgments and decree were affirmed on appeal . It was in second appeal that the learned single Judge D.K. Mahajan, J. after considering the matter, held that the abolition of 'Ala Malkiat' rights did not, in any manner, alter the character of the property in the hands of 'Adna Malik', and that if the land was ancestral in the hands of 'Adna Malki', it would remain ancestral.
>
> 25. In the given situation, I shall follow the judgment of the Division Bench of the Punjab and Haryana High Court where the question presently involved stands clearly answered.
>
> 26. Apart from what has been said above, the learned trial Court, as noticed earlier in the judgment, has held on appreciation of the evidence that the property in question does not constitute Joint Hindu Family coparcenary and ancestral property."

13. In the case of ***Commissioner of Wealth Tax, Kanpur etc. etc. vrs. Chander Sen etc.,*** reported in ***AIR 1986 SC 1753,*** their lordships of the Hon'ble Supreme Court have held that under the Hindu Law, the son would inherit the property of his father as karta of his own family. But, the Hindu Succession Act has modified the rule of succession. The Act lays down the general rules of succession in the case of males. It has been held as follows:

> " 19. It is necessary to bear in mind the Preamble to the Hindu Succession Act, 1956. The Preamble states that it was an Act to amend and codify the law relating to intestate succession among Hindus.
>
> 20. In view of the preamble to the Act, i.e., that to modify where necessary and to codify the law, in our opinion it is not possible when Schedule indicates heirs in class I and only includes son and does not include son's son but does include son of a predeceased son, to say that when son inherits the property in the situation contemplated by section 8 he takes it as karta of his own undivided family. The Gujarat High Court's view noted above, if accepted, would mean that though the son of a predeceased son and not the son of a son who is intended to be excluded under section 8 to inherit, the latter would by applying the old Hindu law get a right by birth of the said property contrary to the scheme outlined in section 8. Furthermore as noted by the Andhra Pradesh High Court that the Act makes it clear by section 4 that one should look to the Act in case of doubt and not

to the pre-existing Hindu law. It would be difficult to hold today the property which devolved on a Hindu under section 8 of the Hindu Succession would be HUF in his hand vis-a-vis his own son; that would amount to creating two classes among the heirs mentioned in class I, the male heirs in whose hands it will be joint Hindu family property and vis-a-vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may be mentioned that heirs in class I of Schedule under section 8 of the Act included widow, mother, daughter of predeceased son etc.

21. Before we conclude we may state that we have noted the observations of Mulla's Commentary on Hindu law 15th Edn. dealing with section 6 of the Hindu Succession Act at page 924-26 as well as Mayne's on Hindu Law, 12th Edition pages 918-919.

22. The express words of section 8 of The Hindu Succession Act, 1956 cannot be ignored and must prevail. The preamble to the Act reiterates that the Act is, inter alia, to 'amend' the law, with that background the express language which excludes son's son but included son of a predeceased son cannot be ignored."

14. In the case of ***Yudhister vrs. Ashok Kumar,*** reported in ***AIR 1987 SC 558,*** their lordships of the Hon'ble Supreme Court have held that the property devolved on Hindu under Section 8 would not be HUF in his hand vis-à-vis his own sons. It has been held as follows:

"10. This question has been considered by this Court in Commissioner of Wealth Tax, Kanpur and Others v. Chander Sen and Others, [1986] 3 SCC 567 where one of us (Sabyasachi Mukharji, J) observed that under the Hindu Law, the moment a son is born, he gets a share in father's property and become part of the coparcenary. His fight accrues to him not on the' death of the father or inheritance from the father but with the very fact of his birth. Normally, therefore whenev- er the father gets a property from whatever source, from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. This Court observed that this position has been affect- ed by section8 of the Hindu Succession Act, 1956 and, there- fore, after the Act, when the son inherited the property in the situation contemplated by section 8, he does not take it as Kar of his own undivided family but takes it in his individual capacity. At pages 577 to 578 of the report, this Court dealt with the effect of section 6 of the Hindu Suc- cession Act, 1956 and. the commentary made by Mulla, 15th Edn. pages 924-926 as well as Mayne's on Hindu Law 12th Edition pages 918919. Shri Banerji relied on the said obser- vations of Mayne on 'Hindu Law', 12th Edn. at pages 918-919. This Court observed in the aforesaid decision that the views expressed by the Allahabad High Court, the Madras High Court, the Madhya Pradesh High Court and the Andhra Pradesh High Court appeared to be correct and was unable to accept the views of the Gujarat High Court. To the similar effect is the observation of learned author of Mayne's Hindu Law, 12th Edn. page 919. In that view of the matter, it would be difficult to hold that property which developed on a Hindu under section 8 of the Hindu Succession Act, 1956 would be HUF in his hand vis-a- vis his own sons. If that be the position then the property which developed upon the father of the respondent in the instant case on the demise of his grandfather could not be

said to be HUF property. If that is so, then the appellate authority was fight in holding that the respondent was a licensee of his father in respect of the ancestral house."

15. In view of the ratio of these judgments, after the abolition of PEPSU Ala Malkiat Rights Act, where the Adna Malik has acquired absolute rights in the property, the property has been held to be his self acquired property and it cannot be held to be Joint Hindu Family property and Coparcenary property. Both the Courts below have correctly appreciated the oral as well as documentary evidence on record. The plaintiffs have failed to discharge onus that the suit property was coparcenary property. The substantial questions of law are answered accordingly.

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

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

Jagdish Chand Gupta ....Appellant.

Versus

The Executive Engineer, National Highway Division, HP PWD .....Respondent.

Arb.A. No.7 of 2008.
Decided on: November 17, 2015.

Arbitration and Conciliation Act, 1996- Section 37- An arbitrator was appointed in the year 1995, who closed the proceedings without making the award- proceedings were revived and the award was made by the second arbitrator- State had not questioned the appointment of second arbitrator and joined the proceedings- held, that State is caught by its own conduct, omission and waiver- no findings were given by the learned Judge on issues No. 1 to 4 therefore, matter remanded to the Learned Judge for decision on issues No. 1 to 4. (Para-7 to 10)

For the Appellant: Mr.Ramakant Sharma, Senior Advocate, with Ms.Soma Thakur, Advocate.

For the Respondent: Mr.Shrawan Dogra, Advocate General with Mr.Romesh Verma & Mr.Anup Rattan, Additional Advocate Generals, and Mr.J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.(Oral):

This appeal is directed against the judgment and order, dated 30th May, 2008, passed by a learned Single Judge of this Court in Arbitration Case No.66 of 2002, titled The Executive Engineer vs. Jagdish Chand Gupta, whereby the award made by the Arbitrator, came to be set aside, on the ground of limitation and jurisdiction, (for short, the impugned judgment).

2. Feeling aggrieved, the appellant/claimant filed the instant appeal challenging the impugned judgment.

3. During the pendency of the appeal, the Division Bench of this Court, vide order dated 24th September, 2013, referred the matter to the Arbitrator for determining issue No.4(A) i.e. "Whether the reference to the Arbitrator was beyond time and as such, the award is bad?" The Arbitrator returned the findings and held that the claim was not barred by limitation. The respondent/State has not questioned the said findings of the Arbitrator, therefore, the same have attained finality.

4. In view of the above, the findings returned by the learned Single Judge on issue No.4(A) needs to be set aside. Ordered accordingly.

5. Issue No.4(B) framed by the learned Single Judge is – "Whether the appointment of second Arbitrator was not in accordance with law, if so its effect?"

6. The learned counsel for the appellant/claimant argued that the learned Single Judge has fallen in error in deciding issue No.4(B) in the affirmative for the reason that the respondent/State had participated in the proceedings before the Arbitrator and also not raised the said issue in the memo of application filed under Section 34 of the Arbitration and Conciliation Act, 1996, (for short, the Act).

7. From the facts of the case, it transpires that the Arbitrator, for the first time, was appointed in the year 1995, who closed the proceedings without making the award vide order dated 8th July, 1997, whereafter the proceedings were revived on the order made by the Chief Engineer and second Arbitrator was appointed.

8. We are unable to countenance how the first Arbitrator closed the proceedings without making the award. Be that as it may. Respondent/State has also not questioned the appointment of the second Arbitrator, rather joined the proceedings before the second Arbitrator, which proceedings resulted into making of the award. The respondent/State questioned the said award on the grounds taken in the memo of the application filed under Section 34 of the Act. However, no such ground has been taken by the respondent/State in the said application.

9. From the above, it is clear that the respondent/State is caught by its own conduct, law of omission and waiver. Accordingly, the findings recorded by the learned Single Judge on Issue No.4(B) are also liable to be set aside and the same are set aside accordingly.

10. The learned Single Judge, after determining issues No.4(A) and 4(B), has not returned findings on issues No.1 to 4, as having become redundant.

11. In the given circumstances, the appeal is allowed, the matter is remanded to the learned Single Judge for decision on issues No.1 to 4 as early as possible, preferably within 8 weeks. Parties through their counsel are directed to cause appearance before the learned Single Judge having the Roster on 1st December, 2015.

12. The appeal stands disposed of accordingly, so also the pending CMPs, if any.

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

Karan Singh Pathania .....Appellant
Versus
State of H.P. and others .....Respondents.

LPA No. 604 of 2011
Date of decision: 17th November, 2015.

Constitution of India, 1950- Article 226- Petitioner filed a Writ Petition in the year 2012 claiming the arrears w.e.f. 1.1.1996 till 18.3.1999- held, that arrears can only be granted for three years prior to filing of the Writ Petition- merely, because relief was granted to some other person can be no ground to grant the relief to the petitioner. (Para- 3 to 9)

Cases referred:
Jai Dev Gupta versus State of Himachal Pradesh and another, AIR 1998 SC 2819
Union of India and others versus Tarsem Singh, (2008) 8 SCC 648
Asger Ibrahim Amin versus Life Insurance Corporation of India, JT 2015 (9) SC 329
B.S. Bajwa and another versus State of Punjab and others, (1998) 2 Supreme Court Cases 523
State of Uttar Pradesh and others versus Arvind Kumar Srivastava and others, 2014 AIR SCW 6519

For the appellant: Mr. Avneesh Bhardwaj, Advocate.
For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 and 2.
Mr. K.D. Sood, Sr. Advocate with Mr. Sanjeev Sood, Advocate, for respondents No. 3 and 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This Letters Patent Appeal is directed against the judgment dated 27.8.2011, made by the learned Single Judge of this Court in CWP No. 8025 of 2010, titled *Karan Singh Pathania versus State of H.P. and others,* whereby the writ petition filed by the petitioner came to be dismissed on the ground of delay, for short "the impugned judgment", on the grounds taken in the memo of appeal.

2. We have gone through the impugned judgment and the record.

3. The petitioner had invoked the jurisdiction of the Writ Court in the year 2010 claiming the arrears from 1.1.1996 to 18.3.1999 which is hopelessly time barred. Even otherwise, the arrears can only be granted three years prior to filing of the writ petition in view of the judgment delivered by the apex Court in ***Jai Dev Gupta* versus *State of Himachal Pradesh and another*** reported in ***AIR 1998 SC 2819.***

4. The apex Court in another judgment delivered in case ***Union of India and others*** **versus** ***Tarsem Singh*** reported in ***(2008) 8 SCC 648,*** has laid down the same propositions of law.

5. The apex Court in a latest judgment delivered in case ***Asger Ibrahim Amin*** versus ***Life Insurance Corporation of India*** reported in ***JT 2015 (9) SC 329*** has also laid down the same principles of law. It is profitable to reproduce paras 4 and 16 of the said judgment herein.

> *"4. As regards the issue of delay in matters pertaining to claims of pension, it has already been opined by this Court in Union of India v. Tarsem Singh, 2008 8 SCC 648 that in cases of continuing or successive wrongs, delay and laches or limitation will not thwart the claim so long as the claim, if allowed, does not have any adverse repercussions on the settled third-party rights. This Court held:*
>
> *7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the reopening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or refixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion, etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/successive wrongs will apply. As a consequence, the High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition. [emphasis is ours]*
>
> *5 to 15..... ....*
>
> *16. We thus hold that the termination of services of the Appellant, in essence, was voluntary retirement within the ambit of Rule 31 of the Pension Rules of 1995. The Appellant is entitled for pension, provided he fulfils the condition of refunding of the entire amount of the Corporation's contribution to the Provident Fund along with interest accrued thereon as provided in the Pension Rules of 1995. Considering the huge delay, not explained by proper reasons, on part of the*

> *Appellant in approaching the Court, we limit the benefits of arrears of pension payable to the Appellant to three years preceding the date of the petition filed before the High Court. These arrears of pension should be paid to the Appellant in one instalment within four weeks from the date of refund of the entire amount payable by the Appellant in accordance of the Pension Rules of 1995. In the alternative, the Appellant may opt to get the amount of refund adjusted against the arrears of pension. In the latter case, if the amount of arrear is more than the amount of refund required, then the remaining amount shall be paid within two weeks from the date of such request made by the Appellant. However, if the amount of arrears is less than the amount of refund required, then the pension shall be payable on monthly basis after the date on which the amount of refund is entirely adjusted."*
>
> *[emphasis supplied]*

6. The learned counsel for the appellant argued that other similarly situated persons had obtained reliefs from the Court and thereafter he had filed the writ petition. Meaning thereby the petitioner is a fencer and the fencer cannot be held entitled to any reliefs.

7. Our this view is fortified by the judgment delivered by the Apex Court in a case titled as **B.S. Bajwa and another versus State of Punjab and others,** reported in **(1998) 2 Supreme Court Cases 523**. It is apt to reproduce para 7 of the judgment herein:

> *"7. Having heard both sides we are satisfied that the writ petition was wrongly entertained and allowed by the single Judge and, therefore, the Judgments of the single Judge and the Division Bench have both to be set aside. The undisputed facts appearing from the record are alone sufficient to dismiss the writ petition on the ground of laches because the grievance made by B. S. Bajwa and B. D. Kapoor only in 1984, which was long after they had entered the department in 1971-72. During this entire period of more than a decade they were all along treated as junior to the other aforesaid persons and the rights inter se had crystallised which ought not to have been re-opened after the lapse of such a long period. At every stage the others were promoted before B. S. Bajwa and B. D. Kapoor and this position was known to B. S. Bajwa and B. D. Kapoor right from the beginning as found by the Division Bench itself. It is well settled that in service matters the question of seniority should not be re-opened in such situations after the lapse of a reasonable period because that results in disturbing the settled position which is not justifiable. There was inordinate delay in the present case for making such a grievance. This alone was sufficient to decline interference under Article 226 and to reject the writ petition."*

8. The Apex Court in the case titled as **State of Uttar Pradesh and others versus Arvind Kumar Srivastava and others,** reported in **2014 AIR SCW 6519,** held that relief cannot be extended to the persons who have approached the Court after long delay, that too, who are fence-sitters. It is apt to reproduce para 24 of the judgment herein:

"24. Viewed from this angle, in the present case, we find that the selection process took place in the year 1986. Appointment orders were issued in the year 1987, but were also cancelled vide orders dated June 22, 1987. The respondents before us did not challenge these cancellation orders till the year 1996, i.e. for a period of 9 years. It means that they had accepted the cancellation of their appointments. They woke up in the year 1996 only after finding that some other persons whose appointment orders were also cancelled got the relief. By that time, nine years had passed. The earlier judgment had granted the relief to the parties before the Court. It would also be pertinent to highlight that these respondents have not joined the service nor working like the employees who succeeded in earlier case before the Tribunal. As of today, 27 years have passed after the issuance of cancellation orders. Therefore, not only there was unexplained delay and laches in filing the claim petition after period of 9 years, it would be totally unjust to direct the appointment to give them the appointment as of today, i.e. after a period of 27 years when most of these respondents would be almost 50 years of age or above."

9. This Court in ***LPA No. 99 of 2014*** titled *Sukhdev Kumar and others versus State of H.P. and others* decided on 15.7.2015 has laid down the same propositions of law.

10. Having said so, the Writ Court has rightly made the impugned judgment and we see no reason to interfere with the same. Accordingly, the LPA is dismissed along with pending applications if any.

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

LPAs No. 282 & 303 of 2010
Reserved on: 02.11.2015
Decided on: 17.11.2015

LPA No. 282 of 2010

Lal Singh ...Appellant.

Versus

H.P. State Co-operative Milk Producers Federation Limited ...Respondent.

LPA No. 303 of 2010

Dhani Ram ...Appellant.

Versus

State of Himachal Pradesh and others ...Respondents.

Constitution of India, 1950- Article 226- Petitioner was working as Milk Procurement Assistant in H.P. State Co-operative Milk Producers Limited- his appointment was made only on adhoc basis without following the due process- it was specifically stated in the office order that appointment was temporary in nature and had to lose its efficacy on the date of regular appointment- he also accepted the condition that he would not claim any seniority

or other benefits- held, that the person who was appointed on ad-hoc basis or without following due process cannot claim regularization- mere continuation in service on the basis of court orders will not create any right, title or interest in his favour- his Writ was rightly dismissed. (Para- 12 to 28)

Cases referred:

Director, Institute of Management Development, U.P. versus Smt. Pushpa Srivastava, AIR 1992 Supreme Court 2070

State of Karnataka and others versus P.M. Bhaskara Gowda and others, AIR 2004 Supreme Court 317

Chief Commissioner of Income-tax, Bhopal & Ors. versus M/s. Leena Jain & Ors., 2006 AIR SCW 6066

Accounts Officer (A & I), APSRTC & Ors., vs K.V. Ramana & Ors., 2007 AIR SCW 1185

Rajasthan Krishi Vishva Vidhyalaya, Bikaner versus Devi Singh, 2008 AIR SCW 1383

State of U.P. & Anr. versus Ram Adhar, 2008 AIR SCW 5479

Ravinder Singh versus State of H.P. & ors., 2006 Lab. I.C. 1409

State of Himachal Pradesh & Anr. versus Ravinder Singh, 2009 AIR SCW 452

State of Karnataka & Ors. versus G.V. Chandrashekhar, 2009 AIR SCW 2346

State of Orissa & Anr. versus Mamata Mohanty, 2011 AIR SCW 1332

Nand Kumar versus State of Bihar and others, 2014 AIR SCW 5203

Indian Council of Agricultural Research and another versus T.K. Suryanarayan and others, (1997) 6 Supreme Court Cases 766

State of U.P. and others versus Raj Karan Singh, (1998) 8 Supreme Court Cases 529

Mohammad Maqbool Wagay versus State of J&K and others, 2007 (1) S.L.J. 351

LPA No. 282 of 2010

For the appellant: Mr. Subhash Sharma, Advocate.

For the respondent: Mr. M.R. Verma, Advocate.

.....

LPA No. 303 of 2010

For the appellant: Mr. B.C. Verma, Advocate.

For the respondent: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Additional Advocate General, and Mr. J.K. Verma, Deputy Advocate, General, for respondent No. 1.
Mr. M.R. Verma, Advocate, for respondent No. 2.
Mr. Subhash Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Both these appeals are outcome of one judgment, thus, are being determined by this common judgment.

2. These Letters Patent Appeals are directed against the judgment and order, dated 25.10.2010, made by the learned Single Judge in CWP (T) No. 12255 of 2008, titled as Lal Singh versus H.P. State Cooperative Milk Producers' Federation Ltd., and CWP No. 217 of 2010, titled as Dhani Ram versus State of H.P. and others, whereby the writ petitions filed by both the writ petitioners came to be dismissed (for short "the impugned judgment").

Brief facts:

3. Appellant-Lal Singh, who was working as Dairy Helper in the H.P. State Cooperative Milk Producers' Federation Limited (for short "the Federation"), was appointed on ad hoc basis as Milk Procurement Assistant in terms of order, dated 31.05.2004 (Annexure A-1 in CWP (T) No. 12255 of 2008), which was withdrawn vide order, dated 27.07.2005 (Annexure A-2 in CWP (T) No. 12255 of 2008), constraining appellant-Lal Singh to invoke the jurisdiction of the H.P. State Administrative Tribunal (for short "the Tribunal") by the medium of Original Application No. 1953 of 2005.

4. Learned counsel for the appellant-Lal Singh made a request before the Tribunal that the Original Application be treated as representation, the Managing Director of the respondent-Federation be directed to examine and decide the same within six weeks and the order of withdrawal, dated 27.07.2005 be stayed. The said Original Application was disposed of, in terms of order, dated 10.08.2005 (Annexure A-3 in CWP (T) No. 12255 of 2008) and the Managing Director of the respondent-Federation was directed to examine and make a decision on the representation within six weeks from the date of receipt of the order, after hearing the appellant-Lal Singh and till the decision of the representation, the order, dated 27.07.2005, was kept under eclipse.

5. The representation was examined and rejected vide order, dated 27.09.2005 (Annexure A-4 in CWP (T) No. 12255 of 2008), constraining appellant-Lal Singh to question the same by the medium of Original Application No. 2493 of 2005.

6. By the medium of the said Original Application, appellant-Lal Singh has sought quashment of order, dated 27.09.2005 (Annexure A-4), but has not sought any relief viz-a-viz the withdrawal order, dated 27.07.2005 (Annexure A-2). The respondent-Federation resisted the same on the grounds taken in the memo of the reply.

7. During the pendency of the lis, the Tribunal was abolished and the file was transferred to this Court and was diarized as CWP (T) No. 12255 of 2008.

8. The learned Single Judge, after hearing the parties and perusing the record, dismissed the writ petition vide the impugned judgment.

9. It appears that during the pendency of the second petition, i.e. CWP (T) No. 12255 of 2008, one Dhani Ram filed a writ petition, being CWP No. 217 of 2010, with the prayers that he be appointed as Milk Procurement Assistant and the seniority list of the Milk Procurement Assistant be revised, on the grounds taken in the said writ petition, was resisted by the respondents, came to be dismissed in terms of the impugned judgment.

10. The case of the appellant-Lal Singh revolves around the orders of appointment and withdrawal, dated 31.05.2004 and 27.07.2005, respectively. Both the orders were not the subject matter of CWP (T) No. 12255 of 2008. However, it is apt to reproduce the relevant portions of both the orders herein:

"THE HP STATE COOPERATIVE MILK PRODUCERS FED. LTD. TOTU SHIMLA-11

NO. HMF/HQ-III/PER-361/98-975 Dated: 31.5.04

OFFICE ORDER

Shri Lal Singh-II Dairy Helper is hereby appointed as Milk Procurement Assistant in the pay scale of Rs. 4020-120-4260-140-4400-150-5000-160-5800-200-6200 with initial start of Rs. 4020/- plus allowances admissible to Milkfed Employees on Adhoc basis till the time the post is filled on regular basis and posted under Milk

Chilling Centre Kepu with Head Quarter at Niether, Distt. Kullu. He will have no claim for seniority and other benefits during the period of Adhoc appointment."

xxx xxx xxx

"THE HP STATE ACOOPERATIVE MILK PRODUCERS' FEDERATION LTD.

HEAD OFFICE: TOTU, SHIMLA-11

No : HMF/HQ-III/PER-361/98-1410 Dated: 27/7/2005.

OFFICE ORDER

Reference under this office order No. HMF/HQ-III/Per-361/98-975-78, dated: 31.5.2004.

The Adhoc appointment order as Milk Procurement Assistant in the pay scale of Rs. 4020-6200 ordered vide this office order referred to above is hereby withdrawn with immediate effect. However, consequent to withdrawal of this adhoc appointment, he will continue to work at his present place of posting."

11. Appellant-Lal Singh has laid the foundation of his case on the basis of so called appointment order. It appears that he was working as Dairy Helper and by the so called appointment order, was allowed to work against the post of Milk Procurement Assistant. Virtually, his appointment was conditional to the effect that he had to work against the said post on ad hoc basis till the same was to be filled up on regular basis. The said order also contained a rider clause that he would not claim any seniority or other benefits. He accepted the said order without any murmur. This order was withdrawn and he was directed to work against the post of Dairy Helper.

12. It appears that the appointment of appellant-Lal Singh was made only on ad hoc basis, that too, without following the due process. He continued to work on the said post because of such order and thereafter, had obtained stay order from the Tribunal.

13. The question is - whether such appointment will confer any right upon him? The answer is in the negative for the following reasons:

14. Appellant-Lal Singh accepted the terms and conditions contained in the office order, dated 31.05.2004 (supra), which was temporary in nature and had to lose its efficacy on the date when the regular appointment was to be made against the said post. He also accepted the condition that he will not claim any seniority or any other benefits. Then how can he claim regularization in terms of the said ad hoc arrangement.

15. The Apex Court, in a series of cases, has considered the question as to whether ad hoc appointment/temporary arrangement/stop gap arrangement will create any right, title, equity or interest.

16. The Apex Court in a case titled as **Director, Institute of Management Development, U.P. versus Smt. Pushpa Srivastava,** reported in **AIR 1992 Supreme Court 2070,** held that a person, who was appointed on ad hoc basis or without following the due process, cannot claim any right for his regularization. It is apt to reproduce paras 22 and 23 of the judgment herein:

"22. In dealing with this, at page 577 (of 1990 (1) Supp SCR 562) : (at p. 2238 of AIR 1990 SC 2228), the Court observed:

"If any person who does not possess the requisite qualifications is appointed under the said clause, he will be liable to be replaced by a qualified person. Clause (iii) of Rule 9 states that a person appointed under clause (i) shall, as soon as possible, be replaced by a member of the service or an approved candidate qualified to hold the post. Clause (e) of Rule 9, however, provided for regularisation of service of any person appointed under clause (1) of sub-rule (a) if he had completed continuous service of two years on December 22, 1973, notwithstanding anything contained in the rules. This is a clear indication that in the past the Government also considered it Just and fair to regularise the services of those who had been in continuous service for two years' period to the cut-off date. The spirit underlying this treatment clearly shows that the Government did not consider it just, fair or reasonable to terminate the services of those who were in employment for a period of two or more years' period to the cut-off date. 'This approach is quite consistent with the spirit of the rule which was intended to be invoked to serve emergent situations which could not brook delay. Such appointments were intended to be stop-gap temporary appointments to serve the stated purpose and not long term ones. The rule was not intended to fill a large number of posts in the service but only those which could not be kept vacant till regular appointments were made in accordance with the rules. But once the appointments continued for long, the services had to be regularized if the incumbent possessed the requisite qualifications as was done by sub-rule (e). Such an approach alone would be consistent with the constitutional philosophy adverted to earlier. Even otherwise, the rule must be so interpreted, if the language of the rule permits, as will advance this philosophy of the Constitution. If the rule is so interpreted it seems clear to us that employees who have been working on the establishment since long, and who possess the requisite qualifications for the job as obtaining on the date of their employment, must be allowed to continue on their jobs and their services should be regularised."

23. In the instant case, there is no such rule. The appointment was purely ad hoc and on a contractual basis for a limited period. Therefore, by expiry of the period of six months, the right to remain in the post comes to an end."

17. The Apex Court in another case titled as **State of Karnataka and others versus P.M. Bhaskara Gowda and others,** reported in **AIR 2004 Supreme Court 317,** laid down the same principle.

18. In the cases titled as **Chief Commissioner of Income-tax, Bhopal & Ors. versus M/s. Leena Jain & Ors.,** reported in **2006 AIR SCW 6066, Accounts Officer (A & I), APSRTC & Ors., versus K.V. Ramana & Ors.,** reported in **2007 AIR SCW 1185,** and **Rajasthan Krishi Vishva Vidhyalaya, Bikaner versus Devi Singh,** reported in **2008 AIR SCW 1383,** held that an employee cannot claim regularization merely on the basis of long rendition of service.

19. This question again arose for consideration before the Apex Court in the case titled as **State of U.P. & Anr. versus Ram Adhar,** reported in **2008 AIR SCW 5479,**

wherein it has been held that a person appointed in a temporary capacity has no right to continue till regular selection is made. It is apt to reproduce para 5 of the judgment herein:

> *"5. It may be mentioned that there is no principle of law that a person appointed in a temporary capacity has a right to continue till a regular selection Rather, the legal position is just the reverse, that is, that a temporary employee has no right to the post vide State of U.P. v. Kaushal Kishore, (1991) 1 SCC 691. Hence, he has no right to continue even for a day as of right, far from having a right to continue till a regular appointment."*

20. We have laid down our hands on a judgment, which has arisen from the judgment rendered by a learned Single Judge of this Court in **Ravinder Singh versus State of H.P. & ors.,** reported in **2006 Lab. I.C. 1409.** In terms of the said judgment, the learned Single Judge of this Court directed the State Government to consider the case of an employee, who was appointed on daily rated basis, for regularization, which came up for consideration before the Apex Court in the case titled as **State of Himachal Pradesh & Anr. versus Ravinder Singh,** reported in **2009 AIR SCW 452** and the judgment of this Court was set aside. It is profitable to reproduce paras 8 and 9 of the judgment herein:

> *"8. In addition it has to be noted that the Labour Court had observed that the name of the respondent claimant was not sponsored by the employment exchange; there was no appointment order; the requirements relating to procedure to be followed at the time of recruitment were also not fulfilled. There was a mere back- door entry. It was further noted that they were not selected in the manner as applicable to regular employees who are liable to be transferred and are subject to disciplinary proceedings to which daily-rated workers are not subjected to.*
>
> *9. In the background of what has been stated above the directions given for regularization in the post of clerk being indefensible are set aside. However, undisputedly the appellants had regularized the services of the respondent as a Chowkidar in July, 1997 which the respondent had refused. If the respondent is so advised, he may accept the order in that regard by submitting the requisite documents within six weeks from today. If not so done, the respondent shall not be entitled to any relief in terms of the High Court s impugned order which as noted above we have set aside."*

21. The Apex Court in the cases titled as **State of Karnataka & Ors. versus G.V. Chandrashekhar,** reported in **2009 AIR SCW 2346,** and **State of Orissa & Anr. versus Mamata Mohanty,** reported in **2011 AIR SCW 1332,** has held that continuation of a person wrongly appointed on the post does not create any right in his favour. It is worthwhile to reproduce paras 18 to 20 of the judgment in **Mamata Mohanty's case (supra)** herein:

> *"APPOINTMENT/EMPLOYMENT WITHOUT ADVERTISEMENT:*
>
> *18. At one time this Court had been of the view that calling the names from Employment Exchange would curb to certain extent the menace of nepotism and corruption in public employment. But, later on, came to the conclusion that some appropriate method consistent with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly. Even if the names of candidates are requisitioned*

from Employment Exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from the open market by advertising the vacancies in newspapers having wide circulation or by announcement in Radio and Television as merely calling the names from the Employment Exchange does not meet the requirement of the said Article of the Constitution. (Vide: Delhi Development Horticulture Employees' Union v. Delhi Administration, Delhi & Ors., AIR 1992 SC 789 : (1992 AIR SCW 616); State of Haryana & Ors. v. Piara Singh & Ors., AIR 1992 SC 2130 : (1992 AIR SCW 2315); Excise Superintendent Malkapatnam, Krishna District, A.P. v. K.B.N. Visweshwara Rao & Ors., (1996) 6 SCC 216 : (1996 AIR SCW 3979); Arun Tewari & Ors. v. Zila Mansavi Shikshak Sangh & Ors., AIR 1998 SC 331 : (1997 AIR SCW 4310); Binod Kumar Gupta & Ors. v. Ram Ashray Mahoto & Ors., AIR 2005 SC 2103 : (2005 AIR SCW 1872); National Fertilizers Ltd. & Ors. v. Somvir Singh, AIR 2006 SC 2319 : (2006 AIR SCW 2972); Telecom District Manager & Ors. v. Keshab Deb, (2008) 8 SCC 402 :(2008 AIR SCW 4106); State of Bihar v. Upendra Narayan Singh & Ors., (2009) 5 SCC 65; and State of Madhya Pradesh & Anr. v. Mohd. Ibrahim, (2009) 15 SCC 214 : (Air 2009 SC 2892 : 2009 AIR SCW 4533).

19. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the Employment Exchange or putting a note on the Notice Board etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance of the said Constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit.

ORDER BAD IN INCEPTION:

20. It is a settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironic to permit a person to rely upon a law, in violation of which he has obtained the benefits. If an order at the initial stage is bad in law, then all further proceedings consequent thereto will be non est and have to be necessarily set aside. A right in law exists only and only when it has a lawful origin. (vide: Upen Chandra Gogoi v. State of Assam & Ors., AIR 1998 SC 1289 : (1998 AIR SCW 1144); Mangal Prasad Tamoli (Dead) by L.Rs. v. Narvadeshwar Mishra (Dead) by L.Rs. & Ors., AIR

2005 SC 1964 : (2005 AIR SCW 1272); and Ritesh Tiwari & Anr. v. State of U.P. & Ors., AIR 2010 SC 3823).

The concept of adverse possession of lien on post or holding over are not applicable in service jurisprudence. Therefore, continuation of a person wrongly appointed on post does not create any right in his favour. (Vide Dr. M.S. Patil v. Gulbarga University & Ors., 2010 AIR(SC) 3783)."

22. In the latest judgment in the case titled as **Nand Kumar versus State of Bihar and others,** reported i**n 2014 AIR SCW 5203,** the Apex Court held that an ad hoc appointee has no right to seek regularization. It is apt to reproduce paras 19, 20 and 23 of the judgment herein:

"19. Therefore, considering the facts of the present case, it appears to us that the appellants were never appointed through a proper procedure. It is not in dispute that they all served as daily wagers. Therefore, it was within their knowledge all the consequences of appointment being temporary, they cannot have even a right to invoke the theory of legitimate expectation for being confirmed in the post. Accordingly, we cannot accept the contention of the appellants in the matter. We have further considered the case of the appellants in the light of Section 6 of the Repeal Act which has made it clear that the employees of the Board and the appellants cannot be said to be of the same status and cannot enjoy the benefit given under Section 6(i) of the Repeal Act, 2006. Therefore, we are unable to accept the contention that the daily wagers would also come within the meaning of "all officers and employees" as specifically stated in Section 6 of the Repeal Act. In these circumstances, we are unable to accept the submission of learned senior counsel appearing on behalf of the appellants.

We have also considered the decision in M.L. Kesari (AIR 2010 SC 2587 : 2010 AIR SCW 4577) (supra) of this Court which deals with the exception contained in para 53 of Umadevi (supra) but considering the facts of this case, we do not have any hesitation to hold that the said decisions can not be a help to the appellants.

20. We have heard learned counsel for the parties. We have also perused the records placed before us. We find that the status of the appellants was continuing to be as daily wagers. They cannot be treated as permanent Government employees. They all worked as employees of the Board. We have also found that no steps were followed by the Board to safeguard the service of these appellants. We have not been able to find out whether any advertisement was issued by the Government to regularise them. In these circumstances, in view of the submission which has been advanced on behalf of the appellants, we do not find that there is any substance in the matter/arguments put forwarded before us on behalf of the appellants as we have been able to find out that the appellants have served as daily wagers and we do find that Section 6(i) makes it clear that after the repeal of the Agriculture Produce Act, 1960, all officers and employees of the Board are to continue in employment and they shall continue to be paid what they were getting earlier as salary and

allowance till such time the State Government takes an official decision as per the further provisions of Section 6. Such provision certainly allows continuance of the officers and employees of the Board to continue in employment in the same status. The status of the daily wage employees and regular employees of the Board is eminent from the said provision. It cannot be said that the status of the daily wage employees can enjoy or acquire the same status as that of the regular employees. In these circumstances, we do not find that there was any discrimination between the daily wage employees and the regular employees as is tried to be contended before us. Therefore, such submission has no substance, in our opinion, for the reason that the difference continues and is recognised under the said provision of the Repeal Act. So far as the power of the Committee of Secretaries constituted in terms of section 6(ii) of the Repeal Act is concerned, it is to prepare a scheme of absorption as well as of retirement, compulsory retirement or voluntary retirement and other service conditions of officers and employees of the Board. In our opinion, the scheme which was prepared by the Committee of Secretaries is only in the nature of recommendation and the State has the power either to accept, modify or amend the same before granting its official approval. Therefore, after the sanction is granted by the Government in respect of the said scheme, it would gain the status of statutory scheme framed under the said Act and would be enforced within the time to be indicated in section 6(iii) of the Repeal Act, 2006.

21. .....

22. .....

23. In these circumstances, in our considered opinion, the regularisation/ absorption is not a matter of course. It would depend upon the facts of the case following the rules and regulations and cannot be de hors the rules for such regularisation/ absorption."

23. The Apex Court in a case tiled as **Indian Council of Agricultural Research and another versus T.K. Suryanarayan and others,** reported in **(1997) 6 Supreme Court Cases 766,** held that promotion, which is made de hors the Rules, cannot be a ground to claim any right or title. It is profitable to reproduce relevant portion of para 8 of the judgment herein:

"8. .....Even if in some cases, erroneous promotions had been given contrary to the said Service Rules and consequently such employees have been allowed to enjoy the fruits of improper promotion, an employee cannot base his claim for promotion contrary to the statutory Service Rules in law courts. Incorrect promotion either given erroneously by the department by misreading the said Service Rules or such promotion given pursuant to judicial orders contrary to Service Rules cannot be a ground to claim erroneous promotion by perpetrating infringement of statutory Service Rules. In a court of law, employees cannot be permitted to contend that the Service Rules made effective of 1st October, 1975 should not be adhered to because in some cases erroneous promotions had been given. The statutory Service Rules must be applied strictly in terms of the interpretation of

Rules as indicated in the decision of Three Judges Bench of this Court in Khetra Mohan's case (1994 AIR SCW 4154). ....."

24. Mr. Subhash Sharma, learned counsel for the appellant-Lal Singh, argued that he was performing his duties continuously in terms of the interim directions right from the date of filing of the first Original Application No. 1953 of 2005, now cannot be deprived of the same.

25. The argument, though attractive, is devoid of any force for the reason that the Apex Court in a series of cases has held that the court orders cannot clothe any person with any right and he has no right to continue if he has been appointed without following due process of law.

26. The service jurisprudence provides that if a person/employee works on a post in terms of Court orders, that cannot be treated as appointment and can also not create any right, title or interest in his favour.

27. The Apex Court in the case titled as **State of U.P. and others versus Raj Karan Singh,** reported in **(1998) 8 Supreme Court Cases 529,** laid down the same principle. It would be profitable to reproduce para 2 of the judgment herein:

"2. Heard counsel on both sides. It appears that a division bench of the High court comprising V. N. Khare and S. K. Mookerji, JJ. had by their order dated 27/4/1989 directed that the ad hoc appointment of the respondent may continue till a regularly-selected candidate becomes available for appointment or till his services are terminated in accordance with law or the post is abolished. Under the said interim order, the respondent is continuing to function as an Assistant Lecturer (Civil Engineering) on ad hoc basis. By the impugned order dated 26/10/1994, another division bench of the High court has directed that since the respondent was retained in service beyond. one year, he should be treated as on "regular service" and his services cannot be terminated without issuing any formal order. Thus the respondent was directed to be treated on regular service by the impugned order merely because by the earlier order of 27-4-1989, he was permitted to continue till a regularly-selected candidate was available. The original prayer of the respondent was for the issuance of a writ to allow him to continue till regular selection through the UPSC is made. The impugned order of 26/10/1994, therefore, goes beyond the relief claimed by the respondent in the writ petition itself. Besides, merely because a person continues under the interim orders of the court, such continuance on the post cannot and, in this case, does not confer on him any right for continuance, it does not enhance his case for regularisation. It is only an interim arrangement pending decision by the court and cannot disturb the position in law or equities, as on the date of the petition."

(Emphasis added)

28. The same principle has been laid down in the judgment, the author of which is one of us (Justice Mansoor Ahmad Mir, Chief Justice), in the case titled as **Mohammad Maqbool Wagay versus State of J&K and others,** reported in **2007 (1) S.L.J. 351.** It is apt to reproduce relevant portion of para 12 of the judgment herein:

> *"12. .....It appears that the petitioner is working as teacher on the strength of court orders referred to hereinabove. Even if a person is continuing on a particular post, on the strength of court orders, to which he is not entitled to in terms of the recruitment rules, and has been made to work on the said post de hors the rules, he has no right to continue on the said post and his continuation will not create any right in him to seek regularization....."*

29. It is apt to record herein that the order of withdrawal, dated 27.07.2005, was questioned by appellant-Lal Singh in the first Original Application, was not quashed. He has not questioned the order of withdrawal, dated 27.07.2005 in the present lis, i.e. CWP (T) No. 12255 of 2008, but foundation of his case is based on the order of ad hoc appointment, dated 31.05.2004. On this count only, CWP (T) No. 12255 of 2008 was to be dismissed.

30. Even otherwise, in terms of the Rules occupying the field, appointment to the post of Milk Procurement Assistant was to be made by direct recruitment and was not to be filled up by promotion or any back door entry. Thus, the appointment of appellant-Lal Singh was illegal.

31. The writ petition filed by appellant-Dhani Ram, being CWP No. 217 of 2010, also came to be dismissed in terms of the impugned judgment.

32. Appellant-Dhani Ram, for the first time, came to the Court in the year 2010 by the medium of CWP No. 217 of 2010, has not raised any voice against the order of ad hoc appointment of appellant-Lal Singh made in the year 2004 in terms of order, dated 31.05.2004. Even, he has not joined the litigation before the Tribunal or before the Writ Court in the first round of litigation, rather, remained silent and came out of slumber in the year 2010, i.e. after six years.

33. However, be as it is, the case projected by appellant-Dhani Ram was that he was appointed as Dairy Helper on 05.12.1986, was working as such till the year 2005, had done his graduation from Indira Gandhi National Open University and was eligible for the post of Milk Procurement Assistant, but the person junior to him was appointed as such.

34. At the cost of repetition, it is worthwhile to record herein that he has not questioned the appointment of appellant-Lal Singh as Milk Procurement Assistant with effect from 31.05.2004 till the year 2010, when he filed the writ petition. Moreover, by the medium of CWP No. 217 of 2010, he has not laid any challenge to the appointment of appellant-Lal Singh as Milk Procurement Assistant, but has only prayed that he be appointed as Milk Procurement Assistant and the seniority list be revised.

35. As discussed hereinabove, the appointment to the post of Milk Procurement Assistant was to be made by direct recruitment and not by promotion.

36. Having said so, both the writ petitions rightly came to be dismissed in terms of the impugned judgment, needs no interference.

37. Viewed thus, the impugned judgment is upheld and both the appeals are dismissed alongwith all pending applications.

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

Aam Bahadur .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 273 of 2015.
Reserved on: 6th November, 2015.
Date of Decision :18th November, 2015.

Code of Criminal Procedure, 1973- Section 313- Accused pleaded ignorance to the prosecution case regarding his consent for being searched by police officer and being told of his legal right to be searched before Magistrate or a Gazetted Officer - held, that this evasive denial does not make any difference as inference of estoppel cannot be drawn against the accused – further held that provision of estoppel has been engrafted in the Code of Civil Procedure and not in Code of Criminal Procedure. (Para-13)

N.D.P.S. Act, 1985- Section 20- Accused turned and tried to flee on seeing the police party- he was apprehended on suspicion- bag carried by him was searched and was found to be containing 7.8 kilograms charas- his personal search was also conducted- accused was convicted by the trial Court- in appeal held, that the accused pleaded his inability to write his consent on the memo- the oral consent to be searched was given by the accused, which was written by the police and signatures of accused were obtained on the memo – prosecution had failed to adduce cogent evidence through the report of hand writing expert that the signatures of the accused on the memo were compared with his admitted signatures- therefore, an inference can be drawn that accused had not put his signatures on Ex.PW-7/A- compliance of Section 50 of N.D.P.S. Act is not established-accused acquitted. (Para-11 and 12)

For the Appellant: Mr. Virbahadur Verma, 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 of the learned Special Judge-II (Additional Sessions Judge), Kullu, Himachal Pradesh, rendered on 24.01.2015 in Session Trial No. 86 of 2014 (2013), whereby, the learned trial Court convicted the accused for his having committed an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as "NDPS Act") and sentenced him to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, sentenced him to suffer simple imprisonment for one year.

2. The facts relevant to decide the instant case are that on the evening of 7.7.2013 around 8.15 p.m., a police party headed by PW-8 SI Gaurav Bhardwaj of Police Post Manikaran, consisting of H.C. Yash Pal, H.C. Ramesh, C. Tej Ram and C. Bhagat Ram was present in connection with Nakabandi duty one kilometer ahead of Tegadi Nala on the road in official vehicle having been driven by C. Vishwa Nath, then accused came on foot from Barshaini side towards Manikaran and on seeing the police party and police vehicle accused turned back and tried to flee away from the spot. At that time accused was

carrying a black colour bag on his back and the accused was nabbed by the police party at a distance of 5 to 10 steps. The accused was asked about his name who disclosed his name as Aam Bahadur, citizen of Nepal and when the accused was asked by the police about the reason of his roaming at night time with bag, the accused got perplexed and could not reply satisfactorily. As the place was isolated and secluded one and no vehicular traffic was there, SI Gaurav Bhardwaj sent Constable Bhagat Ram (PW-7) toi call independent witnesses, who came after ten minutes and disclosed that no local witness was available. The Investigating Officer Shri Gaurav Bhardwaj associated H.C. Yash Pal and C. Bhagat Ram as witnesses and in their presence apprised the accused orally as well as in writing about his legal right to be searched before a Magistrate or Gazetted Officer regrading which memo Ex.PW7/A was prepared. Thereafter personal search of the accused was conducted by the Investigating Officer but nothing incriminating was found regrading which memo Ex.PW7/C was prepared. Thereafter bag, Ex.P-6 which the accused was carrying in his hand was searched and on opening the zip of the main pocket of bag 16 packets wrapped with khakhi cello tape, Ex. P-2 were found and when the cello tape was removed inside the same transparent wrappers, Ex.P-3 containing black colour substance in pan cake shape were found and when the said wrappers were opened, black colour substance was found charas, Ex.p-4. The recovered charas was weighed with the help of an electronic scale and its weight was found 7 kg. 800 grams. The recovered charas was again put inside the wrappers and then in a cloth parcel, Ex.P-1 and the parcel was sealed with eight seals of “W”. Sample of seal was separately taken on a piece of cloth, Ex.PW7/D as well as on NCB-1 form, Ex.PW1/A. The black colour bag, Ex.P-6 which the accused was carrying was also put in a cloth parcel, Ex.P-5 and the parcel was sealed with six seals of 'A'. Specimen of seal was also take on a piece of cloth, Ex.PW7/E and both parcels were taken into possession through seizure memo Ex.PW7/F in the presence of witnesses who put their signatures on the seizure memo which was also signed by the accused. Rukka Ex.PW8/A was sent to the police station through C. Bhagat Ram on the basis of which FIR Ex.PW5/A was registered. The Investigating Officer prepared the site plan and the accused was arrested. The photographs of the spot were taken by the Investigating Officer. The Investigating Officer handed over the accused and besides that also handed over case property along with NCB-1 form, sample of seals, relevant papers to the the then Station House Officer ASI Bala Ram for resealing who resealed the case property with six seals of 'T' and after filling relevant columns of NCB-1 form Ex.PW1/A obtained sample of seal on a piece of cloth Ex.PW1/B and thereafter handed over the case property, i.e. sealed parcel, sample seals and other relevant documents of MHC H.C. Ram Krishan, who deposited the same in the malkhana by making entry in the Malkhana register and sent the case property i.e. parcel containing charas, sample seals and relevant documents through HHC Gian Chand, PW-6 vide R.C. No.142/2013 for depositing at SFSL, Junga who accordingly deposited the same at SFSL, Junga and on his return handed over the receipt to the MHC. The Investigating Officer also handed over special report to Addl. S.P. Nihal Singh on 8.7.2013.

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. The accused was charged by the learned trial Court for his having committed an offence under Section 20 of the NDPS Act. In proof of the prosecution case, the prosecution examined 8 witnesses. On conclusion of recording of the prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the Court, in which the accused claimed innocence and pleaded false implication in the case besides chose not to lead any evidence in defence.

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

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

7. On the other hand, the learned Deputy Advocate General has with considerable force and vigour, contended that the findings of conviction recorded by the Court below are based on a mature and balanced appreciation of evidence on record and they 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 accused is alleged to have been found in exclusive and conscious possession of 7 Kg, 800 grams of charas while his carrying it in a bag, Ex.P-6 held by him in his hand. The official prosecution witnesses have deposed in tandem and in harmony in proof of each of the links in the chain of circumstances commencing from the proceedings relating to search, seizure and recovery thereof from the alleged conscious and exclusive possession of the accused till the consummate link comprised in the rendition of an opinion by the FSL on the specimen parcel sent to it for analysis, hence portraying proof of unbroken and un-severed links, in the entire chain of circumstances. As such, it is argued that when the prosecution case stands established, it would be legally unwise for this Court to acquit the accused. Besides when the testimonies of the official witnesses unravel the fact of theirs being bereft of any inter se or intra se contradictions, consequently they too are contended to enjoy credibility.

10. Apparently, the prosecution case gathers strength from the deposition of the official witnesses especially when they have deposed qua the genesis of the prosecution version in a consistent, uniform and harmonious manner. Consequently, their depositions acquire a hue of veracity.

11. Charas Ex.P-4 was recovered under recovery memo Ex.PW7/F. Its recovery was effected from bag, Ex.P-6 carried by the accused in his hand. The depositions of the official witnesses are firm and categorical in clinching the fact of Charas Ex.P-4 having been recovered under memo Ex.PW7/F from a bag, Ex. P-6, carried by the accused in his hands. The accused carrying bag Ex.P-6 in his hands wherefrom recovery of charas Ex.P-4 was effected nails a conclusion of his being in exclusive and conscious possession thereof. As a corollary, with the official witnesses deposing with intra se consistency in their respective examinations-in-chief qua the factum of its recovery therefrom, hence, when their respective depositions comprised in their examinations-in-chief are bereft of any intra se contradictions, as such, their testimonies qua the factum of recovery of charas Ex.P-4 under recovery memo Ex.PW7/F from bag, Ex.P-6 carried by the accused in his hands, are to be construed to be both trustworthy as well as credible. Apart therefrom, with no occurrence of any inter se contradictions in the testimonies of the official witnesses comprised in their respective examinations-in-chief vis-a-vis their depositions comprised in their respective cross-examinations lends impetus to an inference of their testimonies inspiring confidence besides, being trustworthy. Moreover, the effect of their respective depositions comprised in

their examinations-in-chief being also bereft of any contradictions with their previous statements recorded in writing qua the occurrence benumbs any inference of their testimonies on oath being ridden with any taint of improvements or embellishments. In sequel this Court is constrained to with aplomb amass an inference of their testimonies being amenable to, theirs being imputed implicit reliance, for thereupon concluding qua the guilt of the accused.

12. Nonetheless, what detracts from the efficacy of the testimonies of the officials witnesses besides, impeaches their creditworthiness is the fact of the accused preceding recovery of Charas Ex.P-4 from bag Ex.P-6 held by him in his hands, having come to be subjected to personal search by the Investigating officer. Adherence to the provisions of Section 50 of the NDPS Act by the Investigating Officer while searching bag, Ex.P-6 held by the accused in his hands wherefrom charas Ex.P-4 was recovered, was wholly unnecessary as compliance, if any, by the Investigating Officer with the mandatory statutory provisions enshrined in the NDPS Act, arose only in the event of charas EX.P-4 having stood recovered while its being carried by the accused in his pockets or from his arm pits, waist or any other part of the body of the accused whereto it stood inextricably fastened or strapped. However, when preceding the recovery of Ex.P-4 under memo Ex.PW7/F from bag, Ex.P-6 held by the accused in his hands, the Investigating Officer took to carry out a personal search of the accused, necessarily then compliance by him with the provisions of Section 50 of the NDPS Act arose. Consequently, with necessity of compliance by the Investigating Officer with the mandatory/statutory requirements envisaged under Section 50 of the NDPS Act having arisen, as a corollary then, it was incumbent upon the Investigating Officer, to elicit the consent of the accused under an apposite consent memo recording therein the factum of his having a legal right to be searched before a Magistrate or a Gazetted Officer, which options having been foregone by him in favour of the Investigating Officer would have facilitated the latter to carry out a valid personal search of the accused, in sequel to the accused communicating to him his appositely recorded consent to him. Necessarily for validating the personal search of the accused by the Investigating Officer preceding recovery of Ext.P-4 under Memo Ext.PW-7/F from bag Ext.P-6 held by the accused in his hands, an apposite unfoldment of the accused having in writing consented to his personal search by the Investigating Officer was legally enjoined to occur in Ext.PW-7/A. However, the recorded consent of the accused to the Investigating Officer carrying out his personal search does not occur in Ext.PW-7/A. The Investigating Officer has portrayed in his deposition on oath corroborated by the deposition of PW-7, of the accused having only appended his signatures on consent memo Ex.PW7/A yet his having divulged to both, the factum of his apart therefrom his not possessing the skill to record therein his consent in writing to his personal search being carried out by the Investigating Officer which constraint besetting him precluded him to record his consent in writing for his personal search by the Investigating Officer, lack of its unfoldment therein in Ext.PW-7/A is nonetheless espoused before this Court to not detract from the legal efficacy of the personal search of the accused carried out by the Investigating Officer in face of both the Investigating Officer besides PW-7 having harmoniously deposed qua the accused while being for reasons aforestated disabled to record in writing his consent for his personal search being carried out by the Investigating Officer his yet having orally communicated his consent to the Investigating Officer for the latter proceeding to carry out his personal search rather hence foists it with validity. However, it is imperative for this Court to ascertain by assessing the entire evidence on record whether the aforesaid propagation by the Investigating Officer carries any truth. In that endeavour a keen discernment of the evidence on record underlines the salient factum of the said explanation, emanating from the deposition of PW-7 and PW-8 of the accused only orally communicating to them his consent for his being personally searched by the Investigating Officer, his not excepting his possessing the skill to signature Ext.PW.7/A,

which do exist thereon, possessing the skill to record therein his consent in writing for his personal search being conducted by the Investigating Officer, not for reasons ascribed herein-after attaining any probative consolidation nor its carrying any implicit credibility, especially when though it was incumbent upon the prosecution to prove the factum of the purported signatures of the accused existing on Ex.PW7/A belonging to him, it yet failed to by adducing cogent evidence comprised in the report of the Handwriting Expert concerned portraying therein on his comparing the purported signatures of the accused existing thereon with his admitted signatures the factum of the accused having signed Ext.PW-7/A, discharge the onus of proving the factum probandum of the accused having signatured Ext.PW-7/A. As a corollary, when the said onus cast upon the prosecution remained un-discharged by it constrains this Court to draw an apt conclusion of the accused having not signatured Ext.PW-7/A. In sequel, even, if credence is to be tentatively imputed to the testimonies of PW-7 and PW-8 of the accused being deterred by his not possessing the skills to record his consent in writing to any of the options/proposals comprised in Ext.PW.7/A except his possessing the skill to signature it, which purported signatures of the accused exist thereon, which dis-empowerment in regard aforesaid led him to orally communicate his consent to the Investigating Officer holding his personal search, yet when for the aforesaid reasons their testimonies to the extent aforesaid are susceptible to skepticism, concomitantly renders inconsequential the effect, if any of the accused being purportedly enjoined with a legal disability to scribe his consent therein for his personal search being conducted by the Investigating Officer, besides also benumbs the factum, if any of his having purveyed any apposite oral communication to the Investigating Officer for validating his personal search, if any, in pursuance thereto as stood purportedly carried out by the former. Concomitantly, for reiteration, the effect of an oral communication, if any, purveyed by the accused to the Investigating Officer, after his having purportedly signed consent memo, Ex.PW7/A, authorizing the Investigating Officer to conduct his personal search, is, in the face of the prosecution having omitted to discharge the onus of proving the factum of the accused having signed Ex.PW7/A by adducing best and cogent evidence comprised in the report of a handwriting expert, is of its being construable in its entirety to be an invention or a concoction on the part of the Investigating Officer to circumvent the provisions of Section 50 of the NDPS Act. In aftermath, the preparation of Ex.PW7/A by the Investigating Officer is also in its entirety a sham or of its being construable to be ingenuously doctored by the Investigating Officer, to in its guise convey his having preceding the search of bag, Ex.P-6 held by the accused in his hands wherefrom charas, Ex.P-4 was recovered, his having meted compliance with the provisions of Section 50 of the NDPS Act. With the preparation of Ex.PW7/A having stood construed to be a sham or an invention, as such, even the recitals or portrayals therein of the accused after his having purportedly signatured it, his having orally communicated to the Investigating Officer his consent to the latter holding or conducting his personal search, are too for reasons aforesaid prevaricated. Added impetus to the aforesaid inference of the accused having not orally communicated to the Investigating Officer his consent of his person being searched by him is lent by the factum of PW-7 having deposed in his testimony comprised in his examination-in-chief of the accused having been apprised by the Investigating Officer of his having a legal right to be searched by a Magistrate or a Gazetted Officer. However, during his cross examination when PW-7 stood qua the factum aforesaid confronted with his previous statement, comprised in Ex.D-1, the latter omitted to therein unravel the factum as deposed by him in his examination-in-chief, of his in his previous statement recorded in writing divulged therein the factum of his having disclosed to the Investigating Officer the germane factum of the accused having been apprised by the Investigating Officer of his having a legal right to be searched by a Magistrate or a Gazetted Officer, which option he may forego to be exercised in favour of the Investigating Officer. Hence, the testimony of

PW-7 recording the aforesaid fact comprised in his examination-in-chief standing for the reasons aforesaid contradicted, the deduction which is drawable therefrom is, given the inferences hereinabove drawn by this Court of Ex.PW7/A being a concoction, of even both PW-7 as well as constable Yaspal being not contemporaneously available at the site of occurrence when the Investigating Officer initiated and concluded therein the apposite proceedings. Naturally then, redoubled vigor is lent to the factum of Ext.PW-7/A having been drawn up elsewhere or its being an invention. Obviously then, the legal efficacy and impact of Ex.PW7/A in its purportedly validating the personal search of the accused by the Investigating Officer, inasmuch as its meting compliance with the provisions of Section 50 of the NDPS Act stands denuded or whittled down. As a concomitant with Ex.PW7/A losing its legal efficacy the ensuing sequel therefrom is of charas Ex.P-4 recovered from bag Ext.P-6 under memo Ex.PW7/F having been planted therein by the Investigating Officer besides of recovery of charas Ex.P-4 from bag Ex.P-6 held by the accused in his hands being in a manner other than the one as portrayed in Ex.PW7/F. The arousal of the aforesaid inference when belying the genesis of the prosecution case, hence eroding its veracity also impinges upon the fairness as well as the transparency in which the Investigating Officer initiated and concluded the apposite proceedings at the site of occurrence. In sequel it has to be hence concluded that Ex.PW7/A was prepared other than at the site of occurrence and that the personal search of the accused was carried out by the Investigating Officer even when preceding such personal search Ex.PW7/A remained unprepared. Consequently, the entire proceedings are rendered invalid. Furthermore, for reiteration the herein-above discussion lends leverage to a concomitant deduction of the personal search of the accused having been carried out by the Investigating Officer in dire infraction of the provisions of Section 50 of the NDPS Act being drawable there-from. Even though, PW-7 has deposed that the Investigating Officer had joined C. Yaspal as a witness at the time of preparation of Ex.PW7/A in pursuance whereof personal search of the accused was carried out by him yet HC Yashpal was neither cited as a prosecution witness nor he came to be examined as a witness. The aforesaid omission on the part of the prosecution appears to have been prompted to preclude him from deposing qua Ext.PW-7/A being not bereft of any element of doctoring or concoction. Moreover, it is apt to record herein that with the aforesaid infirmities making pervasive inroads into the genesis of the prosecution case, the effect thereof is of even the harmonious besides, consistent depositions on oath of the officials prosecution witnesses losing their creditworthiness obviously no reliance hence can be placed upon the depositions of the official witnesses even when their depositions on oath qua the occurrence before the learned trial Court are bereft of any taint.

13. The learned Deputy Advocate General has contended before this Court that with the accused during the course of proceedings carried under Section 313 of the Cr.P.C. having purveyed an evasive answer to question No.7 which stands extracted herein-after which encompasses the factum of the accused being apprised orally as well as in writing of his having a legal right of being searched by a Magistrate or a Gazetted Officer qua which memo Ex.PW7/A stood prepared, tantamounts to, while his not having specifically denied it, his having accepted the said fact comprised therein. Question No.7 reads as under:-

> "Q.7.:- It is further in prosecution evidence led against you accused that on this PW-8 Sub Inspector Gaurav Bhardwaj associated Head Constable Yash Pal and Constable Bhagat Ram as witnesses and in their presence apprised you accused orally as well as in writing about your legal right to be searched before a Magistrate or Gazetted Officer regarding which memo Ex.PW7/A was prepared. What have you to say?
>
> Ans: I do not know."

14. However, the said argument necessitates its being rejected on the ground that the rule of want of specific denial by the defendant in his written statement to the apposite corresponding averments constituted in the plaint sequels an inference of an admission thereof by the defendant, is inapplicable in its fullest sway to proceedings under Section 313 of the Cr.P.C. nor the accused is enjoined to while answering questions put to him in proceedings drawn up under Section 313 of the Cr.P.C. specifically admit or deny them. Consequently, even if an evasive denial has ensued from the accused to the afore extracted apposite question, conveying the factum of his having been orally as well as in writing apprised by the Investigating Officer qua his having a legal right of his being searched before a Magistrate or a Gazetted Officer regarding which memo Ex.PW7/A was prepared, yet would not tantamount to an inference of the accused arising from his not having specifically denied it, his having admitted it**,**besides the recitals recorded therein especially the one conveying the oral consent of the accused to the Investigating Officer holding his personal search especially when for the reasons aforesaid, the rule of specific denial by the accused to any question put to him in proceedings drawn up under Section 313 of the Cr.P.C. for estopping an inference of his having hence acquiesced to it is unattractable to proceedings drawn therein, more so when the rule aforesaid stands engrafted in the Code of Civil Procedure obviously renders it to be applicable only to pleadings constituted in the Code of Civil Procedure and not to pleadings constituted in proceedings drawn under Section 313 of the Code of Criminal Procedure. If an inference of the accused having by his omitting to give a specific answer to the afore-referred question No.7 with an encapsulation therein, of the apposite fact existing therein his hence having admitted it, it would be permitting the prosecution to avail an untenable leverage therefrom even when it is a cardinal principle of criminal jurisprudence of the prosecution being enjoined to prove by adducing cogent evidence, the factum of Ex.PW7/A being signatured by the accused as also of its hence concomitantly proving the factum of the accused not possessing any skills to write except signing, disabling him to record therein his consent in writing, for his personal search being carried out by the Investigating Officer for validation whereof the accused purportedly orally conveyed his consent to the apposite proposals manifested in Ext.PW-7/A. Even otherwise when the said obligation cast upon the prosecution for the reasons aforesaid stood undischarged by it rather when as emanable from the discussion aforesaid the prosecution failing to unflinchingly prove the factum of the accused having signed Ex.PW7/A, absence of proof in regard aforesaid, concomitantly belying the deposition of both PW-7 and PW-8 of the accused after his having signatured EX.PW7/A his having orally conveyed his consent to the Investigating Officer holding his personal search, renders the espousal of the learned Deputy Advocate General arising from the factum of the accused having evasively answered the aforesaid apposite question No.7 drawn up under Section 313 of the Cr.P.C. and its hence tantamounting to acceptance by him of the apposite proposals existing in Ex.PW7/A, to be legally unworthwhile as well as carrying no legal efficacy in dispelling the adversarial effect as enunciated aforesaid of the prosecution omitting to discharge the onus of proving the signatures of the accused on Ex.PW7/A. Concomitantly, for the reasons assigned herein above when Ex.PW7/A has been construed to be an invention or a concoction wherefrom a deduction has ensued of the Investigating Officer having not, while carrying out the personal search of the accused complied with the mandatory statutory requirement enshrined in Section 50 of the NDPS Act, this Court is prodded to infer that Ex.P-4 was planted in P-6 at the instance of the Investigating Officer besides this Court is also constrained to deduce that recovery of Ex.P-4 from bag Ex.P-6 held by the accused in his hands stands engulfed in a shroud of doubt, benefit whereof ought to go to the accused.

15. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has not appraised the entire evidence on record in a wholesome

and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court suffers from a perversity or absurdity of mis-appreciation and non appreciation of the evidence on record.

16. For the foregoing reasons, the appeal is allowed and the judgment of the learned trial Court is set-aside. Accused/appellant is acquitted of the offences charged. He be set at liberty forthwith, if not required in any other case. Fine amount, if any, deposited by the accused/appellant, be refunded to him. Release warrant be prepared accordingly. Records be sent back.

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

Dinesh Kumar S/o Sh. Sher Singh .....Applicant.

Vs.

State of Himachal Pradesh .....Non-applicant.

Cr.MP(M) No. 1523 of 2015
Date of order: 18.11.2015

Code of Criminal Procedure, 1973- Section 438- An FIR for the commission of offences punishable under Sections 419 and 466 of IPC was registered against the accused - as per police report, accused was not required for custodial interrogation - statements of the witnesses had also been recorded- accused is to be presumed innocent till he is convicted by the competent Court of law- hence, accused is ordered to be released on bail in the event of arrest.

For the applicant: Mr. Jagdish Thakur, Advocate.

For the non-applicant: Mr. M.L. Chauhan and Mr. Rupinder Singh Thakur, Addl. A.Gs. ASI Kamal Pati, Police Post Tauni Devi, Police Station Sadar, Hamirpur present in Court.

The following order of the Court was delivered:

P.S. Rana, J. (Oral):

Application filed under Section 438 of the Code of Criminal Procedure for grant of bail relating to FIR No. 160/2015, dated 17.09.2015 registered under Sections 419 and 466 of the Indian Penal Code Police Station Hamirpur, District Hamirpur, H.P. Investigating Officer is present in Court. Investigating Officer submitted before the Court that the applicant is not required for custodial interrogation. Statement of Investigating Officer is recorded and placed on record. It is well settled law that the accused is presumed to be innocent till he is convicted by the competent Court of law. In view of the fact that applicant is not required for custodial interrogation, anticipatory bail is granted on furnishing personal bond to the tune of rupees one lac with two sureties in like amount to the satisfaction of investigating officer in the event of arrest on the following terms and conditions: (i) That applicant will joint investigation of case as and when called for by the Investigating Officer in accordance with law. (ii) That applicant will not leave India without prior permission of the Court. (iii) 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 Investigating Officer or Court. (iv) That applicant will not commit similar offence qua which he is accused. (v) That applicant will furnish his residential address in written manner to the Investigating Officer so that he can be located within short notice. In view of the the above stated facts Cr.MP(M) No. 1523 of 2015 is disposed of. Pending applications also stand disposed of.

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

Jai Singh .....Appellant.
Versus
State of H.P. ...Respondent.

Cr. Appeal No.: 233 of 2015
Reserved on: 30.10.2015
Date of Decision: 18.11.2015

Indian Penal Code, 1860- Section 376(2)(f)- **Protection of Children from Sexual Offences Act, 2012-** Section 5- Accused, God brother of uncle of the prosecutrix, asked the prosecutrix and another girl aged 9 years to accompany him to forest for collection of Guchchi- accused showed obscene clippings on the mobile to both the girls in the jungle and thereafter directed them to remove their pajama- PW-9 ran away, whereas, PW-11 (prosecutrix) was caught by the accused – the accused tried to insert his private part into private part of prosecutrix by making her to lie on the ground- accused also put finger into her private part and threatened both the girls not to disclose the incident to any one- one day when both the girls were playing in the courtyard they started quarreling and PW-9 threatened to disclose the incident to the mother of the prosecutrix- upon this prosecutrix started crying and disclosed the incident to her mother- on inquiry FIR was lodged and accused was arrested – accused was convicted by the trial court- in appeal held, that prosecutrix and PW-9 had withstood the lengthy cross-examination and their testimonies remained un-shattered- further held, that mere fact that hymen of the prosecutrix remained un-ruptured is not enough to disbelieve the witnesses in view of explanation furnished by Medical Officer- delay in FIR has been satisfactorily explained- hence, the findings of the trial Court are based upon proper appreciation of evidence- appeal dismissed. (Para-8 to 10)

For the Appellant: Mr. Vivek Singh Thakur, Advocate.
For the respondent: Mr. M.A.Khan, Additional Advocate General.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, *Judge*

This appeal is directed against the judgement rendered on 7.5.2015 by the learned Special Judge, Mandi, in Sessions trial No. 35/2013, whereby the latter convicted and sentenced the accused for his having committed offences punishable under Section 5(m) of the Protection of Children from Sexual Offences Act read with Section 376(2)(f) besides read with Section 506 of the Indian Penal Code. The accused/convict is aggrieved by the renditions of the learned Special Judge, Mandi. Being aggrieved he has come to institute the

instant appeal before this Court assailing the findings of conviction recorded therein. He has canvassed before this Court that this Court in the exercise of its appellate jurisdiction reverse the findings of conviction recorded against him by the learned Special Judge, Mandi.

2. The prosecution story, in brief, is that the accused/appellant herein was God brother of uncle of the prosecutrix and was frequently visiting their house. On 1.4.2013, the prosecutrix PW-11 along with PW-9 were playing in their house. The accused came to their house and asked PW-11 and PW-9 to accompany him to forest for collection of 'Gucchi". The accused carried PW-9 on his back and prosecutrix accompanied them on foot to the forest. The accused showed obscene clippings on his mobile phone to PW-9 and PW-11. Thereafter he directed PW-11 and PW-9 to took off their Pajama. PW-9 ran away, however, PW-11 victim was caught by the accused. The accused took off her Pajama and she was laid on the ground. The accused laid over the prosecutrix and tried to insert his private part into her private part. The victim raised cries. The accused put finger into the private part of the victim and thereafter threatened PW-11 and PW-9 not to disclose anything about this incident to anyone. PW-11 and PW-9 keep quite for some time, however, on 11.4.2013, when they were playing in the courtyard, they started quarrelling and PW-9 threatened to disclose the incident to the mother of the victim. Thereafter, the victim started crying. PW-4, mother of the victim made inquiries from the victim and thereafter a complaint Ext.PW-3/A was lodged with the police station and on the basis of which FIR Ext.PW.3/B was registered. The victim was produced before PW-1 Dr. Seema and her MLC Ext.PW-1/B was obtained. The clothes of the victim and her vaginal swab sample were preserved and handed over to the police for chemical examination. The accused was arrested and was got medically examined. The doctor opined as per MLC Ext.PX that the accused was capable of performing sexual intercourse. The mobile phone of the accused Ext.P.2 was also taken into possession vide memo Ext.PW.4/A. The Investigating Officer prepared spot map Ext.PW.12/B and also recorded the statements of witnesses as per their versions. The case property was deposited with the MHC and thereafter forwarded to the Regional Forensic Science Laboratory, Mandi. The Regional Forensic Science Laboratory, Mandi after examination submitted the report Ext.P.Y. The accused while in police custody identified the place of occurrence vide memo Ext.PW.4/A. During the investigation, date of birth certificate of the prosecutrix Ext.PW.7/A, copy of Parivar Register Ext.PW.7/B were obtained. After completion of the investigation, the challan was prepared and put up before the Court for trial.

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 his having committed offences punishable under Section 5(m) of the Protection of Children from Sexual Offences Act read with Section 376(2)(f) besides read with Section 506 of the Indian Penal Code. to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined as many as 12 witnesses. On closure of the prosecution evidence, the statement of the accused under Section 313 Cr.P.C. was recorded, in which he pleaded innocence. On closure of proceedings under Section 313 Cr.P.C the accused was given an opportunity to adduce evidence in defence, which opportunity he chose to avail.

5. The accused/appellant is aggrieved by the judgement of conviction recorded by the learned trial Court. Shri Vivek Singh Thakur, learned Advocate, has concertedly and vigorously contended before this Court 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 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.

6. On the other hand, the learned Additional Advocate General appearing for the State, has, with considerable force and vigour, contended that the findings of conviction, recorded by the Court below, are based on a mature and balanced appreciation of evidence on record, hence do not necessitate interference, rather merit vindication.

7. This Court with the able assistance of the learned counsel on either side, has with studied care and incision, evaluated the entire evidence on record.

8. At the time of occurrence, the prosecutrix was aged 9 years. Implicit reliance can be placed on the sole testimony of the minor prosecutrix for anviling thereupon findings of conviction against the accused only when on a wholesome reading of her deposition recorded on oath before the learned trial Court an ensuing inference emanates therefrom of her testimony being both inspiring as well as credible. The prosecutrix has deposed as PW-11. She in her recorded deposition on oath before the learned trial Court has, therein after her competence to depose as a witness having stood gauged by the learned trial Court by its putting queries to her, answers whereto meted by her unfolded hers being possessed of intelligibility, made a disclosure qua the occurrence in tandem with the version qua it comprised in the FIR (Ext.PW.3/B) inasmuch as of the accused on 1.4.2013 at about 3.30 P.M. in a forest at Badi-Dhar, whereto she along with PW-9 accompanied him, having shown to both of them obscene clippings enclosed in his mobile whereafter the accused after taking off her Pajama inserted his private part in her private part, at which she felt pain and cried. She has also deposed in her examination-in-chief of the accused having threatened both her and PW-9, against theirs disclosing the incident to anyone, in event thereof he would eliminate both. She has also deposed qua hers having subsequently narrated the occurrence to her mother. The learned defence counsel subjected the prosecutrix to an inexorable cross examination for from her eliciting answers to the apposite suggestions put to her displaying the factum of the version deposed by her in her examination in chief standing contradiction for hence her creditworthiness losing force sequelly rendering her version qua the incident to be, as such, uninspiring as well as untrustworthy. However, the learned defence counsel while subjecting PW-11 to an exacting cross examination has been unable to throughout its course elicit from the prosecutrix any answer to the apposite suggestions put to her by him, wherefrom it could be inferred that she has contradicted her version qua the incident comprised in her examination in chief. In sequel when her testimony in her examination-in-chief remains unshattered during the course of her exacting cross examination by the learned defence counsel, necessarily then her deposition qua the incident comprised in her examination-in-chief is to be construed to be both inspiring as well as trustworthy. Apart therefrom the deposition of PW-9 who along with PW-11 had accompanied the accused to a forest whereto they had proceeded to collect 'Guchhi' has in her recorded deposition on oath after hers having been declared by the learned trial Court to be a competent witness on its putting queries to her, answers whereto meted by her unfolded hers being possessed of intelligibility, divulged therein a version qua the incident corroborative to the version qua it spelt out by PW-9. She too was subjected to the grueling ordeal of a rigorous cross examination by the learned defence counsel. Nonetheless she during the course of the exacting cross examination to which she was subjected to, has come out unscathed, rendering her testimony qua the incident comprised in her examination in chief to remain unshattered for its hence being construable to be both inspiring as well as credible, besides attaining immense probative force for giving succor to the undefiled deposition on oath of PW-11. Concomitantly with the version qua the incident spelt out by the prosecutrix in her recorded deposition on oath having come to be corroborated by PW-9, an eye witness to the occurrence, buoys an apt conclusion from this Court, of implicit reliance being imputable to the deposition on oath of PW-11. Consequently, the imminent conclusion which surfaces therefrom, is of the prosecution

hence having been able to prove the guilt of the accused. Moreover, the findings of conviction recorded against the accused by the learned trial Court as such do not merit any interference.

9. The factum of the hymen of the prosecutrix having remained intact, as has been contended by the learned counsel for the appellant herein to dispel the factum as espoused by the prosecutrix in her examination in chief of the accused having inserted his penis into her private parts. However, the mere factum of the hymen of the prosecutrix having remaining unruptured and its hence sequelling the ensuing derivable inference of her testimony qua the occurrence being prevaricated stands belied/countervailed in the face of PW-1, Dr. Seema having portrayed in her deposition qua occurrence of penetration of penis into the private parts of the victim even when the hymen of the victim/prosecutrix remains unruptured. Concomitantly, the mere factum of the hymen of the prosecutrix having remained unruptured cannot stand good to constrain this Court to conclude therefrom that the version qua the incident spelt out by the prosecutrix in her recorded deposition on oath, besides corroborated by PW-9, an eye witness, whose presence at the site of occurrence has for reasons attributed hereinabove remained unshattered, stands overwhelmed.

10. Even if a delay of 10 days has occurred in the reporting of the matter by the complainant to the police, nonetheless when the said delay stands explained by the prosecutrix comprised in the factum of hers fearing, hers coming to be subjected to beatings by her mother in case she makes a disclosure qua the incident to the latter which looming fear, hence having deterred her to promptly disclose the incident to her mother, in face thereof hers being a minor, besides especially when the aforesaid explanation appears not to be gripped with any falsehood necessarily the effect of delay if any on the part of the complainant in reporting the matter to the police station concerned, would not enjoin this Court to draw a conclusion therefrom that the version qua the incident comprised in Ext.PW-3/B besides in the harmonious depositions on oath of both PW-9 and PW-11 is either premeditated or concocted.

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

12. In view of the above, we find no merit in this appeal which is accordingly dismissed. In sequel, the impugned judgement convicting and sentencing the accused/appellant is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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

Shri Khem Chand s/o Shri Dhanna Ram & others. .....Revisionists.

Versus

Shri Jiwa Nand s/o Shri Dhanna Ram & others. .....Non-Revisionists.

Civil Revision No. 49 of 2015
Date of order: 18.11.2015

Code of Civil Procedure, 1908- Order 23 Rule 3- Parties entered into a compromise which is taken on record as Ex.PA- compromise is lawful and, therefore, compromise decree ordered to be prepared; and revision disposed of in terms of compromise. (Para-1 to 3)

For the revisionists:	Mr. G.D. Verma, Sr. Advocate, with Mr. B.C. Verma, Advocate.
For the non-revisionists:	Mr. Sanjeev Kuthiala, Advocate, for the respondents.

The following order of the Court was delivered:

P.S. Rana, Judge. *(Oral).*

Compromise order under Order XXIII Rule 3 C.P.C

Heard. Record perused. Learned Advocate appearing on behalf of the parties submitted that compromise Ex. PA has been executed *inter se* the parties and present Civil Revision No. 49 of 2015 and Civil Suit No. 132-1 of 2013 titled Khem Chand and others vs. Jeeva Nand and others be disposed of in view of compromise Ex. PA. In view of above stated facts present civil revision and civil Suit No. 132-1 of 2013 are disposed of on following terms and conditions:

"(A) That suit property comprised in khewat No. 19 khatauni No. 28 khasra Nos. 186, 188, 189, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209 and 210, kitta 23, measuring 3499-26, situated in Muhal Khalini, Tehsil Shimla, H.P., will be partitioned by Competent Revenue Officer Assistant Collector 1st Grade strictly in accordance with law as per H.P. Land Revenue Act within a period of three months with effect from today.

(B) That revisionists and non-revisionists will not raise any type of construction upon the vacant portion of the suit land till suit land is not finally partitioned in accordance with H.P. Land Revenue Act by the competent authority of law.

(C) That terms and conditions of compromise Ex. PA placed on record shall be binding upon revisionists and non revisionists in accordance with law and compromise Ex. PA will form part and parcel of order subject to legal rights of other co-owners who are not impleaded as party.

(D) That legal rights of other co-owners who are not impleaded as co-parties will not be effected in any manner over suit property.

(E) That as per request of learned Advocates appearing on behalf of revisionists and non-revisionists while exercising inherent powers under Section 151 CPC in the ends of justice Civil Suit No. 132-1 of 2013 titled Khem Chand s/o Dhanna Ram and others vs. Jeeva Nand s/o Dhanna Ram also disposed of accordingly.

2. Compromise decree is passed accordingly in the ends of justice under Order XXIII Rule 2 Civil Procedure Code while exercising inherent powers under Section 151 CPC in the ends of justice. No order as to costs. Registrar (Judicial) is directed to prepare compromise decree sheet strictly in accordance with law forthwith under Order XXIII Rule 3 CPC.

3. In view of above stated facts Civil Suit No. 132-1 of 2013 and Civil Revision No. 49 of 2015 are disposed of in the ends of justice. Pending applications if any also disposed of. No order as to costs. File of learned trial court along with certified copy of

compromise order and compromise decree sheet prepared under Order XXIII Rule 3 Code of Civil Procedure 1908 be transmitted forthwith.

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

Khem Singh. ...Appellant.

Versus

Y.R. Sharma. ...Respondent.

RSA No. 481 of 2005
Reserved on: 16.11.2015
Decided on: 18.11.2015

Specific Relief Act, 1963- Section 38- Plaintiff purchased the suit land- he filed a suit seeking permanent prohibitory injunction against the defendant who has no right, title or interest in the suit – defendant pleaded that suit land bearing Khasra No.153/57 was part and parcel of Khasra No.47- record shows that Khasra Nos.56 and 47 are separately owned and possessed by the parties- no evidence was placed on record to show that any part of Khasra No.153/57 formed part of Khasra No.47- demarcation report also does not show that Khasra No.153/57 was part of Khasra No.47- held, that Court had properly appreciated the evidence- appeal dismissed. (Para-15 to 17)

For the Appellant : Mr. Rajneesh K. Lal, Advocate.
For the Respondent: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 7.6.2005 rendered by the District Judge, Solan in Civil Appeal No. 72-S/13 of 2004.

2. "Key facts" necessary for the adjudication of this appeal are that respondent-plaintiff (hereinafter referred to as the "plaintiff" for convenience sake) filed a suit for permanent prohibitory injunction against the appellant-defendant (hereinafter referred to as the "defendant" for convenience sake). Plaintiff was one of the co-owners of the suit land. He purchased 8 biswas of land from Khasra No. 153/57 vide sale deed No. 264 dated 18.3.1991. Defendant has no right, title or interest in the suit land. He has threatened to interfere in the suit land.

3. Suit was contested by the defendant. It was denied that plaintiff was owner in possession of the suit land. Plaintiff did not possess any part of Khasra No. 153/57. The suit land was part and parcel of Khasra No. 47.

4. Issues were framed by the Civil Judge (Senior Division), Solan. Civil Judge (Senior Division) decreed the suit on 21.9.2004. Defendant preferred an appeal before the District Judge, Solan against the judgment and decree dated 21.9.2004. He dismissed the same on 7.6.2005. Hence, the present appeal. It was admitted on the following substantial questions of law:

1. **Whether the courts below were justified in rejecting the application for appointment of Local Commissioner when in the**

facts and circumstances of the case, boundary dispute could only be determined by appointment of Local Commissioner and adjudication of the dispute in accordance with High Court Rules and Orders Vol.I Chapter-I which procedure has not been followed?

2. **Whether the discretion exercised in rejecting the application for additional evidence and not adjudicating and determining the exact location of the plot has vitiated the findings more particularly when it was found that the original Musabi and torn Momi copy thereof had not been produced and demarcation could be carried out with the Aks tatima in respect of Khasra numbers 57 and 47 which could have been located?**

3. **Whether production of additional evidence was necessary for satisfactorily pronouncing the judgment and judicial discretion has not been exercised while rejecting the same?**

5. Mr. Rajnish K. Lal, on the basis of the substantial questions of law framed, has vehemently argued that the boundary dispute could only be determined by appointing Local Commissioner. He has lastly contended that application under order 41 rule 27 has been rejected in an illegal manner.

6. Mr. Neeraj Gupta has supported the judgments and decrees passed by both the courts below.

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

8. Since all the substantial questions of law are interconnected and interlinked the same are taken up together for determination to avoid repetition of discussion of evidence.

9. PW-1 Yudhishter Raj Sharma has deposed that he has purchased the suit land on 13.3.1991 from Surmi and Jeet Ram vide sale deed No.264. He has proved copy of sale deed Ex.P-1, copy of Jamabandi for the year 1991-92 Ex.P-2 and tatima mark 'A'. Defendant has no concern over the suit land. He had engaged labourers to remove the bushes. Defendant forced his labourers to leave the spot. He has proved copy of demarcation report mark 'B'. He has denied in his cross-examination that Khasra No.57 is part of Khasra No. 47.

10. PW-2 Ashok Kumar has proved Latha and has also prepared Aksh from Latha qua Khasra No.153/57, 152/57, 56, 47, 38 and 48.

11. PW-3 Y.R. Sharma has led his evidence by filing an affidavit. He has produced Aksh Sajra Ex.P-4, copy of Jamabandi for the year 1991-92 Ex.P-5 and copy of Jamabandi for the year 1996-97 Ex.P-6.

12. Defendant has led his evidence by filing an affidavit. According to him, Naib Tehsildar Parma Nand had undertaken the demarcation.

13. DW-2 Nand Lal has also led his evidence by filing affidavit. According to him, on 15.5.1983 at the time of demarcation, Jeet Ram, Surmi and Krishan Das Bhatia were present on the spot. In his cross-examination, he has admitted that he has not seen the revenue record at the time of demarcation. He did not know which Khasra number

exists below Khasra No.153/57. He did not know which Khasra number is in existence over Khasra No.47.

14. PW-3 Prem Dutt has deposed that he could not produce the record since the same was destroyed.

15. It is evident from the revenue record produced by the parties that Khasra Nos. 57 and 47 are separately owned and possessed by the parties. There is no contemporaneous evidence placed on record to suggest that any part of Khasra No. 153/57 forms part of Khasra No.47.

16. Mr. Rajnish K. Lal has vehemently argued that the courts below have not taken into consideration the demarcation report conducted by Parma Nand. Fact of the matter is that defendant has not produced Parma Nand, who has conducted the demarcation. Even from report it is not discernible that Khasra No.153/57 was part of Khasra No. 47.

17. Mr. Rajnish K. Lal has also contended that an application under order 41 rule 27 of the Code of Civil Procedure has been wrongly rejected. Defendant wanted to produce on record Aksh Sajra Kistwar and to summon the record pertaining to demarcation proceedings. It was not a case of boundary dispute, as argued by Mr. Rajnish K. Lal. Moreover, there was no encroachment found as per demarcation report dated 15.5.1983. The purpose of application under order 41 rule 27 is not to fill up the lacunae in the case. The purpose of application under order 26 rule 9 CPC is to ascertain the position on the spot.

18. The courts below have correctly appreciated the oral as well as documentary evidence led by the parties and there is no need to interfere with the well reasoned judgments and decrees passed by both the courts below.

19. The substantial questions of law are answered accordingly.

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

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

Krishan Datt alias Krishan Chand & ors. .....Appellants.

Versus

Parma Nand & ors. .....Respondents.

RSA No. 342 of 2005.
Reserved on: 16.11.2015.
Decided on: 18.11.2015.

Code of Civil Procedure, 1908- Section 100- Plaintiffs challenged the sale deed executed by the defendants No. 2 & 3 and father of defendant No. 4 to 8 in favour of defendant No. 1 alleging that plaintiffs and the defendants No. 2 to 8 were owners to the extent of 3/4th share in the suit land but they had sold the entire suit land- defendant No. 1 contested the suit on the plea that the entire land of the vendors with other co-sharers was 69 bighas and

10 biswas out of which vendors were in exclusive possession of the suit land which was sold by them- the trial court declared the sale deed null & void to the extent of the share of the plaintiffs-first appellate court partly allowed the appeal- held, that the suit land is proved to be in exclusive possession of vendors, therefore, the sale deed dated 20.3.1975 cannot be termed illegal or void-further held that, the sale deed by vendors was valid since they were in exclusive possession of the same subject to determination of their share at the time of partition-appeal accordingly dismissed. (Para 14 to 16)

Cases referred:
Bhartu vrs. Ram Sarup, 1981 P.L.J. 204
Baldev Singh vs Smt. Darshani Devi And Anr., AIR 1993 H.P. 141

For the appellant(s):	Mr. B.N.Sharma, Advocate.
For the respondents:	Mr. Ajay Kumar, Sr. Advocate, with Mr. Dheeraj K. Vashishta, 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, Shimla, H.P., dated 6.4.2005, passed in Civil Appeal No. 113-S/13 of 2002.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the appellants-plaintiffs (hereinafter referred to as the plaintiffs), have instituted suit for declaration and for permanent prohibitory injunction against the respondents-defendants (hereinafter referred to as the defendants). The case set up by the plaintiffs is that the suit land was recorded in the ownership and possession of the plaintiffs and defendants No. 2 to 8 to the extent of their share ¾ alongwith their mother Smt. Devki and sisters Godawari, Kalawati and Tarawati. Defendants No. 2 & 3 and father of defendants No. 4 to 8 have sold the entire land to defendant No. 1 through sale deed dated 20.3.1975 and mutation No. 141 was attested in the office of Assistant Collector, Grade II, Shimla. The defendants have no right to sell the share of the plaintiffs in the suit land and as such the alleged sale deed is null and void.

3. The suit was contested by defendant No. 1, namely, Parma Nand. According to him, Charan Dass, Amar Singh, Medh Ram and Devki were joint owners of land bearing khewat No. 23, khatauni No. 82 and 83 (kita-13) measuring 69 bighas and 10 biswas. Out of this land, Charan Dass, Amar Singh, Medh Ram and Devki Devi were in exclusive possession of Kh. No. 384, measuring 6 bighas and 18 biswas i.e. the suit land which they sold to defendant No. 1 through sale deed dated 20.3.1975 for consideration of Rs. 2000/- and defendant No. 1 was put in physical possession on the spot and thereafter mutation was also attested on 24.9.1977.

4. The learned trial Court framed the issues on 16.1.2002. The suit was partly decreed to the effect that the plaintiffs were co-owners in the suit land comprising khata khatauni No. 24/83, Kh. No. 384, total measuring 6 bighas 18 biswas, situated at Mauja Mohri, Pargana Kalhanj, Tehsil and Distt. Shimla, H.P., as per their shares and the sale deed Ext PW-1/E, registered in the office of Sub Registrar dated 20.3.1975 was null and void to the extent of the share of the plaintiffs in the suit land and the mutation No. 141 dated 24.9.1977 on the basis of sale deed was also wrong, null and void. Defendant No. 1,

Parma Nand, preferred and appeal, feeling aggrieved, against the judgment and decree dated 2.12.2002. The learned District Judge, Shimla, partly allowed the same on 6.4.2005. Hence, this regular second appeal.

5. The regular second appeal was admitted on the following substantial question of law on 14.7.2005:

> "1. Whether the lower appellate court ignored the provision of co-owner Rights in joint land and misread and misconstrued the documentary evidence, whereby it was held that sale deed executed by vendors from the joint land is legal and valid, whereas, they are not in exclusive ownership and possession of joint land?"

6. Mr. B.N. Sharma, Advocate, appearing on behalf of the appellants, on the basis of the substantial questions of law framed, has vehemently argued that the sale executed by the defendants No. 2 & 3 and father of defendants No. 4 to 8 in favour of defendant No. 1 was null and void and the mutation thus could not also be attested in their favour from the joint land. On the other hand, Mr. Ajay Kumar, Sr. Advocate, appearing on behalf of defendant No.1 has supported the judgment and decree passed by the learned District Judge, Shimla dated 6.4.2005.

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

8. PW-1 Krishan Chand deposed that the disputed land measures 6 bighas 18 biswas. Kh. No. 384 was in joint ownership. He has proved copy of jamabandi Ext. PW-1/A, Ext. PW-1/B, PW-1/C and PW-1/D. The partition has not taken place. The defendants No. 2 & 3 have sold the land to defendant No. 1 without his consent. He did not know when the land was sold. Defendants No. 2 & 3 have no right to sell the land. The land was in his possession. However, he has admitted that defendant No. 1 used to cut grass occasionally from the suit land. In his cross-examination, he has categorically admitted that the defendant was cutting grass for the last 10-15 years and then he deposed that it was occasionally being cut by him. He was not aware about the date of mutation.

9. PW-2 Charan Dass deposed that he knew the parties. The land was in joint ownership. The land was sold to defendant No. 1 by Amar Singh and Charan Dass. The consent of the plaintiffs was not obtained at the time of sale. The possession was of the plaintiffs. The defendants have no right to sell the land. In his cross-examination, he has admitted that the land was sold for Rs. 2000/-. The possession was not handed over to defendant No. 1. The mutation was attested in the year 1977.

10. Defendant No. 1 Parma Nand has appeared as DW-1. He testified that he purchased land on 20.3.1975 from Charan Dass, Amar Singh and their mother Devki Devi. The sale deed was prepared. He has proved the same vide Ext. DW-1/A. The Kh. No. was 384, measuring 6 bighas 18 biswas. The land was purchased for a consideration of Rs.2000/-. The possession was handed over to him. The mutation was attested in the year 1977. He has produced copy of jamabandies for the year 1973-74 Ext. PW-1/B, for the year 1968-69 Ext. PW-1/C, for the year 1999-2000 Ext. PW-1/d. Mutation is Ext. PW-1/E. He has fenced the suit land. In his cross-examination, he has admitted that when he purchased the suit land, he has seen the revenue record.

11. DW-2 Paras Ram, deposed that the defendants Charan Dass, Amar Singh and their mother Devki Devi have sold the land to defendant No. 1 measuring about 7 bighas.

12. DW-3 Ram Krishan deposed that defendant No. 1 has purchased the land from Charan Dass, Amar Singh and their mother Devki Devi. He was in possession of the same. He had seen the land. Sh. Charan Dass, Amar Singh and their mother Devki Devi, were owners of the land before the year 1975.

13. The sale deed is Ext. PW-1/E dated 20.3.1975. It has come on record that the vendors were in exclusive possession of the disputed land even though the partition had not taken place. DW-1 Krishan Chand has admitted, as noticed hereinabove, that defendant No. 1 was cutting the grass from the disputed land for the last 10-15 years. DW-1 Parma Nand has categorically deposed that immediately after the execution of the sale deed Ext. DW-1/A, he was put in possession. His statement was corroborated by DW-2 Paras Ram and DW-3 Ram Krishan. It has also come on record that vendors Charan Dass, Amar Singh and their mother Devki Devi were also owning some land other than the disputed land which was joint. According to the sale deed Ext. DW-1/E dated 20.3.1975, Charan Dass, Amar Singh and their mother Devki Devi were having 3/7th share in the total land measuring 69-10 bighas comprising of khewat No. 23 and khatauni Nos. 82 and 83.

14. Krishan Chand, while appearing as PW-1 has admitted in his cross-examination that there was total 80 or 85 bighas of land which was owned by 8 co-sharers. What emerges from the evidence led by the parties is that the plaintiffs were co-owners in the disputed land alongwith vendors Charan Dass, Amar Singh and their mother Devki Devi and the parties were also jointly owning some land measuring about 60 or 65 bighas. However, no partition had taken place. The land measuring 6-18 bighas was in exclusive possession of vendors Charan Dass, Amar Singh and their mother Devki Devi. Thus, it cannot be termed that the sale deed dated 20.3.1975 was illegal or void. The sale deed was to be given effect to at the time of partition of the land between the parties. It is not the case of the plaintiffs that vendors Charan Dass, Amar Singh and their mother Devki Devi have sold land more than their share in the joint land.

15. In the case of ***Bhartu vrs. Ram Sarup,*** reported in ***1981 P.L.J. 204,*** the Full Bench of the Hon'ble Punjab and Haryana High Court has held while answering the following question, referred to it as under:

> " Question: Whether the sale of a specific portion of land described by particular Khasra numbers by a co-owner out of the joint Khewat would be a sale of share out of the joint land and pre-emptible under Section 15(1) (b) of the Punjab Pre-emption Act?"
>
> "[5] The rights of a transferee from a co-owner are not entirely dependent on judicial decisions but are regulated by Section 44 of the Transfer of Property Act which provides that where one or two or more co-owners of the immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property and to enforce a partition of the same but subject to conditions and liabilities affecting at the date of the transfer, the share or interest so transferred. According to this statutory provision also what transferee gets is the right of the transferor to joint possession and to enforce a partition of the same irrespective of the fact whether the property sold is fractional share or specified portion, exclusively in possession of the transferor. Again, it cannot be disputed that when a co-sharer is in exclusive possession of the specified portion of the joint holding, he is in possession there of as a co-sharer and all the other co-sharers continue to be in its constructive possession. By the

transfer of that land by one co-owner, can it be said that other co-sharers cease to be co-sharers in that land or to be in its constructive possession. The answer obviously would be in the negative because try of the other co-share is can either seek a declaration from the Court as held in Sukh Dev's case that the vendee is in possession only as a co-sharer or can initiate proceed--for partition of the joint holding including the tend transferred. If the other co-sharers continue to be co-sharers in the land transferred even though comprised of specific khasra numbers how can it be said that what is sold is something other than the share out of the joint holding. That the sale of specific portion of land out of joint holding by one of the co-owners is nothing but a sale of a share cut of the joint holding, would be further elucidated if we take the example of a sale where a co-owner sells the land comprised of a particular khasra number which is not in his possession but is within his share in the joint holding. For example, 'A' who is joint owner of one-fourth share in the joint holding measuring 100 bighas sells the land measuring 10 bighas bearing khasra numbers 'X' and 'Y' which are not in possession. On the basis of this sale, the vendee can neither claim himself to be a transferee of the said land nor can he claim its possession from other co-owners in possession thereof. The effect in law of such a transfer would be only that the vendee shall be entitled to 10 bighas of land out of the share of his vendor at the time of partition or prior thereto to a decree for joint possession to the extent of the land purchased by him. Consequently, the effect in law of sale of even of specified portion of joint land is that it is only a sale of portion of share by one of the co-owners."

16. Mr. B.N.Sharma, Advocate, has relied upon the decision of this Court in the case of ***Baldev Singh vs Smt. Darshani Devi And Anr.,*** reported in ***AIR 1993 H.P. 141.*** This case is distinguishable since in the present case, as discussed hereinabove, the co-owners were in exclusive possession of the specific portion of the joint property. Thus, it is held that the land sold by vendors Charan Dass, Amar Singh and their mother Devki Devi was valid since they were in exclusive possession of the same subject to determination of their share at the time of partition. The substantial questions of law are answered accordingly.

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

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

Mahli Devi and another. ...Petitioners.

Versus

Jagdish Chand. ...Respondent.

Civil Revision No. 175 of 2007
Reserved on: 17.11.2015
Decided on: 18.11.2015

Code of Civil Procedure, 1908- Order 21- A decree was passed for possession and injunction of the suit land- petition was filed for execution of the decree pleading that judgment debtors had taken forcible possession of the suit property in absence of the

decree holder- Judgment debtor pleaded that they were in possession of the suit property prior to filing of the suit- trial Court dismissed the Execution Petition- held, that Decree Holder had failed to prove that after getting the possession of the share- Judgment Debtor had dispossessed him and had constructed the house – Decree Holder also admitted that shops were constructed in the year 1995 by the Judgment Debtor – held that the trial Court had rightly dismissed the petition- petition dismissed. (Para-8 to 13)

For the Petitioners: Mr. Sanjay Jaswal, Advocate.
For the Respondent: Mr. Y.P. Sood, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge:

This petition is instituted against the order dated 20.7.2007 rendered by the Civil Judge (Senior Division), Palampur in C.M.A. No. 192/2003.

2. "Key facts" necessary for the adjudication of this petition are that the petitioners-plaintiffs-decree holders (hereinafter referred to as the "decree holders" for convenience sake) had instituted a suit bearing Civil Suit No.3/95, titled as ***Mahli Devi and another*** Vs. ***Jagdish Chand***. The suit was partly decreed on 16.12.1999. The decree holders were declared to be owners in possession of land comprising Khasra Nos. 313, 332, 311, 312, 333, 318, 331, 314 and 315 measuring 0-16-11 alongwith other co-sharers and the entry showing the judgment debtor as "*Davedaar Bai*" or vendee over Khasra Nos. 314 and 315 was declared wrong and illegal. Defendant was restrained from interfering over the suit land. Decree holders filed a petition under order 21 (1) (5) of the Code of Civil Procedure for the execution of the judgment and decree dated 16.12.1999 rendered in Civil Suit No. 3/95. According to the averments made in the petition, judgment debtor took forcible possession of the suit property on 15.8.2003 in the absence of decree holders and they were refusing to hand over the possession of the same.

3. Judgment debtor contested the petition. Judgment Debtor admitted that judgment and decree dated 16.12.1999 was passed against him. It was also admitted that the appeal filed against the judgment and decree dated 16.12.1999 was dismissed by the appellate Court. According to the Judgment Debtor, even prior to filing of civil suit No. 3/1995, the house of judgment debtor comprising of five rooms was in existence.

4. Issues were framed by the Executing Court on 12.8.2005. The executing Court dismissed the petition on 20.7.2007. Hence, the present petition.

5. Mr. Sanjay Jaswal, learned counsel for the petitioner has vehemently argued that the Court below has not properly appreciated oral as well as documentary evidence led by the parties.

6. Mr. Y.P. Sood has supported the impugned order dated 20.7.2007.

7. I have heard the learned counsel for the parties and have gone through the order dated 20.7.2007 carefully.

8. Mahli Devi has appeared as PW-1. She has deposed that decree was passed in her favour and the house over the same was constructed by her husband. About three years back, judgment debtor took forcible possession of the suit house. AW-2 Hirda Ram has corroborated the statement of AW-1 Mahli Devi. According to him, the Judgment Debtor has taken forcible possession of the suit house.

9. AW-3 Kartar Chand has proved the site plan Ext. AW3/A. In his cross-examination, he has admitted that he did not visit the spot.

10. Judgment Debtor has appeared as RW-1. He has deposed that the old room of the house of Shilo was lying locked. He has constructed the house consisting of 12 rooms about 44 years back and he has not taken possession of the suit house on 15.8.2003. RW-2 Sant Ram has supported the version of RW-1. He has deposed that the house of Judgment Debtor was existing for the last more than 42-43 years back. RW-3 Hari Chand has deposed that the house of Mahli Devi was under lock. The Judgment Debtor has not taken the forcible possession of the house on 15.8.2003.

11. The copy of the decree-sheet dated 16.12.1999 is Ext. A-1. Ext. A-2 is the copy of missal haquiat bandobast jadid, Ext. A-3 is the copy of Jamabandi for the year 2000-2001, Ext. AW-3/A is site plan. Learned Sub Judge 1st Class (1) Palampur had framed issue No. 4 as under:

"Whether the plaintiff is entitled to the relief of possession qua the suit land comprising of Khasra No. 314 and 315, as alleged"? OPP

12. Case set out by the decree holders from the very beginning was that the judgment debtor has taken forcible possession of the land comprised in Khasra Nos. 314 and 315 in the year 1992 and thereafter constructed a shop on 4.4.1995. The decree holders have failed to prove that after getting the shops of the judgment debtor demolished from the suit property situated over Khasra Nos. 314 and 315, they have constructed the house and thereafter the judgment debtor took forcible possession of the same. Ext. AW-3/A shows 6 shops in dispute. AW-1 Mahli Devi has deposed that her house was in possession of the Judgment Debtor and the same was not lying locked on the spot. However, AW-2 Hirda Ram has deposed that the old house of Mahli Devi was lying locked. Thus, the Judgment Debtor was not in possession of the house of decree holders. The decree holder has admitted that the shops were constructed in the year 1995 by the Judgment Debtor. Thus, it cannot be said that Judgment Debtor has willfully disobeyed the decree dated 16.12.1999.

13. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the petition and the same is dismissed, so also the pending application(s), if any. No costs.

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

Sanjeev Kumar .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 166 of 2015.
Reserved on: 6th November, 2015.
Date of Decision : 18th November, 2015.

N.D.P.S. Act, 1985- Section 21- Accused was convicted of possession of 7600 capsules of Parvon Spas and 1142 capsules of Spasmo Proxyvon- in appeal held, that official witnesses have spoken categorically about the facts - independent witnesses had resiled from their

previous statements, however their testimonies cannot be believed as they had admitted their signatures on the memo and Sections 91 and 92 of Indian Evidence Act excluded their oral testimonies - Section 42(2) of Act was also complied and the case property is proved to have remained intact in the malkhana- trial Court has rightly appreciated the evidence and the guilt of the accused is fully established- appeal dismissed. (Para-10 to 15)

For the Appellant: Mr. N.K. Thakur, Senior Advocate with Mr. Rahul Verma, 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 of the learned Special Judge-III, Kangra at Dharamshala, District Kangra, Himachal Pradesh, rendered on 13.03.2015 in Session Case No. 4-J/VII/2014, whereby, the learned trial Court convicted the accused for his having committed an offence punishable under Section 21 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as "NDPS Act") and sentenced him to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, sentenced him to suffer rigorous imprisonment for two years.

2. The facts relevant to decide the instant case are that on 16.07.2013 HC Sanjeev Walia, the Investigating Officer, SIU was present at village Sihal at 2.15 P.M. along with H.C. Kuldeep Kumar, Constable Ashish Kumar, Constable Kujljeet Singh and Drugs Inspector Ashish Raina when a secret information was received that the accused has kept contraband such as Spasmo Proxyvon and Parvon Spas for sale in his rented store at village Dhameta and if raided, huge quantity of contraband can be recovered. On this, information under Section 42(2) of the NDPS Act was sent to DSP Jawali. The police party headed by H.C. Sanjeev Walia proceeded to village Dhameta to raid the store of the accused. Pradhan Gram Panchayat, Nirjala Devi and Ward Panch Kewal Krishan were also associated in the raiding party. The store of the accused was found locked and the accused was called and asked to open the store. The SDPO, Jawali, Dharampal also reached the spot. During the search, one carton was recovered from the store and on checking the same, 38 boxes of Parvon Spas containing 7600 capsules and 8 boxes of Spasmo Proxyvon containing 1142 capsules were recovered. The Investigating Officer filled in NCB form in triplicate. The case property was taken into possession vide recovery memo Ex.PW1/A and was sealed in a parcel with twenty seals of seal impression 'V'. After obtaining specimen seal impression on a separate piece of cloth, seal after use was handed over to witness Nirjala Devi. The Investigating Officer prepared rukka and same was sent to Police Station, Fatehpur through C. Kuljeet Singh for registration of a case upon which formal FIR was registered. During the Investigation, Investigating Officer prepared the site plan and recorded the statements of the witnesses. Special report was submitted to DSP, Jawali. The accused was arrested. During the investigation, accused could not produce any permit for possessing the aforesaid contraband. The case property was resealed by SI Tilak Raj, SHO, Police Station, Fatehpur, with ten seals of seal impression 'N' and to this effect reseal certificate was also prepared. The case property was sent to SFSL, Junga for chemical analysis. On receipt of SFSL Report, the samples were found to be that of Dextropropoxyphene Hydrochloride Capsules.

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. The accused was charged by the learned trial Court for his having committed an offence under Section 21 of the NDPS Act. In proof of the prosecution case, the prosecution examined 15 witnesses. On conclusion of recording of the prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the Court, in which the accused claimed innocence and pleaded false implication. He chose not to not lead evidence in defence.

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

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

7. On the other hand, the learned Deputy Advocate General has with considerable force and vigour, contended that the findings of conviction recorded by the Court below are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. The accused is alleged to have been found in exclusive and conscious possession of 8742 capsules of Parvon Spas and Spasmo Proxyvon while his having concealed/kept them in his shop/store. The official prosecution witnesses have deposed in tandem and in harmony in proof of each of the links in the chain of circumstances commencing from the proceedings relating to search, seizure and recovery of contraband from the alleged conscious and exclusive possession of the accused till the consummate link comprised in the rendition of an opinion by the FSL on the specimen parcel sent to it for analysis, hence portraying proof of unbroken and un-severed links, in the entire chain of circumstances, as such, it is argued that when hence the prosecution case stood established, it would be legally unwise for this Court to acquit the accused. Besides when the testimonies of the official witnesses unravel the factum of theirs being bereft of any inter se or intra se contradictions for belittling their creditworthiness, consequently they too are contended to enjoy credibility.

10. Apparently, the prosecution case gathers strength from the depositions of the official witnesses especially when they have deposed qua the genesis of the prosecution version in a consistent, uniform and harmonious manner. Consequently, their depositions acquire a hue of veracity.

11. Contraband Ex.P-2 was recovered under recovery memo Ex.PW1/A. Its recovery was effected from a store taken on monthly rent of Rs.500/- by the accused from PW-15 Shri Desh Raj. Certificate Ex.PW12/A issued by PW-15 besides, proven by him consolidates an inference of the accused having taken on rent a shop from PW-15 which was used by him as a store wherefrom recovery of contraband Ex.P-2 under recovery memo Ex.PW1/A stood effected. The depositions of the officials witnesses are firm and categorical in clinching the fact of Ex.P-2 having stood recovered under memo Ex.PW1/A from the shop taken on rent by the accused from PW-15 and which stood used as a store by him. The accused holding tenancy of the store wherefrom recovery of contraband Ex.P-2 was effected

nails a conclusion of his being in exclusive and conscious possession thereof. As a corollary, with the official witnesses deposing with intra se consistency in their respective examinations-in-chief qua the factum of its recovery therefrom, hence when their respective depositions comprised in their examinations-in-chief are bereft of any intra se contradictions, as such, their testimonies qua the factum of recovery of Ex.P-2 under recovery memo Ex.PW1/A from the store held/possessed exclusively by the accused are construable to be hence both trustworthy as well as credible. Apart therefrom, with no occurrence of any inter se contradictions in the testimonies of the official witnesses comprised in their respective examinations-in-chief vis-a-vis their depositions comprised in their respective cross-examinations lends impetus to an inference of their testimonies inspiring confidence besides, being trustworthy. Moreover, the effect of their respective depositions comprised in their examinations-in-chief being also bereft of any contradictions with their previous statements recorded in writing qua the occurrence is of theirs as a corollary not giving leverage for any sprouting therefrom of an inference of their testimonies on oath being ridden with any taint of improvements or embellishments. In sequel this Court is constrained to with aplomb amass an inference of their testimonies being amenable to theirs being imputed implicit reliance, for forming thereupon a conclusion qua the guilt of the accused.

12. No capital can be drawn by the defence from the factum of both independent witnesses to the apposite proceedings depicted in Ex.PW1/A as stood initiated and concluded at the site of occurrence having while standing examined as PWs resiled, reneged besides, having not supported the prosecution case. The reason for this Court to not even in the face of PW-1 and PW-2 not supporting the prosecution case oust the tenacity of their respective depositions, arises from the factum of theirs having admitted their signatures on Ex.PW1/A which records the factum of Ex.P-2 having come to be recovered thereunder from the store held as a tenant by the accused. Necessarily with theirs having admitted their signatures on Ex.PW1/A, in sequel the recovery thereunder of Ex.P-2 from the store held by the accused as a tenant renders workable against them the legal fetter or embargo constituted in Sections 91 and 92 of the Indian Evidence Act, whose provisions stand extracted hereinafter, whereby they are enjoined to not depose at variance with the recorded recitals of Ext.PW.1/A admittedly signatured by each, besides concomitantly the effect, if any of theirs having reneged therefrom would not undermine the legal efficacy of the recorded recitals in Ext.PW.1/A, especially given the sway of the legal embargo constituted therein and its interdicting them to depose in variance with the recorded recitals of Ex.PW1/A, deposed by each to have been signatured by them, renders hence their testimonies in variance to the recorded recitals of Ex.PW1/A to be inconsequential, rather as a corollary fastens sanctity to the apposite recitals comprised in Ext.PW-1/A. Moreover, hence their testimonies on oath at variance with the recorded recitals in Ext.PW.1/A are obviously discardable nor also it can be deduced therefrom that the prosecution case suffers erosion for want of oral corroboration to it by PW-1 and PW-2. The provisions of Sections 91 and 92 of the Indian Evidence Act, read as under:-

> "91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of documents.- When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

92. Exclusion of evidence of oral agreement.:- When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:-

Proviso (1).- Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, [want of failure] of consideration, or mistake in fact or law;

Proviso (2).- The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document:

Proviso (3).- The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved:

Proviso(4).- The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property,may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents:

Proviso (5). Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved:

provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of contract:

Proviso(6).- Any fact may be proved which shows in what manner the language of a document is related to existing facts."

Concomitantly for reiteration, their depositions on oath in contradiction to or at variance with the recorded recitals of Ex.PW1/A are discardable arising from the factum of theirs being statutorily debarred to depose in contradiction thereto especially when signatures whereon of PW-1 and PW-2 stand admitted by both rather renders Ext.PW.1/A to be clothed with an aura of veracity, with a concomitant deduction of the factum recorded therein of Ex.P-2 having been thereunder recovered from the store held by the accused as a tenant gaining immense probative vigour. As a corollary, it renders inconsequential the effect, if any, of theirs reneging or resiling from the recorded recitals qua the apposite proceedings comprised in Ex.PW1/A. In aftermath, they are to be construed to be rather lending support or corroboration to the testimonies of the official witnesses qua the factum comprised in Ex.PW1/A. Consequently, when the testimonies of the official witnesses have been construed for the reasons recited hereinabove to be inspiring confidence, for forming thereupon a conclusion qua the guilt of the accused, they acquire added probative leverage for sustaining the prosecution case moreso when both independent witnesses to the apposite proceedings have been for the reasons afore-stated construed to be corroborating their testimonies.

13. Since, it was a case of prior information, the Investigating Officer, PW-14 H.C. Sanjeev Walia was enjoined to mete compliance with the mandatory statutory

conditions enshrined in Section 42(2) of the NDPS Act requiring him to reduce the prior information qua the accused dealing in contraband into writing, thereafter his with utmost promptitude transmitting it to his superior officer. Compliance with the afore referred mandatory/statutory condition fastened by Section 42(2) of the NDPS Act upon the Investigating Officer stands proven by PW-8 C. Ashish Kumar inasmuch as his deposing qua the factum of preparation of Ex.PW7/A by the Investigating Officer in compliance with the provisions of Section 42(2) of the NDPS Act and its also containing the prior information qua the factum of the accused consciously and exclusively holding unauthorized possession of contraband. Apart therefrom, he has also proven the factum of its having been delivered by him in the office of SDPO, Jawali with H.C. Kuldeep Singh. However, given the factum of the Dy. S.P. being then unavailable, the latter having been telephonically apprised qua the aforesaid factum by H.C. Bhoop Singh also manifests evidence qua substantial compliance by the Investigating Officer with the provisions of Section 42(2) of the NDPS Act. Furthermore, PW-8 has also proven the factum of his having carried Special report Ex.PW7/B to the office of SDPO, Jawali on 17.07.2013.

14. Abstract of Malkhana register, Ex.PW5/B unflinchingly proves the factum of the case property along with NCB form in triplicate and samples seals hence having come to be deposited therein. Parcel Ex.P-1 containing contraband Ex. P-2 was under road certificate No.48/21 comprised in Ex.PW5/A carried by PW-6 C. Surinder Singh to FSL, Junga, who after depositing it with the FSL concerned handed over receipt of its deposit by him with the latter, to the MHC. The tenacity of the recitals in Ex.PW5/A, the road certificate whereunder case property was transmitted to FSL, Junga through PW-6 C. Surinder Singh has remained unimpeached. In sequel with the recitals in Ex.PW5/A of 8742 capsules of Parvon Spas and Spasmo Proxyvon having been handed over to PW-6 C. Surinder Singh for onward transmission to FSL Junga besides of NCB form in triplicate, sample seals and copy of recovery memo accompanying it and with theirs as portrayed in the report of the FSL concerned comprised in Ex.PA having come to received by it in the manner recited in Ex.PW5/A, overcomes any inference of any intra se incompatibility existing in recitals in Ex.PW5/A vis-a-vis recitals in EX.PA. Necessarily, besides when Ex.PA, the report of FSL, Junga underscores in tandem with the recitals in Ex.PW5/A of all items/material disclosed therein to be accompanying it, having stood deposited with it by PW-6, as also with the seals borne on the parcels sent to it for examination by the police on comparison by it with the sample seals accompanying Ex.PW5/A not manifesting any palpable incongruity, both in numbering as well as qua the English alphabet borne therein, necessarily when hence no ambiguity on intra se comparison thereof by the FSL stands unearthed qua the number of seals borne on the sample parcels besides qua the English alphabet borne thereon constrains an aplomb conclusion of the report of FSL Ex.PA being linkable to contraband Ex.P-2 recovered under memo Ex.PW1/A. More so when the seals borne on parcel Ex.P-1 have been disclosed in Ex.PA to have been on its receipt at FSL found intact.

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

16. Hence, the appeal is dismissed and the impugned judgment of the learned trial Court is affirmed and maintained. Records be sent back.

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

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

Cr.Appeal No.579 of 2008.
Reserved on: 30.10.2015
Decided on: 18th November, 2015.

N.D.P.S. Act, 1985- Section 20- Accused was apprehended on the basis of secret information- he was found carrying a blue and red coloured bag- on search of the bag 1.8 kg. of charas was recovered- accused was acquitted by the Court- in appeal, held that official witnesses had contradicted each other on material facts, such as, personal search of the witnesses by the accused- contradictions in the depositions of PW-12 & PW-14 create doubts in the genesis of the prosecution case- memo Ex.PW-1/B did not mention personal search of official and independent witnesses by the accused before his search, as deposed before the Court- guilt of the accused is not established beyond doubt - accused rightly acquitted- appeal dismissed. (Para-12 and 13)

For the Appellant: Mr. M.A. Khan, Addl. Advocate General.
For the Respondent: Mr. Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

This appeal is directed against the judgement of acquittal rendered on 24.5.2008 by the learned Special Judge, Shimla, H.P. in Sessions trial No.2-S/7 of 2008, whereby he acquitted the accused/respondent herein for his having committed an offence punishable under Section 20 of the NDPS Act.

2. Brief facts of the case are that on 19.11.2007, at about 12.30 P.M., PW-14 HC Ashwani Kumar along with HC Yashwant Singh, PW-12 HC Kundan Singh No.190 and PW-6 Constable Mohinder in consequence of Rapat No.5 Ext.PW.3/A proceeded towards local Bus Stand, Shimla for patrolling and detection of crimes. At about 2.30 P.M. on the relevant day, they received a secret information that one person wearing blue jean pant and gray jacket carrying a bag, was having Charas and if searched, the Charas could be recovered. In the meantime the accused resembling the description in the secret information appeared, who was stopped by PW-14. The name and address of the accused was asked, upon which he disclosed his name and address. PW-14 apprised the accused of his legal right of being searched either before the Magistrate or the Gazetted Officer, upon which he vide option and consent memo Ext.PW.1/A , declined the said offer and opted to get himself searched through the police present on the spot. Vide Memo Ext.PW.1/B, the aforesaid police officials and witnesses gave search, but nothing incriminating was found. Thereafter, PW-14 carried out the search of rucksack being carried by the accused and on the said search, Charas wrapped in one plastic belt which was kept in another blue and red colored bag was recovered, which was weighed and found 1.8 Kg. PW-14 out of the so recovered Charas took out two samples of 50 grams each and packed and sealed into two separate parcels and marked those as S-1 and S-2 and sealed with seal having impression

'R'. The seal after use was handed over to PW-1. PW-14 filled in the NCB forms in triplicate. The recovered Charas was taken into possession, vide memo Ext.PW.1/A. PW-14 prepared Ruka and sent the same through PW-12 to the Police station for registration of the case and on the basis of whichle FIR Ext.PW-5/B came to be registered in Police Station, Sadar, Shimla. Site plan Ext.PW.13/A was prepared. The sample of the Charas was sent to SFSL, Junga for chemical examination. The report of the SFSL, Junga is Ext.P.Z, according to which the samples were found to be of Charas.

3. After completion of the necessary investigation, into the offence, allegedly committed by the accused/respondent herein, challan was filed under Section 173 of the Code of Criminal Procedure.

4. The accused/respondent herein was charged by the learned trial Court for his having committed an offence punishable under Section 20 of the NDPS Act, to which he pleaded not guilty and claimed trial.

5. In proof of the prosecution case, the prosecution examined as many as 14 witnesses. On closure of the prosecution evidence, the statement of accused under Section 313 Cr.P.C. was recorded by the Court, in which he claimed false implication and pleaded innocence. In defence, the accused/respondent did not choose to examine any witness.

6. On appraisal of the evidence on record, the learned trial Court acquitted the accused for his having committed offence punishable under Section 20 of the NDPS Act.

7. The State of H.P. is aggrieved by the findings of acquittal recorded by the learned trial Court. The learned Additional Advocate General appearing for the appellant/State has concertedly and vigorously contended that the findings of acquittal recorded by the learned trial Court are not based upon a proper appreciation of evidence on record, rather they are sequelled by gross mis-appreciation of material on record. Hence, he contends that the findings of acquittal recorded by the learned trial Court in favour of the accused 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 defence counsel has with considerable force and vigour, contended that the findings of acquittal recorded by the learned Court below are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication.

9. The 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. Even though the official prosecution witnesses have deposed in tandem and in harmony in proof of each of the links in the chain of circumstances commencing from the proceedings relating to search, seizure and recovery of contraband from the alleged conscious and exclusive possession of the accused till the consummate link comprised in the rendition of an opinion by the FSL on the specimen parcels sent to it for analysis, portraying proof of unbroken and unsevered links, in the entire chain of the circumstances, hence it is argued that when the prosecution case stood established, it would be legally unwise for this Court to acquit the accused.

11. In proof of the prosecution case, the prosecution has relied upon the testimonies of official witnesses besides upon the depositions of independent witnesses PW-1, PW-2 and PW-11. However, PW-1, PW-2 and PW-11 though stood joined as

independent witnesses by the Investigating Officer in the proceedings relating to search and recovery of contraband from the alleged conscious and exclusive possession of the accused, they have not supported the prosecution case. Even if PW-1, PW-2 and PW-11 have omitted to lend support to the prosecution case, their omission to do so would not constrain this Court to belie the testimonies of the official witnesses unless on a threadbare analysis of their testimonies on oath, stark and blatant material contradictions eroding the genesis of the prosecution version, surface therefrom.

12. Ext.PW.1/B encapsulates the factum of official witnesses besides the independent witnesses, having preceding the recovery of contraband under memo Ext.PW.1/C from bag Ext.P.2 carried by the accused on his back, given their uninvented personal search to him for dispelling any inference of contraband Ext.P.1 having come to be planted by the Investigating Officer in bag Ext.P-2 purportedly carried by the accused on his back. In case efficacy is to be imputed to Ext.PW.1/B, the official witnesses besides the independent witnesses purportedly contemporaneously available at the site of occurrence at the time of carrying out of the apposite proceedings thereto, were enjoined to depose consistently qua the factum of their respective personal search having been as portrayed in Ext.PW.1/B carried out by the accused, to dispel any inference of contraband having been planted by the Investigating Officer in bag Ext.P.2 carried by the accused on his back. However, PW-12 in his cross examination has deposed that the search of the police officials was conducted by the accused as well as by the independent witnesses. He has also proceeded to depose that initially the search of the police officials was carried out by the independent witnesses inasmuch as by PW-1 and PW-11, yet he has been unable to disclose with specificity the names of the official witnesses, whose personal search was carried out by PW-1 nor he has been able to disclose with specificity the names of the official witnesses whose personal search was conducted by PW-11. He though has also proceeded to depose that the accused also carried out the personal search of the official witnesses as well as of the independent witnesses, yet again he was unable to spell out with specificity qua whether the accused initially carried out the personal search of each of the independent witnesses succeeding whereto he carried out the personal search of each of the official witnesses nor he has been able to depose with specificity qua the factum of the accused having carried out the personal search of each of the official witnesses preceding his carrying out a personal search of each of the independent witnesses. Necessarily with lack of specificity qua the aforesaid facet gives momentum to an inference of portrayals in Ext.PW.1/B of the accused having carried out personal search of each of the independent witnesses as well as of each of the official witnesses, not gaining any vigor. Apart therefrom the deduction which is drawable therefrom is of Ext.PW.1/B losing its credibility. Furthermore with PW-14, the Investigating Officer, having in his deposition comprised in his cross-examination underscored therein the factum of the accused having not carried out any personal search of any of the police officials nor his having carried out any personal search of any of the independent witnesses, rather the personal search of all the aforesaid having been carried out only by Ram Singh, constrains this Court to record the following inferences: (a) PW-12 and PW-14 being unavailable simultaneously at the site of occurrence at the stage contemporaneous to the initiation and conclusion of the apposite proceedings therein; (b) as a corollary the depositions of PW-12 and PW-14 in proof of the genesis of the prosecution case cannot gain any probative force, rather fillip an apt deduction of the proceedings, if any, relating to the seizure of contraband from the alleged conscious and exclusive possession of the accused in the manner as projected by the prosecution having stood not carried out at the site of occurrence, rather theirs having been carried out elsewhere, with the sequelling effect of the genesis of the prosecution version facing erosion; (c) the factum of the accused having been given an opportunity to carry out personal searches of each of

the official witnesses as well as of each of the independent witnesses, to benumb the deriving of an inference by this Court of contraband Ext.P.1 recovered at the site of occurrence from the alleged conscious and exclusive possession of the accused from bag Ext.P.2 carried by him on his back, having been planted therein by the Investigating Officer, besides to countervail any inference of Ext.PW.1/C having been not prepared at the site of occurrence in succession thereto yet the existence of intra se ambiguities in the testimony of PW-12 and in the testimony of PW-14, the Investigating Officer qua the carrying out of personal search of each of the official witnesses as well as of each of the independent witnesses, by the accused, rather constrains this Court to hence conclude of no such opportunity having stood afforded by the Investigating Officer to the accused, necessarily then this Court is not precluded to draw an inference of contraband, if any recovered from the bag carried by the accused on his back, having stood planted therein by the Investigating Officer, even when an inference of Ext.PW-1/C having been prepared other than at the site of occurrence for hence jettisoning the genesis of the prosecution case, emerges therefrom; (d) aggravated momentum to the inference aforesaid is lent by the factum of PW-14 having deposed qua only PW-2 having carried out the personal search of each of the official witnesses as well as of each of the independent witnesses, yet when the said factum remains undisclosed in Ext.PW.1/B, facilitates an inference of PW-14 having prevaricated qua the factum of personal search of each of the official witnesses as well as of each of the independent witnesses at the site of occurrence at the stage preceding search and recovery of contraband from bag carried by the accused on his back, having stood carried out by PW-2. Dehors the aforesaid inference, the effect if any of a disclosure in Ext.PW.1/B of the accused preceding the recovery of contraband Ext.P.1 under memo Ext.PW-1/C from bag Ext.P-2 carried by him on his back, having carried out a personal search of each of the official witnesses as well as of each of the independent witnesses for dispelling an inference of planting of contraband by the Investigating Officer in bag Ext.P-2, is of its acquiring no truth or veracity. Concomitantly, even the holding of the purported apposite proceedings by the Investigating Officer leading to recovery of contraband Ext.P-1 from bag Ext.P-2 carried by the accused on his back apparently ex-facie appear to be a contrivance as well as an engineered concert on the part of the Investigating Officer necessarily then the versions of the official witnesses qua the holding of the apposite proceedings at the site of occurrence do not inspire confidence. In aftermath this Court is constrained to disbelieve the recorded depositions on oath of the official witnesses in proof of the aforesaid fact.

13. NCB forms are comprised in Ext.PW-14/B. PW-14, the Investigating Officer has not categorically testified qua the factum of relevant columns of NCB forms as are enjoined to be filled up by him, having come to be filled up by him on the spot, whereas PW-12 has deposed that PW-14 had performed the aforesaid act at the spot. Evidently the deposition of PW-12 qua the factum of the Investigating Officer as enjoined upon him having filled up all the relevant columns of the NCB forms on the spot, when hence has not come to be lent corroboration by PW-14 arising from the factum of his having equivocated qua his having performed the enjoined aforesaid act at the spot. In sequel with contradictions occurring intra se the deposition of PW-12 vis-à-vis the deposition of PW-14 qua the factum of the latter having performed his enjoined duty of his having filled up the relevant columns of the NCB forms at the spot, arising from the latter having equivocated qua the factum of his having filled up all the relevant columns of NCB forms Ext.PW-14/B at the spot renders open an inference of the Investigating Officer having not as enjoined upon him filled up the relevant columns of the NCB forms at the site of occurrence. Cumulatively, in conjunction with the preceding discussion it is to be held that the apposite proceedings were not carried

out at the site of occurrence. Naturally then the genesis of the prosecution case gets capsized.

14. The summon bonumn of the above discussion, is with rife, open and material contradictions occurring in the testimonies of the official witnesses qua the afore-referred facets, their testimonies are hence rendered to be uninspiring as well as untrustworthy. As a natural corollary when the depositions of the official witnesses are not to be meted implicit credence by this Court, warranting hence theirs being discarded, necessarily when even the independent witnesses have not supported the prosecution version, it was fated to, hence as aptly concluded by the learned trial Court, gain no approbation.

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

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

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

Thakur Singh son of Sh.Bharat Singh. ...Petitioner.

Vs.

State of H.P. ...Non-petitioner.

Cr.MP(M) NO.1492 of 2015
Order reserved on:6.11.2015
Date of Order: November 18, 2015.

Code of Criminal Procedure, 1973- Section 439- An FIR was registered for the commission of offences punishable under Sections 366, 370, 376 and 506 of IPC and Section 8 of Protection of Children from Sexual Offences Act, 2012- 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 evidence being tampered with and the larger interest of the public and State- allegations against the petitioner are serious and grave in nature relating to rape- rape is not only crime against the person but it is crime against society- investigation is at initial stage and would be adversely affected in the event of release of the petitioner on bail- petition dismissed. (Para-6 to 8)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Sh Bodhisattwa Gautam Vs. Miss Subhra Chakroborty, AIR 1996 SC 922

For the petitioner: Mr.Janesh Mahajan, Advocate
For Non-petitioner: Mr.R.S.Verma, Addl. Advocate General.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present bail application is filed under Section 439 Cr.P.C. relating to FIR No. 39/2015 dated 12.9.2015 registered under Sections 366, 370, 376 and 506 IPC and under Section 8 POCSO Act 2012 in police station Rekong Peo District Kinnaur H.P.

2. It is pleaded that false FIR is registered against petitioner. It is further pleaded that petitioner is not required for any kind of investigation and custodial interrogation. It is further pleaded that investigation and trial will take considerable time. It is further pleaded that petitioner will suffer unbearable hardship if bail is not granted. It is further pleaded that petitioner is sole bread earner in his family. It is further pleaded that petitioner will not influence prosecution witnesses and will not directly or indirectly make any inducement, threat or promise to prosecution witnesses. It is further pleaded that petitioner will not tamper with prosecution evidence. It is further pleaded that any condition imposed by Court will be binding upon petitioner. Prayer for acceptance of bail sought.

3. Per contra police report filed. There is recital in police report that petitioner Thakur Dass and co-accused Rajesh Kumar took two un-married girls in a maruti vehicle having registration No. HP-25A-2363 and thereafter petitioner Thakur Dass had committed rape upon prosecutrix. There is further recital in police report that co-accused Rajesh had committed offence under Section 366, 370 and 354A IPC and under section 8 of Pocso Act 2012 with another minor prosecutrix. There is further recital in police report that statement of prosecutrix under Section 164 Cr.PC also recorded before learned Chief Judicial Magistrate. There is further recital in police report that as per location shown by prosecutrix site plan was prepared. There is further recital in police report that birth certificate of prosecutrix also obtained from gram panchayat Pangi. There is further recital in police report that accused persons Thakur Dass and Rajesh Kumar are married persons. There is further recital in police report that in case bail is granted to petitioner then petitioner will threat prosecution witnesses and investigation will be adversely effected. There is further recital in police report that till date report of SFSL Junga not received. Prayer for dismissal of bail application sought.

4. Court heard learned Advocate appearing on behalf of petitioner and learned Additional Advocate General appearing on behalf of non-petitioner.

5. Following points arise for determination in present bail application.

(1) Whether bail application filed under Section 439 Cr.PC is liable to be accepted as mentioned in memorandum of grounds of bail application?.

(2) Final Order.

Findings upon Point No.1 with reasons.

6. Submission of learned Advocate appearing on behalf of petitioner that applicant is innocent and he did not commit any offence cannot be decided at this stage. Same fact will be decided when case shall be decided on its merits by learned trial Court after giving due opportunity of hearing to both parties to lead evidence in support of their case.

7. Submission of learned Advocate appearing on behalf of petitioner that petitioner is sole bread earner of the family and he will not influence prosecution witnesses and any condition imposed by Court will be binding upon petitioner and on this ground bail application be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that at the time of granting bail following factors are to be considered (i) Nature and seriousness of offence (ii) Character of the evidence (iii) Circumstances which are peculiar to the accused (iv) A reasonable possibility of the presence of accused not being secured at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) 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.*** Allegations against the petitioner are very heinous and grave in nature relating to commission of rape upon prosecutrix. It is well settled law that rape is not only crime against the person of woman but it is crime against entire society. It is well settled law that rape destroys entire psychology of a woman and pushed woman into deep emotional crisis. It is well settled law that rape is a crime against basic human rights and is also violative of the victim most cherished fundamental rights i.e. the right to life contained in Article 21 of the Constitution of India. See AIR 1996 SC 922 titled Sh Bodhisattwa Gautam Vs. Miss Subhra Chakroborty. In view of the fact that allegations against the petitioner are very heinous and grave in nature and in view of the fact that investigation is in the initial stage of case it is held that if applicant is released on bail at this stage then investigation of the case will be adversely effected. It is held that if petitioner is released on bail at this stage then interest of State and general public will also be adversely effected. It is well settled law that murder destroys the body of victim but rapist degrades the soul of prosecutrix.

8. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that if the petitioner is released on bail then petitioner will induce and threat prosecution witnesses and on this ground bail application be rejected is accepted for the reasons hereinafter mentioned. There is apprehension in the mind of Court that if petitioner is released on bail at this stage then petitioner will induce or threat prosecution witnesses. In view of above stated facts it is held that it is not expedient in the ends of justice to release petitioner on bail at this stage of case. Point No.1 is answered in negative.

Point No.2(Final Order)

9. In view of finding in point No.1 bail application filed by petitioner 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. Bail application disposed of. Pending applications if any also disposed of.

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

Shri Amar Chand s/o late Shri Durga Singh & others. .....Petitioners.

Versus

Shri Bhagat Ram s/o Shri Moti Ram. .....Non-petitioner.

Cr.MMO No. 129 of 2015
Date of order: 19.11.2015

Constitution of India, 1950- Article 227- **Code of Criminal Procedure, 1973-** Section 482**-** Judicial Magistrate returned the complaint under section 138 of N.I Act on the ground

of lack of jurisdiction in view of the Judgment reported in ***J.T-2014 (9) SC 81 titled Dashrath Roop Singh Rathore vs. State of Maharashtra***- held that, After the decision of the Hon'ble Supreme Court of India, President of India promulgated Ordinance dated June 15th, 2015 relating to The Negotiable Instruments Act 1881 and a subsequent promulgation issued by President of India dated 22.9.2015- the very court which has returned the complaint on the ground of jurisdiction was clothed with the power to try the same- the order of the Judicial Magistrate set aside. (Para 1 to 3)

For the petitioners: Mr. Pradeep K. Gupta, Advocate.
For the Non-petitioner: Mr. Jeet Ram Poswal, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge. *(Oral).*

Heard. Present petition filed under Article 227 of the Constitution of India read with Section 482 of Code of Criminal Procedure assailing the order passed by learned Judicial Magistrate 1st Class, Bilaspur dated 02.03.2015 in Criminal Complaint No. 195/2 of 2013 titled as Amar Chand & others vs. Bhagat Ram filed under Section 138 read with Section 142 of The Negotiable Instrument Act, 1881. Learned trial court returned complaint in view of ruling announced by Hon'ble Supreme Court of India reported in J***.T-2014 (9) SC 81 titled Dashrath Roop Singh Rathore vs. State of Maharashtra.*** After the decision of the Hon'ble Supreme Court of India, President of India promulgated Ordinance dated June 15th, 2015 relating to The Negotiable Instruments Act 1881, operative part is quoted as under in toto:

2. ***"142A. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any judgment, decree, order or directions of any court, all cases arising out of Section 138 which were pending in any Court whether filed before it or transferred to it before the commencement of Negotiable Instrument (Amendment) Ordinance 2015 shall be transferred to the court having jurisdiction under sub-section (2) of section 142, as if that sub-section had been in force at all material time.***

(2) Notwithstanding anything contained in sub-section (2) of section 142 or sub-section (1), where the payee or the holder in due course, as the case may be, has filed a complaint against the drawer of a cheques in the court having jurisdiction under sub-section (2) of section 142 or the case has been transferred to that court under sub-section (1), and such complaint is pending in that court, all subsequent complaints arising out of section 138 against the same drawer shall be filed before the same court irrespective of whether those cheques were delivered for collection or presented for payment within the territorial jurisdiction of that court.

(3) If, on the date of the commencement of Negotiable Instrument (Amendment) Ordinance 2015 more than one prosecution filed by the same payee or holder in due course, as the case may be, against the same drawer of cheques is pending before different courts, upon the said fact having been brought to the notice of the court, such court shall transfer the case to the court having jurisdiction under sub-section (2) of section 142, before which the first case was filed and

is pending, as if that sub-section had been in force at all material times."

3. In view of the promulgation of Ordinance by the President of India and in view subsequent promulgation issued by President of India dated 22.9.2015 order of learned Judicial Magistrate 1st Class, Bilaspur dated 02.03.2015 is set-aside and Judicial Magistrate 1st Class, Bilaspur is directed to dispose of the case strictly in accordance with law. Promulgation dated 15.6.2015 and 22.9.2015 issued by President of India placed on record shall form part and parcel of order. Parties are directed to appear before the learned Judicial Magistrate 1st Class, Bilaspur on ***4th December, 2015.*** Record of learned trial court alongwith certified copy of order be transmitted forthwith. Petition is disposed of. *Copy dasti.*

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

Shri Amar Chand s/o late Shri Durga Singh. .....Petitioner.

Versus

Shri Bhagat Ram s/o Shri Moti Ram. .....Non-Petitioner.

Cr.MMO No. 130 of 2015
Date of order: 19.11.2015

Constitution of India, 1950- Article 227- **Code of Criminal Procedure, 1973-** Section 482**-** Judicial Magistrate returned the complaint under section 138 of N.I Act on the ground of lack of jurisdiction in view of the Judgment reported in ***J.T-2014 (9) SC 81 titled Dashrath Roop Singh Rathore vs. State of Maharashtra***- held that, After the decision of the Hon'ble Supreme Court of India, President of India promulgated Ordinance dated June 15th, 2015 relating to The Negotiable Instruments Act 1881 and a subsequent promulgation issued by President of India dated 22.9.2015- the very court which has returned the complaint on the ground of jurisdiction was clothed with the power to try the same- the order of the Judicial Magistrate set aside. (Para 1 to 3)

For the petitioner: Mr. Pradeep K. Gupta, Advocate.
For the Non-petitioner: Mr. Jeet Ram Poswal, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge. *(Oral).*

Heard. Present petition filed under Article 227 of the Constitution of India read with Section 482 of Code of Criminal Procedure assailing the order passed by learned Judicial Magistrate 1st Class, Bilaspur dated 02.03.2015 in Criminal Complaint No. 196/2 of 2013 titled as Amar Chand vs. Bhagat Ram filed under Section 138 read with Section 142 of The Negotiable Instrument Act, 1881. Learned trial court returned complaint in view of ruling announced by Hon'ble Supreme Court of India reported in J***.T-2014 (9) SC 81 titled Dashrath Roop Singh Rathore vs. State of Maharashtra.*** After the decision of the Hon'ble Supreme Court of India, President of India promulgated Ordinance dated June 15th,

2015 relating to The Negotiable Instruments Act 1881, operative part is quoted as under in toto:

2. ***"142A. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any judgment, decree, order or directions of any court, all cases arising out of Section 138 which were pending in any Court whether filed before it or transferred to it before the commencement of Negotiable Instrument (Amendment) Ordinance 2015 shall be transferred to the court having jurisdiction under sub-section (2) of section 142, as if that sub-section had been in force at all material time.***

(2) Notwithstanding anything contained in sub-section (2) of section 142 or sub-section (1), where the payee or the holder in due course, as the case may be, has filed a complaint against the drawer of a cheques in the court having jurisdiction under sub-section (2) of section 142 or the case has been transferred to that court under sub-section (1), and such complaint is pending in that court, all subsequent complaints arising out of section 138 against the same drawer shall be filed before the same court irrespective of whether those cheques were delivered for collection or presented for payment within the territorial jurisdiction of that court.

(3) If, on the date of the commencement of Negotiable Instrument (Amendment) Ordinance 2015 more than one prosecution filed by the same payee or holder in due course, as the case may be, against the same drawer of cheques is pending before different courts, upon the said fact having been brought to the notice of the court, such court shall transfer the case to the court having jurisdiction under sub-section (2) of section 142, before which the first case was filed and is pending, as if that sub-section had been in force at all material times."

3. In view of the promulgation of Ordinance by the President of India and in view subsequent promulgation issued by President of India dated 22.9.2015 order of learned Judicial Magistrate 1st Class, Bilaspur dated 02.03.2015 is set-aside and Judicial Magistrate 1st Class, Bilaspur is directed to dispose of the case strictly in accordance with law. Promulgation dated 15.6.2015 and 22.9.2015 issued by President of India placed on record shall form part and parcel of order. Parties are directed to appear before the learned Judicial Magistrate 1st Class, Bilaspur on ***4th December, 2015.*** Record of learned trial court alongwith certified copy of order be transmitted forthwith. Petition is disposed of. *Copy dasti.*

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

Gokal Chand. ...Appellant.

Versus

Reeta and others. ...Respondents

RSA No. 495 of 2005
Reserved on: 17.11.2015
Decided on: 19.11.2015

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit seeking declaration to the effect that judgment and decree rendered by Senior Sub Judge, Mandi in Execution Petition No. 66/94 is hit by Section 44 of Evidence Act and is nullity in the eyes of law having been obtained by fraud- defendants pleaded that judgment/order had been upheld up to the Hon'ble Supreme Court- previous suit was decreed for possession by way of pre-emption subject to the deposit of the Rs. 8,000/- on or before 9.2.1981- time was extended by 30.10.1981- amount was deposited on or before 30.10.1981- objections were considered by the Executing Court- order had attained finality- petition was filed within the period of limitation- notification issued subsequently will not apply retrospectively- appeal dismissed.

(Para-9 to 12)

For the Appellant : Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.
For the Respondents: Mr. G.R. Palsra, Advocate for respondent Nos. 1(a) to 1 (d).

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 16.6.2005 rendered by the District Judge, Mandi in Civil Appeal No. 24 of 2004.

2. "Key facts" necessary for the adjudication of this appeal are that appellant-plaintiff (hereinafter referred to as the "plaintiff" for convenience sake) filed a suit for declaration to the effect that the judgment and decree dated 15.1.1998 rendered by the Senior Sub Judge, Mandi in Execution Petition No. 66/94, titled as Khem Singh vs. Gokal Chand, being hit by section 44 of the Evidence Act are nullity in the eyes of law having been obtained by the respondent-decree holder, predecessor-in-interest of the defendants, by playing a fraud upon the court. According to the averments made in the plaint, plaintiff herein was defendant in the case titled as Khem Singh vs. Gokual Chand bearing Civil Suit No. 177/1974. It was decreed in favour of Khem Singh, predecessor-in-interest of the defendants, vide judgment dated 9.1.1981. The trial Court directed the plaintiff in the civil suit to deposit a Rs. 8000 on or before 9.2.1981. Gokul Chand who is defendant No. 1 in the civil suit, i.e. plaintiff in the present proceedings, filed an appeal, which was assigned to the Additional District Judge, Mandi. Learned Additional District Judge, Mandi granted ex-parte stay against the impugned judgment and decree rendered by the Senior Sub-Judge. Khem Chand, who was respondent in the appeal, was not served with the copy of stay order, passed by the Additional District Judge, Mandi on 9.2.1981. Later on, appeal filed by Gokul Chand i.e. defendant No. 1 was got dismissed on 19.8.1981. Khem Chand pre-emptor in the previous suit moved an application before the Additional District Judge, Mandi for granting permission for depositing pre-emption money. Additional District Judge vide order dated 30.9.1981 granted extension of time to deposit the pre-emption money upto 30.10.1981. Later on, pre-emption money was deposited. Defendant No.1, plaintiff herein, filed a revision petition before this Court which was dismissed on 2.7.1985. The Special Leave Petition filed by the plaintiff was also dismissed by the Hon'ble Supreme Court on 22.8.1994. Thereafter, legal representatives of Khem Singh, i.e. defendants herein, moved an application for execution of decree. The Executing Court summoned the concerned file. Initially, the file was found not to be traceable and the same was re-constructed.

3. Suit was contested by the defendants. According to the defendants, the judgment/order has been upheld up to the Hon'ble Supreme Court.

4. Plaintiff filed replication. Issues were framed by the Civil Judge (Jr. Division), Court No. 3, Mandi on 5.7.2000. He dismissed the suit on 14.1.2004. Plaintiff preferred an appeal before the District Judge, Mandi. He also dismissed the same on 16.6.2005. Hence, the present appeal. It was admitted on the following substantial questions of law:

1. **Whether the execution petition filed on the basis of the judgment and decree dated 9.1.1981 in the year 1998, was barred by limitations and could not be entertained and warrant of possession could not be ordered to be issued?**
2. **Whether the Punjab pre-emption Act having been repealed with effect from 8.5.1987, therefore, on account of this subsequent event it, rendered the judgment and decree dated 9.1.1981 unexecutable and the same could not be enforced?**
3. **Whether the appellant as well as defendant No. 2 being Harijan by caste, therefore, on account of Notification Ext. PW1/E, which came in force on 23.8.1984, the decree for Pre-Emption dated 9.1.1981 is not executable?**
4. **Whether in the execution petition, respondents-decree holders, contravened the provisions of Section 44 of the Indian Evidence Act as set up in the plaint and therefore the appellant is entitled for restoration of the possession of the land in question?**

5. Mr. G.D. Verma, learned Senior Advocate, on the basis of the substantial questions of law framed, has vehemently argued that the execution on the basis of judgment and decree dated 9.1.1981 in the year 1988 was barred by limitation. He has also contended that the judgment and decree dated 9.1.1981 could not be executed after repeal of Punjab Pre-emption Act w.e.f. 8.5.1987. He has lastly contended that since the notification Ext. PW-1/E came into force on 23.8.1984, the decree for pre-emption was not executable. He has also referred to Section 44 of the Indian Evidence Act.

6. Mr. G.R. Palsra, Advocate has supported the judgments and decrees passed by both the courts below.

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

8. Since all the substantial questions of law are interconnected and interlinked the same are taken up together for determination to avoid repetition of discussion of evidence.

9. Civil Suit No. 177/1974 was decided by the learned Senior Sub Judge Mandi vide judgment and decree dated 9.1.1981, Ext. PW-1/B. The operative portion of the judgment dated 9.1.1981 reads as under:

> **"In view of my above findings on issues No.1 to 3 being in favour of the plaintiff and against the defendants the suit of the plaintiff for possession by way of pre-emption is declared subject to the plaintiff depositing a sum of Rs. 8,000/- (including 1/5th pre-emption money already deposited in the court) on or before 9.2.1981 failing which the suit of the plaintiff shall stand dismissed. The suit is accordingly decreed with costs."**

10. The plaintiff-decree holder was ordered to deposit the amount on or before 9.2.1981. An application was filed before the learned Additional District Judge, Mandi vide

CMP No. 10/81 for enlargement of time for depositing pre-emption money. It was specifically stated in the application that Gokul Chand preferred an appeal against the judgment and decree dated 9.1.1981 and the operation of the judgment and decree was stayed by the Additional District Judge, Mandi till 16.2.1981. The amount could not be deposited. The stay order was made absolute on 24.2.1981. The Additional District Judge vide order dated 30.9.1981 Ext. PW-1/D granted extension of time to Khem Singh for depositing the remaining pre-emption amount in terms of the judgment and decree passed by the trial Court by 30.10.1981. Gokul Chand plaintiff herein filed civil revision No. 221/1981 before this Court. It was dismissed by this Court on 2.7.1985. The Decree holder deposited the amount on or before 30.10.1981. He filed special leave petition before the Hon'ble Supreme Court. The Hon'ble Supreme Court dismissed the special leave petition vide order dated 22.8.1994, Ext. D-2. The issues raised by Mr. G.D. Verma, learned Senior Advocate have already been decided by this Court in the revision petition vide judgment dated 22.7.1985. Objections were also filed by the Judgment Debtor. All the objections were duly considered by the executing Court as per order dated 15.1.1998. The order dated 15.1.1998 has attained finality and the Punjab Pre-emption Act was repealed in the year 1987. The execution petition was filed within the prescribed limitation.

11. Now, as far as the notification dated 23.8.1984 is concerned, the plaintiff cannot derive any benefit from the same since the judgment and decree in question is dated 9.1.1981. The Judgment and decree dated 9.1.1981 has attained finality since the appeal filed by the plaintiff herein who was defendant in the previous suit was decided on 19.8.1981. The notification dated 23.8.1984 would not apply retrospectively. The plaintiff has failed to prove how order dated 15.1.1998 was obtained by the defendant by playing any kind of fraud. The plaintiff has unnecessarily filed this regular second appeal to prolong the litigation. He has lost the case up to Hon'ble Supreme Court. Section 44 of the Indian Evidence Act is not at all attracted in this case.

12. The courts below have correctly appreciated the oral as well as documentary evidence led by the parties and there is no need to interfere with the well reasoned judgments and decrees passed by both the courts below.

13. The substantial questions of law are answered accordingly.

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

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

State of Himachal Pradesh & ors. .....Appellants.

Versus

Beli Ram & ors. .....Respondents.

RFA No. 52 of 2008.
Reserved on: 17.11.2015.
Decided on: 18.11.2015.

Land Acquisition Act, 1894- Section 18**-** Land of the respondents was acquired for the construction of road- the collector awarded the compensation at the rate of Rs. 500/- per

bigha- The respondents filed petition under Section 18 of the Act for enhancement of compensation on various grounds-allowing the petition, learned Addl. District Judge, Shimla assessed the market value of the land at Rs. 6000/- per biswa – he further held that the land holders are entitled to a sum of Rs. 3,28,070/- being the value of fruit trees existing on the acquired land- appeal by the State- held that, The learned Addl. District Judge, has correctly relied upon copy of award passed on 16.6.2007 which was based on earlier award dated 3.3.2003, whereby the market value of the land was assessed at Rs. 6,000/- per biswa- further held that, a sum of Rs. 3,28,070/- for the value of plants was rightly awarded after relying upon the judgment in the case of ***Ramesh Chand and others vrs. Land Acquisition Collector,*** reported in ***Latest HLJ 2003 (HP) 977***- appeal dismissed.

(Para-8 & 9)

Case referred:
Ramesh Chand and others vrs. Land Acquisition Collector, Latest HLJ 2003 (HP) 977

For the appellant(s): Mr. Parmod Thakur, Addl. AG.
For the respondents: Mr. G.S.Rathore, Advocate for respondents No. 1 to 4.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular first appeal is directed against the award of the learned Addl. District Judge, Shimla, H.P. dated 24.9.2007, passed in Land Ref. No. 42-R/4 of 2004/99.

2. "Key facts" necessary for the adjudication of this regular first appeal are that the land of the respondents was acquired for the purpose of construction of road. Notification under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act) was issued on 22.2.1996. It was published in the Rajpatra on 2.3.1996. It was also published in two newspapers i.e. Dainik Tribune on 12.3.1996 and Jansatta on 14.3.1996. Wide publicity of this notification was got done through Tehsildar concerned on 25.3.1996. No objection was received from the concerned interested land holders within the prescribed period. Consequently, notification under Sections 6 & 7 of the Act were published on 20.3.1997. It was published in the Rajpatra on 12.4.1997 and in two newspapers i.e. Indian Express and Weekly Giri Raj on 14.7.1997. The copies of the declaration under Section 6 & 7 of the Act were got delivered amongst the interested holders of the village through Tehsildar concerned on 7.5.1997. Notices under Section 9 of the Act were issued to the interested holders on 1.10.1997 requiring them to appear before the Land Acquisition Officer on 17.10.1997 at Camp Rest House, Rohroo at 11:00 AM. The Land Acquisition Collector awarded a sum of Rs. 500 per bighas alongwith the statutory benefits vide award dated 24.11.1997.

3. The respondents filed petition under Section 18 of the Act for enhancement of compensation. According to them, the acquired land was part and parcel of Rohroo town. Modern facilities like road, education, medical, telephone, electricity, college etc. were available near the vicinity of the acquired land. There is sub-station of HPSEB, HP PWD workshop, water lifting station, Settlement Office, Office of the Excise and Taxation Officer within the radius of half kilometer of the land acquired. It was near Seema Rohru road. The value of the land at the time of notification was more than Rs. 12 lacs per bigha. The land was very fertile and orchard also existed thereupon. They claimed Rs. 15 lacs per bigha instead of Rs. 500/- per bighas as awarded by the Land Acquisition Collector. They also sought compensation of Rs. 3 lacs on account of loss of fruit bearing trees.

4. The petition was allowed by the learned Addl. District Judge, Shimla on 24.9.2007. He assessed the market value of the land at Rs.6000/- per biswa. In addition, the land holders were also held entitled to a sum of Rs.3,28,070/- on account of the value of fruit trees which existed on the land so acquired. Hence, this petition at the instance of the State.

5. Mr. Parmod Thakur, Addl. Advocate General for the State has vehemently argued that the market value of the land has been assessed at the higher rate. He then contended that the land holders were not entitled to any compensation for the orchard. On the other hand, Mr. G.S.Rathore, Advocate, has supported the award dated 24.9.2007.

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

7. PW-1 Jawahar Kaith has produced the statements of price index. PW-2 Bhajan Dass has proved receipts Ext. PW-2/A to PW-2/C issued in favour of the claiments. PW-3 N.K.Mehta has given the details of the fruit bearing trees of the claimants vide Ext. PW-3/A and Ext. PW-3/B. PW-4 Beli Ram deposed that the possession of the land was taken in the month of October-November, 1996. He has proved copy of jamabandi Ext. PW-4/A-B. According to him, he used to produce 400-500 boxes of apple and used to earn Rs. 1.80 lac per year. PW-5 Mohinder Singh deposed that NAC was near at a distance of 1 ½ km. from the acquired land. PW-6 Laiq Ram deposed that the land was acquired for the construction of the road. The decision was taken in the year 1995-96. The land was at a distance of 1 km. from the general Bus Stand and ½ km. from the boundary of NAC. He has raised orchard on the land. PW-7 Kanha Singh deposed that the land was acquired for the construction of road. The possession was also taken. He has raised apple orchard over the same. Their land was bifurcated into two blocks. PW-8 Hem Singh has proved sale deed Ext. PW-6/C.

8. Mr. Parmod Thakur, Addl. Advocate General for the State has argued that Ext. R-1 and R-2 should have been taken into consideration. However, these have not been proved in accordance with law. Neither vendor nor vendees have been produced by the Department. It has come on record that the land was fertile. It was situated at a close proximity of the boundary of NAC. The modern facilities like telephone, electricity, College etc. were in the close vicinity of the acquired land. There is sub-station of HPSEB, HP PWD workshop, water lifting station, Settlement Office, Office of the Excise and Taxation Officer within the radius of half kilometer of the land acquired. It was near Seema Rohru road. It was a valuable piece of land. The learned Addl. District Judge, Shimla, has correctly relied upon copy of award passed on 16.6.2007 which was based on earlier award dated 3.3.2003, whereby the market value of the land was assessed at Rs. 6,000/- per biswa.

9. The learned Addl. District Judge, Shimla, has awarded a sum of Rs. 3,28,070/- for the value of plants after relying upon the judgment rendered by this Court in the case of ***Ramesh Chand and others vrs. Land Acquisition Collector,*** reported in ***Latest HLJ 2003 (HP) 977.*** The land holders/claimants were entitled to compensation for the loss of trees separately. The learned Addl. District Judge, Shimla has correctly assessed the market value of the land and trees and awarded statutory benefits in accordance with law.

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

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

State of H.P. .....Appellant.
Versus
Desh Raj .....Respondent.

Cr. Appeal No. 521 of 2012.
Decided on: 19th November, 2015.

Indian Penal Code, 1860- Sections 306 and 498-A- Accused subjected his wife to cruelty in her matrimonial home as a result of which she committed suicide- held, that commission of offence punishable under Section 498-A of IPC can be inferred from the conduct, the gravity and seriousness of the acts of cruelty attributed to the accused- it is also to be established that such acts were sufficient to drive the deceased to commit suicide- further it is to be established that victim was being subjected to cruelty continuously and in close proximity of time of the occurrence- normal wear and tear of the married life and petty quarrels will not constitute the cruelty- it was asserted that accused started maltreating the deceased after 2-3 months without any rhyme and reason which shows that torture and harassment, if any, of the deceased were on account of normal wear and tear of the marriage- matter was never reported to police or pardhan- there was no allegation of demand of dowry- deceased had suffered burn injuries to the extent of 90% and her mental faculty were impaired- hence, statement made by her is not acceptable- slapping or beating in the marriage would not amount to continuous harassment and such act would not lead a person to commit suicide- in these circumstances, prosecution version was not proved- accused acquitted.

(Para-10 to 23)

Case referred:
State of H.P. versus Pradeep Singh and another, Latest HLJ 2013 (HP) 1431

For the appellant : Mr. D.S. Nainta, Addl. A.G and Mr. P.M. Negi, Dy. A.G.
For the respondent : Mr. Rajesh Mandhotra, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

The State of Himachal Pradesh aggrieved by the judgment dated 13.09.2012 passed by learned Sessions Judge, Kangra at Dharamshala in Sessions Case No. 8-D/VII-2010 has preferred this appeal, as thereby the respondent (hereinafter referred to as the 'accused') has been acquitted from the charge under Section 498-A and 306 of the Indian Penal Code.

2. The allegations against the accused in a nut shell are that during the night intervening 30.09.2011/1.12.2009 around 2.00 a.m (mid night), he subjected his wife Smt. Indira Devi (since dead) with cruelty in the matrimonial house at Village Salig, District Kangra and as a result thereof she committed suicide.

3. Deceased Indira Devi was married to the accused in the year 1999. She was treated well in the matrimonial home for 2-3 months of her marriage with the accused. Thereafter, the behaviour of the accused towards her changed altogether and he started picking up quarrel with her on trifles that too without any rhyme or reason. He even started administering beating to her. Looking to such behaviour of the accused elderly placed

persons in her in-laws and from parental side asked him not to quarrel with deceased and spoil the atmosphere in the house, but of no avail as he continued to harass her both mentally and physically. On being fed up from such quarrelsome attitude of her husband, the deceased went to her parents' house on 2-3 occasions, however, on each and every occasion, he came there and admitted his guilt as well as given an assurance that he will not torture or maltreat her in future. She, therefore, in view of such representation he made particularly for well being of her minor children accompanied him to the matrimonial home on such occasions.

4. On 30.09.2011, there was marriage of the daughter of Smt. Satya Devi (PW-3), real aunt (Mausi) of the accused in the same village. In the evening after departure of 'Barat' everybody present there were dancing. The accused, who was under the influence of liquor, asked the deceased to dance with him, however, she finding the presence of elderly placed persons present there, refused to dance with him. He got offended. When deceased returned to the house, he also came behind. He administered her beatings in the ground floor of the house, when she went to upper storey to sleep; the accused came there also and administered her beatings. She being offended from the beatings administered to her and also such cruel behaviour of the accused, went to kitchen and taken out kerosene oil lying there above the hearth. She poured kerosene oil on her and lit match stick and set herself on fire.

5. The accused on finding the deceased under fire picked up her and started extinguishing fire. He, however, failed in his attempt to extinguish the fire, as the deceased received burn injuries over 80-90% on her entire body. He also received burn injuries on his person. On hearing hue and cry his aunt Smt. Satya Devi, PW-3 and another neighbour Smt. Vyasa Devi, PW-4 rushed to the spot. They noticed the accused having picked up the deceased in his arms at that time. The deceased was shifted to Dr. Rajinder Prasad Medical College, Tanda, District Kangra. She was attended upon by the doctor on duty in the causality department. On being informed by the doctor on duty, the police arrived in the hospital and sought the opinion qua fitness of the deceased vide application Ext. PW-6/A. In the opinion of the doctor on duty, she, however, was not fit to make any statement. On 2.12.2009, police again sought the opinion of the doctor qua fitness of deceased to make statement, Dr. Sanjay Sood, PW-14 found the deceased fit to make statement vide his opinion Ext. PW-13/A on the application Ext. PW-6/A. The statement Ext. PW-10/A was thus came to be recorded by ASI Dujesh Kumar in the presence of Dr. Aman Verma. It is, thereafter deceased died in the hospital on 5.12.2009 around 10.30 p.m.

6. The investigating agency on the completion of the investigation has filed the challan against the accused in the trial Court. Learned trial Judge on finding that the evidence available on record suggests the involvement of the accused in the commission of the offence framed charge against him under Section 498-A and 306 of the Indian Penal Code.

7. The parties were put to trial. The prosecution in turn has examined the complainant Sh. Sihnu Ram, PW-1 brother of deceased and her another brother Sh. Piare Lal as PW-2. Smt. Satya Devi and Smt. Vyasa Devi, who witnessed the incident of fire and the deceased as well as the accused in injured condition had also stepped into the witness box as PW-3 and PW-4. The remaining witnesses are formal. PW-5 is Dr. Aakanksha Singh who has conducted the post-mortem o the dead body of deceased Indira Devi, whereas, PW-6 Dr. Harsh Vardhan Singh casualty Medical Officer, who attended upon the deceased in causality when she was brought there. Dr. Aman Verma, Assistant Professor Department of Surgery in whose presence statement of deceased was recorded by ASI Dujesh Kumar, PW-

10 as well as Dr. Sanjay Sood who had given opinion Ext. PW-13/A qua fitness of the deceased to make statement.

8. The remaining prosecution witnesses are police officials as PW-7 Constable Ranjeet Singh had entered the rapat Ext. PW-7/A in the rojnamcha, whereas, PW-9 Inspector Rajiv Attri, the then SHO, Police Station, Dharamshala had prepared the challan on the completion of the investigation. PW-10 ASI Dujesh Kumar, PW-11 ASI Krishan Chand and PW-12 Head Constable Sukesh Kumar are the investigating officers who have partly conducted investigation of the case. PW-8 Anup Verma is the photographer.

9. On the other hand, when the accused examined under Section 313 Cr.P.C he has denied the entire prosecutions case either being wrong or for want of knowledge and stated that he is innocent and has been implicated in this case falsely.

10. Learned trial Court on appreciation of the evidence available on record and also hearing the parties on both sides has arrived at a conclusion that the charge against the accused is not proved beyond all reasonable doubt. He has, therefore, been acquitted from the charge framed against him vide judgment under challenge in the present appeal.

11. The legality and validity of the judgment under challenge has been assailed on the grounds inter-alia that cogent and reliable evidence produced by the prosecution has erroneously been brushed aside. The evidence as has come on record by way of the testimony of complainant PW-1 and also from that of PW-2 and PW-13 Dr. Aman Verma in whose presence statement Ext. PW-10/A was recorded is stated to be not appreciated in its right perspective. It is pointed out that such evidence amply demonstrates that deceased had committed suicide after being beaten up by the accused immediately after the commission of suicide by her. There being overwhelming cogent and reliable evidence available on record, the present was a case of conviction of the accused, however, learned trial Court allegedly erred legally and factually while acquitting the accused from the charge.

12. We have heard Mr. D.S. Nainta, learned Additional Advocate General on behalf of the appellant-State and Mr. Rajesh Mandhotra, Advocate representing the accused-respondent and also gone through the entire record.

13. In order to understand as to what constitutes the commission of an offence punishable under Sections 498-A and 306 of the Indian Penal Code in legal parlance, we are drawing support from the judgment rendered by a Co-ordinate Bench of this Court in **State of H.P.** versus **Pradeep Singh and another, Latest HLJ 2013 (HP) 1431**. This judgment reads as follows:

> "10. At the outset it is desirable to discuss as to what constitutes the commission of an offence punishable under Sections 498-A and 306 of the Indian Penal Code. A bare reading of Section 498-A reveals that sine qua non to establish the said offence is subjecting to cruelty the wife by her husband or relative with a view to coerce her or any person related to her to meet any unlawful demand for any property or valuable security or willful conduct of the husband of such woman or a relative, of such a nature as is likely to drive her to commit suicide or to cause grave injury or danger to life, limb or health.
>
> 11. The **Apex Court in Manju Ram Kalita** versus **State of Assam (2009) 13 Supreme Court Cases 330** has held as under:
>
> > "21. "Cruelty" for the purpose of Section 498-A IPC is to be established in the context of Section 498-A IPC as it may be different from other statutory provisions. It is to be determined/inferred by considering the conduct of the man, weighing the gravity or seriousness of his acts and to

find out as to whether it is likely to drive the woman to commit suicide, etc. It is to be established that the woman has been subjected to cruelty continuously/persistently or at least in close proximity of time of lodging the complaint. Petty quarrels cannot be termed as "cruelty" to attract the provisions of Section 498-A IPC. Causing mental torture to the extent that it becomes unbearable may be termed as cruelty."

12. So far as the commission of offence punishable under Section 306 of the Indian Penal Code is concerned, the prosecution is required to prove beyond all reasonable doubt that some person has committed suicide as a result of abetment by the accused.

13. In the case in hand, the deceased had committed suicide on 25.5.2008 in her matrimonial home at village Nau-Shehra, District Kangra, H.P. One of the ingredients of the commission of offence under Section 498-A IPC, therefore, stands proved. The prosecution, however, is further required to prove that it is the accused alone who had abetted the commission of suicide by the deceased.

14. Abetment has been defined under Section 107 of the Indian Penal code. Its simple meaning is that a person abets the doing of a thing who firstly instigates any person to do a thing, or secondly, engages with one or more other person or person in any conspiracy for doing of that thing, if any act or illegal omission takes place in pursuance of that conspiracy, and in order to doing of that thing, or intentionally aids, by any act or illegal omission, the doing of that thing can be said to have abetted the doing of that thing.

15. Now if coming to the case in hand, whether it is the accused alone, who instigated the deceased to commit suicide within the meaning of Section 107 IPC, has to be seen from the evidence available on record. It is worthwhile to mention here that in a case of this nature, torture and harassment ordinarily is meted out to the victim in the four walls of the house and such cases mostly depend upon the circumstantial evidence. In the absence of direct evidence, the legislature in its wisdom has enacted Section 113-A of the Indian Evidence Act which provides that if a married woman commits suicide within the period of seven years from the date of marriage and there are allegations that she did so because of being subjected to cruelty by her husband or relatives of her husband or by both. Having regard to all other circumstances, the Court can presume that she has committed suicide on being abetted by her husband or by such relatives of her husband. The **Apex Court in Wazir Chand and another** versus **State of Haryana (1989) 1 Supreme Court Cases 244** has held that if any person instigates any other person to commit suicide and as a result of such instigation, the other person commits suicide, the person causing the instigation is liable to be punished under Section 306 of the Indian Penal Code.

16. In case of suicidal death, the onus to prove that suicide was abetted by the accused alone is on the prosecution and to raise the presumption under Section 113-A of the Evidence Act, one of the ingredients that the deceased was subjected to cruelty is required to be proved first by the prosecution."

14. The above legal position make it crystal clear that the commission of an offence under Section 498-A of the IPC can be inferred from the conduct, the gravity and seriousness of the acts of cruelty attributed to the accused and also that such acts were sufficient to drive the victim to commit suicide. It is also to be established that victim was being subjected to cruelty continuously and in close proximity of time of the occurrence.

Wear and tear of the normal married life and petty quarrels cannot at all constitute 'cruelty' to attract the provisions contained under Section 498-A of the Code.

15. The cruelty for the commission of an offence under Section 498-A of the Indian Penal Code should be on account of harassment of the woman with a view to coerce her or Any person related to her to meet any unlawful demand for any property or valuable security or on account of failure by her or any person related to her to meet such demand.

16. Now if coming to the charge under Section 306 of the Indian Penal Code framed against the accused, no doubt, the deceased Smt. Indira Devi has committed suicide, however, it is the accused who alone has abetted the commissions of suicide by her need proof cogent and reliable and beyond all reasonable doubt.

17. Adverting to the case in hand, Sihnu Ram, PW-1 is the complainant, because FIR Ext. PW-1/A has been registered at his instance on 1.12.2009 in the mid night. Nothing has come in the FIR that deceased was being tortured and harassed at the pretext of demand of dowry or any valuable security. The allegations, rather are that accused started maltreating her after 2-3 months of marriage without any rhyme or reason. Meaning thereby that if there was any torture and harassment of the deceased at the hands of the accused, it was on account of wear and tear of normal married life and not to coerce her for dowry or any other valuable security with a view to derive her to commit suicide. The case that on 2-3 occasions on account of being beaten up by the accused, deceased went to the house of her parents plausible or not is again doubtful because no evidence is forthcoming to show that the deceased or her parents have reported the matter if not to the police to Gram Panchayat or Ward Member etc. etc.

18. Now if coming to the testimony of complainant PW-1 he has only said whatever he reported to the police in his statement under Section 154 of the Code of Criminal Procedure, Ext. PW-1/A. There is nothing in his statement that alleged harassment and torture of the deceased at the hands of the accused was at the pretext of the demand of dowry or some valuable security. Interestingly enough, PW-1 was not in talking terms with the accused for the last 5-6 years as he said in his cross-examination. His admission that the deceased did not visit their house (parental house) for the last 5-6 years lead to the only conclusion that she was happy in the matrimonial home and was not being tortured or harassed to an extent so as to compelled her to commit suicide.

19. Now if version of PW-2, Sh. Pyare Lal another brother of deceased is seen, he has introduced a story that accused was a habitual drunkard. However, nothing to this effect has come in his testimony nor in the statement of PW-1 recorded under Section 154 of the Code of Criminal Procedure Code, Ext. PW-1/A. If the prosecution case that deceased has committed suicide after being treated with cruelty by the accused, a reference can be made to the statement of Smt. Satya Devi, PW-3 and Smt. Vyasa Devi, PW-4. As a matter of fact, these two ladies who on hearing hue and cry rushed to the house of the accused. They both tells us that when reached there, they noticed the accused having picked up and placed the deceased in injured condition in his lap. Both had burn injuries on their person. True it is that PW-3 and PW-4 being aunts of the accused are in his close relations, however, when cross-examined by learned Public Prosecutor, nothing could be elicited, lending support to the prosecution case or that they have deposed falsely to save the accused from his prosecution. PW-2 has also admitted in his cross-examination that accused remained under treatment in the hospital on account of burn injuries he sustained on his person while extinguishing the fire. Even the accused having sustained burn injuries is also substantiated from the MLC Ext. PW-6/C. Therefore, admitted case of the parties is that the deceased on seeing his wife under fire came for her rescue without caring for his own life

and made every possible effort to extinguish the fire, however, unsuccessfully because by the time he succeeded in his attempt to extinguish fire the body of his wife had already burnt to an extent of more than 80%, as has come in the statement of PW-6, Dr. Harsh Vardhan Singh who had attended upon her in the casualty of Dr. Rajinder Prasad Government Medical College, Tanda. Therefore, such evidence available on record leads to the only conclusion that had there been intention of the accused to torture the accused with a view to instigate her to commit suicide, there was no question of his coming for her rescue.

20. Much has been said about the statement of deceased Ext. PW-10/A recorded by PW-10 ASI Dujesh Kumar under Section 161 of the Code of Criminal Procedure. The deceased was not in a position to make any statement on 1.12.2009, as is apparent from the opinion of Dr. Harsh Vardhan Singh, Ext. PW-6/B. She, however, was declared fit for making statement by another doctor i.e. PW-14 Dr. Sanjay Sood as per endorsement Ext. PW-13/B. Dr. Sanjay Sood while in the witness box as PW-14 has expressed his inability to tell as to whether he attended to the patient or not, however, according to him, she was examined by him before giving his opinion regarding her fitness to make statement. He also admitted that burn injuries were around 90%. The same could have affected the mental faculty of the patient. He also admitted that as per application Ext. PW-6/A, there were two persons admitted for treatment. The close scrutiny of this witness reveals that he is not certain as to whether deceased was attended upon by him while admitted in the hospital or not. Therefore, it cannot be inferred that his opinion that she was fit to make statement is correct. Otherwise also, when the injuries were to an extent of 90% and the mental faculty of deceased impaired thereby, how she could have make a parrot like statement, in the manner as recorded in Ext. PW-10/A, particularly when as per the version of her brother PW2 during the period remained admitted in the hospital, there was no improvement in her health condition and her condition remained as it is right from her admission till death. Therefore, it is doubtful that she was fit to make the statement on 2.12.2009. Above all, in the application Ext. PW-6/A, there is reference of admission of deceased and the accused both in the hospital for treatment. On this score also, it cannot be said that opinion Ext. PW-13/A was given by PW-14 in respect of fitness of deceased alone and not that of her husband, the accused.

21. Now, if coming to the testimony of PW-3 and PW-4 though they both turned hostile to the prosecution, however, their testimony that when they reached on the spot and noticed the deceased in an injured condition asked her as to what happened and the deceased replied that she had set herself on fire at her own. Such evidence having been brought on record by the prosecution itself has caused a major dent in the prosecution story, therefore, the prosecution has failed to prove beyond all reasonable doubt that the deceased has committed suicide after being beaten up by the accused.

22. Now if coming to further case of the prosecution that deceased was given beatings by the accused on being offended from her denial to dance with him in the marriage, true it is that this aspect of the prosecution case stands established from the prosecution evidence because the marriage was in the house of PW-3 and she has admitted that on being asked by the accused to dance with him, the deceased refused to dance with him. PW-4 has also stated so while in the witness box. However, when returned to home he actually administered beatings to the deceased, no evidence is forthcoming to substantiate the same. Otherwise also, had she been slapped or administered beatings by the accused would neither amounts to her continue harassment nor that the mere beatings so administered was sufficient to instigate her to take such a drastic decision to put an end of her life, more particularly, when two minor children were dependent upon her. Therefore, we are not satisfied that accused had instigated the deceased to commit suicide or abetted the commission of suicide by her within the meaning of Section 107 of the Indian Penal

Code. As a matter of fact, the present rather is a case where nothing suggesting that the deceased was being tortured or harassed by the accused in relation to demand of dowry or any other valuable security has come on record. The present is also not a case where it cannot be said that degree of cruelty was of such a nature that she was not able to make difference between the life and death and chosen the pangs of death. We are oblivious of the fact that in normal circumstances, no one takes such a drastic step to do away with his/her life that too without there being any cause, however, in this case whether the deceased had committed suicide owing to the cruel treatment meted out to her by the accused is not proved on record.

23. In view of what has been said hereinabove, this appeal fails and the same is accordingly dismissed. The personal bonds furnished by the accused shall stand cancelled and the surety discharged.

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

Tek Bahadur .....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 167 of 2015
Reserved on: November 18, 2015.
Decided on: November 19, 2015.

Indian Penal Code, 1860- Section 302- Accused along with his family members was living in the ground floor of the house of one 'V' and used to work in his orchard - accused was in the habit of beating his wife under the influence of liquor- accused also suspected her character- on the date of occurrence 'V' heard the cries of children of accused - when he came down, he found deceased, wife of accused, lying in the veranda with the injuries- accused was carrying a darat and he tried to give another blow on the neck of the deceased- accused was over-powered and was handed over to police- trial court convicted the accused – in appeal held, that witnesses 'V' and others; who had gathered on the spot, on being informed by 'V' had noticed that deceased was given cut injury on her neck- they had categorically stated about the facts- defence of the accused that deceased had died as she fell on the blade of the wood cutter machine installed nearby was rightly discarded by trial Court as there was no blood on the wood cutter machine- defence of the accused that he requested 'V' and others to take his wife for medical assistance also not proved on record- guilt of the accused rightly established- appeal dismissed. (Para-7 to 15)

For the appellant: Mr. Lovneesh Kanwar, Advocate.
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 23.1.2015 rendered by the learned Addl. Sessions Judge (I), Shimla, H.P. in Sessions Trial No. 7-S/7 of 2013, whereby the appellant-accused (hereinafter referred to as accused), who was charged with

and tried for offence punishable under Section 302 IPC, has been convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs. 25,000/- and in default of payment of fine, he was ordered to further undergo simple imprisonment for one year.

2. The case of the prosecution, in a nut shell, is that the accused along with his family members i.e. Roopmati (his wife) and three children, was living in the ground floor of the house of Vinod Kumar son of Lok Pal Mokta. He was working in the orchard of Vinod Kumar. The accused used to give beatings to his wife under the influence of liquor and he also suspected her character. The complainant Vinod Kumar heard noise of weeping of children of accused. He came down from his house and saw that accused armed with darat was wandering in the courtyard proclaiming that he would cut all the family members. Smt. Roopmati (since deceased) was lying in the verandah. Kumari Shobha, minor daughter of accused aged about 13 years, was sitting by the side of Roopmati. She was weeping. The accused hit darat on the neck of his wife. Vinod Kumar took the danda and asked the accused to drop the darat. The accused dropped the darat. The accused was overpowered by Vinod Kumar with the help of his brother Manoj Mokta. The neighbour Aditya Parkash Mokta, Member Rajinder Singh and Pardeep Mokta were also called to the spot. Roopmati died on the spot due to the injury sustained by her. The police was informed. The police reached the spot and recorded the statement of Vinod Kumar under Section 154 Cr.P.C vide Ext. PW-3/A, on the basis of which FIR Ext. PW-10/A was registered at PS Jubbal. The weapon of offence i.e. darat Ext. P-3 was taken into possession during investigation. The I.O. also prepared the rough sketch of the darat. Soil and sample soil were also lifted from the spot vide memo Ext. PW-2/A. The inquest reports Ext. PW-12/A and PW-12/B were prepared. Blood stained jacket worn by the accused at the time of the incident, was also taken into possession. Supplementary statements of Vinod Kumar, Kumari Shobha, Rajinder, Pardeep Manoj Kumar and Aditya Parkash were also recorded under Section 161 Cr.P.C. The accused was arrested. The post mortem of the dead body was got conducted in Civil Hospital Jubbal. The post mortem report is Ext. PW-1/C. The statement of Km. Shobha under Section 164 Cr.P.C. was recorded by JMIC (2), Rohru, as per Ext. PW-8/D. The identification of the spot was also carried out. The case property was taken into possession. On completion of the investigation, challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 13 witnesses. The accused was also examined under Section 313 Cr.P.C. He denied the incriminating circumstances put to him. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Lovneesh Kanwar, Advocate for the accused has vehemently argued that the prosecution has failed to prove the case against the accused. On the other hand, Mr. Ramesh Thakur, Asstt. Advocate General, appearing on behalf of the State, has supported the judgment of the learned trial Court dated 23.1.2015.

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

6. PW-1 Dr. Gagan Sharma has conducted the post mortem examination. According to him, the victim died due to hypovalemic shock following massive hemorrhage from wound site probably leading to cerebral hypoxia and cardio pulmonary arrest. The post mortem report is Ext. PW-1/C.

7. PW-2 Rajinder Singh deposed that he received telephonic call of Vinod Kumar at 11:45 PM. He was Ward Member of the Panchayat. He told him that the accused has committed murder of his wife. He went to the spot. At that time, Vinod Kumar, Aditya

Parkash, Pardeep Kumar and Manoj Kumar were already present there. The accused was also present on the spot. He saw the dead body lying outside the door of the room of the accused. The police had reached the spot. The police clicked the photographs. Blood stained soil was lifted from the spot and put in the "*dibi*" and sealed in a parcel.

8. PW-3 Vinod Kumar is the most material witness. According to him on 11.1.2013 at about 11:30 PM, he heard noise of weeping of children. He woke up and went towards the ground floor and saw accused moving alingwith the darat in his hand. His children were weeping. Accused was proclaiming that he would cut into pieces one and all. The wife of accused was lying dead near the wood cutter which was outside the room of the accused and children were found weeping. He asked the accused to throw the darat. He had danda in his hand. Accused tried to go inside and hit his wife in the throat with darat in his presence while she was dead. Thereafter, he hit the accused by danda and the accused threw the darat outside. He called neighbour and brother Manoj. They overpowered the accused. He informed the police. The police reached the spot after 30/45 minutes. In his cross-examination, he deposed that the hospital was at a distance of 1 km. and it takes about half an hour to reach the hospital. The Police Station was also at the same distance. He admitted that when he reached at the spot, Roopmati was lying dead near the wood cutter machine. Wood cutter machine belongs to him and its blade is having 12 inches radius. He reached the spot within 30 seconds from his room after hearing noise of weeping. He switched on the light of his room and verandah. He reached the spot. He did not touch the body of Roopmati but there was no movement. Firstly, he tried to ask accused to hand over the darat as there was danger to his life. No other villagers had engaged Nepali as labourer in their houses. In the room of the accused there was electricity but outside the room there was no electricity. First he called villagers and thereupon he called the police. His Uncle Parkash Mokta was the first person who reached the spot.

9. PW-4 Aditya Parkash has supported the version of PW-3 Vinod Kumar. He received the call on his mobile phone of Vinod Kumar at 11:30 PM. He reached the spot. Accused was working as servant with Vinod Kumar. He was residing in the ground floor of the house of Vinod Kumar along with his family. Vinod Kumar and Manoj Kumar had caught hold of the accused when he reached there. Pardeep Kumar also reached the spot. Rajinder Kumar, Ward Member came after some time. He saw Roopmati lying on the ground near to the door in injured condition as there was injury on her neck and blood was oozing out. She was dead. Vinod Kumar told him that accused has killed his wife by hitting darat. Thereafter, police was informed. In his cross-examination, he admitted that there was wood cutter in the ground floor. Accused had not made any request to him to take his wife for medical treatment to the hospital. His statement was recorded by the police.

10. PW-5 Pardeep Chand deposed that at 11:30 PM, he received telephonic call of Vinod Kumar who told him that accused has hit darat on the neck of his wife. He asked him to come to his residence. Vinod Kumar is his neighbour. Accused was his servant. He reached on the spot. On the spot Vinod Kumar also informed him that accused has killed his wife with darat. The darat was lying on the spot. The police was informed. In his cross-examination, he denied the suggestion that accused has asked him to take his wife for treatment to hospital. He also denied that accused has put his jacket on the neck of Roopmati.

11. PW-8 Dhiru Thakur, JMIC, Jubbal has recorded the statement of Km. Shobha, daughter of accused (Tek Bahadur). He has personally assured himself that the statement of Shobha was voluntary. The statement was recorded as per the version of Shobha Devi under his supervision. The witness was identified by the I.O. He put his signatures on the statement after reading over the contents to Shobha.

12. PW-12 ASI Raj Kumar deposed that on 12.1.2013, Vinod Kumar Mokta resident of Labrot made a telephone call at PS Jubbal. He along with Const. Pyare Lal and others went to the spot. The statement of Vinod Kumar was recorded under Section 154 Cr.P.C. vide Ext. PW-3/A. On the basis of his statement, FIR Ext. PW-10/A was registered. The darat was taken into possession. The spot was investigated. The spot was also identified by the accused. He denied the suggestion in his cross-examination that accused was proclaiming on the spot that somebody hit his wife and ran away towards jungle side. He also denied the suggestion that accused has requested him to search for that person who ran towards jungle side. He prepared the site plan and recorded the statements of the witnesses under Section 161 Cr.P.C.

13. PW-13 SI/SHO Daya Ram Thakur deposed that on 16.1.2013 the case property was sent to FSL, Junga. The statement of Shobha, daughter of the accused, was recorded under Section 164 Cr.P.C. vide Ext. PW-8/D.

14. PW-3 Vinod Kumar was the employer of the accused. The accused was residing in his house along with his family. He heard the cries of children on 11.1.2013 at around 11:30 PM. He came down and saw that accused was armed with darat. He asked the accused to hand over the darat. The darat was thrown by the accused. He informed his relations. They came on the spot. The police was also informed. The police reached the spot and the case property was taken into possession. The statement of PW-3 Vinod Kumar has been duly corroborated by PW-4 Aditya Parkash and PW-5 Pardeep Chand. It has come in the statement of PW-3 Vinod Kumar that the accused used to administer beatings to his wife under the influence of liquor. He was also suspecting her character.

15. The cause of death, as per the statement of PW-1 Dr. Gagan Sharma, was hypovalemic shock following massive hemorrhage from wound site, probably leading to cerebral hypoxia and cardio pulmonary arrest. The post mortem report is Ext. PW-1/C. Mr. Lovneesh Kanwar, Advocate, for the accused has vehemently argued that Roopmati received injuries when she accidently fell on the woodcutter in the darkness. This version cannot be believed. No blood marks were found on the wood cutter. The other defence taken by the accused is that somebody else gave blow on the neck of Roopmati and thereafter he fled away from the spot towards the jungle. This version also cannot be believed. There is no evidence on record to prove that Roopmati had any enmity with anybody. The suggestion given by the learned counsel for the accused to this effect was denied by the I.O. PW-12 ASI Raj Kumar. The statement of Shobha Devi Ext. PW-8/D also gives credence to the prosecution version, the manner in which the accused has advanced darat blows on the neck of deceased Roopmati. Thus, the prosecution has fully proved the case against the accused under Section 302 IPC. There is no occasion for us to interfere with the well reasoned judgment of the learned trial Court.

16. Consequently, there is no merit in this appeal and the same is dismissed.

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

Ram Kumar (since deceased) through his LRs. Rohit Sharad and ors. .....Appellants.

Versus

Smt. Hukmi Devi (deceased) & Lekh Raj and ors. .....Respondents.

RSA No. 548 of 2003.
Reserved on: 17.11.2015.
Decided on: 20.11.2015.

Specific Relief Act, 1963- Section 5- Plaintiff filed a suit for possession on the ground that father of the defendant got himself recorded as kabiz during settlement and took possession of the suit land- defendants were requested to hand over the possession but the possession was not delivered- said entry was made for the first time showing the name of the father of the defendant in the column possession- there is no basis for recording the same- no entry was made regarding the payment of the rent- no evidence was produced by the defendants to show that land was handed over to the defendant for cultivation- appellate court had rightly dismissed the suit. (Para-12 to 15)

For the appellant(s): Mr. Neeraj Gupta, Advocate.
For the respondents: Nemo

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Kangra at Dharamshala, H.P., dated 10.7.2003, passed in Civil Appeal No. 72-J/XIII/2001.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the appellant-plaintiff (hereinafter referred to as the plaintiff), has instituted suit for possession of land, as detailed in the plaint. According to him, he was owner along with other co-sharers of the suit land. However, during the settlement in the year 1981-82, the father of respondents-defendants (hereinafter referred to as the defendants), namely, Dharam Chand, got himself recorded as *kabiz* and thereafter took forcible possession of the suit land. After the death of Dharam Chand, the defendants are in possession of the suit land. They were requested to hand over the possession and admit the claim of the plaintiff, but they refused to do so.

3. The suit was contested by the defendants. They denied that the father of the defendants in the year 1981-82, manipulated the entry of possession and thereafter took forcible possession of the suit land.

4. The learned Sub Judge Ist Class, Jawali, Distt. Kangra, framed the issues on 27.3.1998. The suit was decreed vide judgment dated 8.3.2001. The defendants, feeling aggrieved, preferred an appeal against the judgment and decree dated 8.3.2001. The learned District Judge, Kangra at Dharamshala, allowed the same on 10.7.2003. Hence, this regular second appeal.

5. The regular second appeal was admitted 7.4.2004 on the following substantial questions of law:

> "1. Whether the lower Appellate court has wrongly ignored from consideration the material evidence i.e. the entries in the revenue records in favour of the plaintiff-appellant, showing owner to be in possession of the suit land consistently and also misreading the documentary evidence holding that the entries in favour of the defendants-respondents or their predecessor are not stray entries?
>
> 2. Whether the Lower Appellate Court has committed grave error of law in wrongly applying the principles of law to the entries in favour of the defendants-respondents showing them to be in possession which entries were without any basis, when it was a contrary situation? Has not the Lower

Appellate Court ignored the material evidence and the pedigree table which showed the correct parentage of the predecessor-in-interest of the defendants-respondents who was never a tenant recorded in the revenue record prior to 1981-82 which entries in the revenue records have not been proved to be having any lawful and legal basis? Are not such findings illegal, erroneous and perverse?"

6. Mr. Neeraj Gupta, Advocate, appearing on behalf of the appellant, on the basis of the substantial questions of law framed, has vehemently argued that there was misreading of the documentary evidence, more particularly, the revenue entries by the first Appellate Court. According to him, the forefathers of the defendants were never recorded as tenants in the revenue record prior to 1971-72 as per the pedigree table.

7. I have heard Mr. Neeraj Gupta, Advocate and have also gone through the judgments and records of the case carefully.

8. PW-1 Ram Kumar deposed that the defendants have forcibly taken possession in the month of February, 1982. Their possession was illegal. They were requested to hand over the possession but they refused to do so.

9. DW-1 Hans Raj deposed that he cultivated the suit land as tenant and before that their father was cultivating the same as tenant against *Galla Batai*. They have become owner of the land under the Tenancy Act. The plaintiff has never cultivated the suit land. The defendants were cultivating the suit land since their forefathers. He could not produce the receipt of *Galla Batai*. His father used to say that the owner used to take *Galla* and used to issue receipt against the same. He did not know when the settlement took place.

10. DW-2 Mangat Ram deposed that previously suit land was cultivated by their father and after his death, the defendants were cultivating the same as tenants.

11. DW-3 Milkhi Ram in his cross-examination has admitted that plaintiff Ram Kumar and Ram Swarup were the owners of the suit land. He also admitted that no document was prepared at the time of taking over the land for cultivation in agreement.

12. The learned District Judge has not correctly appreciated Ext. D-1, copy jamabandi for the year 1966-67. It is not borne out from this jamabandi that Dharam Chand was inducted as tenant. The stray entry for the first time has appeared in the *Missal Haquiat* for the year 1971-72 Ext. D-2, whereby the name of Dharam Chand was shown, however, surprisingly enough, in the jamabandi for the year 1980-81 (Ext. P-2, and copy of jamabandi for the year 1990-91 (Ext. P-1), Dharam Chand has been shown to be merely in the possession of the suit land. He has not been shown to be the tenant. The copy of Jamabandi for the year 1977-78 Ext. P-3 also does not show either the defendants or their forefather in possession of the suit land. Dharam Chand has not been shown to be tenant against payment of *Galla Batai*.

13. There is only one stray entry in Ext. D-2 copy of jamabandi for the year 1971-72. However, there is no basis for recording the same. The stray entry could not be taken into consideration to prove that the defendants or their forefather were inducted as tenants and they have become owners after the coming into force of the H.P. Tenancy and Land Reforms Act..

14. DW-1 Hans Raj, though has stated that his father used to cultivate the land after paying *Galla Batai*, but the fact of the matter is that no receipt whatsoever, was produced. Similarly, DW-3 Milkhi Ram has admitted that plaintiff Ram Kumar and Ram

Swarup were the owners of the suit land. He could not produce any writing whereby the land was handed over to the defendants for cultivation.

15. In Ext. D-1 name of the father of Dharam Chand has been shown as Baria but as per Ext. P-6 Naksha Shajra, the name of the father of Dharam Chand has been recorded as Nathu. The defendants have failed to prove that they were inducted as tenants and have become owners of the suit land under the H.P. Tenancy and Land Reforms Act. There is no document placed on record to prove how the stray entry, for the first time, in Ext. D-2 copy of jamabandi for the year 1971-72 was incorporated showing Dharam Chand as tenant. The substantial questions of law are answered accordingly.

16. Accordingly, the appeal is allowed. Judgment and decree of the learned first appellate Court dated 10.7.2003 is set aside and judgment and decree of the learned trial Court dated 8.3.2001 is restored.

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

Amit Kumar .....Petitioner.

Versus

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

Cr. Revision No. 270 of 2015
Decided on : 21.11.2015

Code of Criminal Procedure, 1973- Section 311- During trial the Magistrate suo motu exercising the power under Section 311 Cr.P.C ordered summoning of victim of offence 'N' and also one 'R', owner of offending vehicle as witness- accused felt aggrieved and challenged the order by way of revision- held, that power under Section 311 of Cr.P.C can be invoked at any stage before the pronouncement of judgment- since, one 'N', victim of the offence had appeared as witness before the MACT Court, therefore, he was rightly summoned by the trial Court suo motu being material witness - N was not associated by the investigation officer as a witness as he was incapacitated by the accident-similarly, owner of the offending vehicle was rightly summoned- petition dismissed. (Para-1 and 2)

For the Petitioner: Mr. Desh Raj Thakur, Advocate.
For the Respondents: Mr. Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered

Sureshwar Thakur, J (oral)

In its impugned order the learned trial Court while suo moto exercising powers under Section 311 Cr.P.C ordered the summoning of Naresh Kumar, the victim of the offence as also of Ms. Rain Sudha Arora, the owner of the offending vehicle as witnesses. The necessity which prevailed upon the learned trial Court to Suo moto summon Naresh Kumar and Ms. Rain Sudha as witnesses to sustain the charge against the accused/revisionist herein arose from the factum of the Investigating Officer having in his final report erroneously displayed qua the victim of the offence, Naresh Kumar, while being in-capacitated by the injuries sustained by him in the accident, hence his being rendered

incompetent to depose as a prosecution witness. The occurrence of the aforesaid erroneous reflection therein was inferred by the learned trial Court to arise from the factum of Naresh Kumar having in a petition preferred before the learned MACT-II, Sirmaur at Nahan for compensation arising from his having sustained injures in a motor vehicles accident allegedly caused by the rash and negligent driving of its driver, deposed as a witness before it. The learned counsel for the petitioner has not controverted the factum as displayed in the order impugned before this Court, of Naresh Kumar having deposed as a witness before the MACT-II Sirmaur at Nahan. Consequently, the learned trial Court did not err in concluding in its impugned order of the Investigating officer having fallaciously displayed in his final report the factum of the victim of the offence namely Naresh Kumar while being enjoined with a disability gained by him in a Motor vehicles accident his being disabled besides incompetent to depose as a witness before the learned trial Court for sustaining the prosecution case. However, the limited address by the learned counsel for the petitioner herein before this Court for seeking reversal of the impugned order is hinged upon the factum of the power invested in the learned trial Court under Section 311 of Cr.P.C being available for reliance or succor only prior to the recording of the statement of the accused under Section 313 of Cr.P.C or prior to the recording of the depositions of the witnesses adduced in his defence by the accused. Its dependence by the learned trial Court subsequent to the completion of the aforesaid stages is canvassed to be grossly untenable as any reliance thereupon thereafter preceding the rendition of a judgment by the learned trial Court, especially with the proceedings occurring thereafter not tantamounting to pendency of " a trial" before the learned trial Court whereat only its invocation by the learned trial Court would be rendered legally proper. In other words he contends that on completion of the aforesaid stages besides prior to rendition of a judgment by the learned trial Court, the trial stood concluded or terminated, hence the provisions of section 311 Cr.P.C are un-attractable thereafter as untenably invoked by the learned trial Court. In sustaining the aforesaid submission the learned counsel for the petitioner relies upon a judgment reported in 2004 CRI.L.J 555 titled K. Sajeendran v. Secretary, Thalakulathur Gram Panchayat, whose relevant paragraphs 6 to 8 stand extracted hereinafter.

> "6. Section 353(1) of the Code of Criminal procedure speaks about judgment.
>
> "353 (1) The judgment in every trial in any criminal Court of original jurisdiction shall be pronounced in open court by the presiding Officer immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleader-
>
> (a) by delivering the whole of the judgment; or
>
> (b) by reading out the whole of the judgment; or
>
> (c) by reading out the operative part of the judgment and explaining the substance of the judgment in a language which is understood by the accused or his pleader."
>
> Therefore, the judgment comes on termination of the trial. It can immediately be after the termination of the trial or subsequent to the date on which the case is posted for judgment. Therefore, when the case is posted for judgment, the trial stands terminated.
>
> 7. Admittedly, the case has been posted for judgment by the magistrate. It indicates that, going by section 353 (1) Cr.P.C the trial has been terminated.
>
> 8. The power under section 311 of the code can be exercised, as already mentioned only "at any stage of any inquiry trial or other proceedings". The

other proceedings is alternate to trial or inquiry. In this case, the trial has been terminated when the case was posted for judgment. So the stage of the trial is already over. Consequently, the power under section 311 of the code ought not to have been invoked by the Magistrate."

2. However, the aforesaid submission is legally frail nor also the judgment relied upon by the learned counsel for the petitioner is of any avail to him as the relevant afore extracted paragraphs though dwells upon the stage at which a trial against the accused concludes during course whereof only succor can be suo moto drawn by the learned trial court upon the provisions of section 311 Cr.P.C for summoning any witness/witnesses deemed fit for facilitating or advancing the cause of justice. Contrarily when it has omitted to dwell upon the factum of the signification borne by the subsequent phraseology "other proceedings" occurring in section 311 during whose pendency also the learned trial Court may suo moto draw sustenance thereupon for summoning any witness/witnesses deemed fit besides expedient in its wisdom on an application of mind by it to the available material on record for facilitating it to determine the guilt of the accused qua the offences for which he stood charged especially when the signification borne by the phraseology "other proceedings" to the considered mind of this court takes within its gamut or domain the proceedings occurring subsequent to the conclusion of proceedings under Section 313 of Cr.P.C as also subsequent to the recording of deposition of the defence witnesses adduced by the accused in his defence before the learned trial Court. In the judgment relied upon by the learned counsel for the petitioner supra the learned Court had attributed to the phrase "other proceedings" occurring in Section 311 Cr.P.C the signification or the parlance of it being alternate to trial or inquiry however, even if the trial or inquiry against the accused stood, on closure of proceedings under Section 313 Cr.P.C as also on closure of adduction of defence evidence by the accused, terminated, the other proceedings occurring thereafter remained un-terminated yet open in as much as the proceedings qua the addressing of arguments before the learned trial Court by the learned counsel on either side**.** Given the aforesaid ascription to the signification borne by "other proceedings" occurring in section 311 Cr.P.C naturally when the signification thereof encompasses the stage apposite to the addressing of arguments before the learned trial Court by the learned counsel on either side necessarily the institution of an application at a stage preceding completion of arguments before the learned trial Court, fell within the ambit of the signification borne by the phraseology "other proceedings" occurring in Section 311 Cr.P.C. Necessarily then even when the trial against the accused stood closed or completed on completion of proceedings under Section 313 Cr.P.C or on completion of adduction of evidence in defence by the accused, the learned court was yet seized with jurisdiction to, even before rendition of a judgment, for empowering it to do complete justice, suo moto summon any witness/witnesses as deemed expedient and fit. In the learned trial Court hence having preceding the rendition of a judgment suo moto exercised powers under Section 311 Cr.P.C by summoning Naresh Kumar, victim of the offence and Ms. Rain Sudha Arora, the owner of the offending vehicle as witnesses has not committed a gross impropriety or illegality necessitating interference by this Court in the exercise of its revisional jurisdiction. Apart therefrom even if the victim of the offence is permitted to be led into the witness box no prejudice will be caused to the accused as in the event of his deposing in contradiction to his recorded deposition before the MACT-II, Sirmaur at Nahan, it would be open to the learned defence counsel while conducting his cross-examination to impeach his creditworthiness for belittling his version qua the incident comprised in his examination in chief by confronting him with his previous statement. In view of the above, present petition is dismissed alongwith pending applications, if any.

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

Collector Land Acquisition & another ...Appellants.
Versus
Karam Singh ...Respondent.

RFA No. 382/2008 alongwith others RFA.
Reserved on : 19.11.2015
Decided on: 21.11.2015

Land Acquisition Act, 1894- Section 18- Reference Court awarded compensation @ Rs.60,000/- per bigha with all statutory benefits- PW-3 had purchased two biswas of land for Rs.6,000/- which is situated in the same mohal, where the land was acquired – sale deeds relied upon by the respondent pertaining to the land situated at a distance of 2 k.m. away and in a different mohal- acquired land abutted the State highway- it was irrigated and was situated near the school and hospital- therefore, in these circumstances compensation of Rs.60,000/- per bigha with all statutory benefits is not excessive. (Para-12)

(in all the cases)
For the Appellants : Mr. Shrawan Dogra, Advocate General with Mr. Parmod Thakur, Addl. A.G.
For the Respondents : Mr. G. Palsra, Advocate.

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. However, in order to maintain clarity, facts of RFA No. 382 of 2008 have been taken into consideration.

2. These appeals are instituted against the award dated 30.4.2008, rendered by the Presiding Officer, Fast Track Court, Mandi in reference petition Nos. 146/2002, 11/05, 144/2002, 36/2005, 143/2002, 35/2005, 147 of 2002, 34/2005, 141/2002, 33/05, 149/2002, 32/05, 142.2002, 31/2005, 145/2002, 13/05, 148/2002, 29/2005, 150/2002, 28/05, 151/2002, 20/2005, 152/2002, 19/2005, 153/2002, 22/2005, 154/200217/2005, 155/2002,18/2005, 156/2002, 12/2005, 157/2002, 15/2002, 158/2002, 16/2005, 159/2002, 21/2005, 160/2002, 23/2005, 161/2002, 26/2005, 162/2002, 27/2005, 163/2002, 14/2005, 164/2002, 24/2005, 165/2002, 25/2005 and 166/2002, 30/2005.

3. "Key facts" necessary for the adjudication of these appeals are that notification under Section 4 of the Land Acquisition Act was published H.P. Rajpatra on 11.4.1992. The same was also published in the vernacular newspapers Jansatta on 28.4.1992 and Dainik Tribune on 30.4.1992. Wide publicity was given in the locality on 5.6.1992. The notifications under Sections 6 and 7 were published in H.P. Rajpatra on 18.3.1993. Notifications under Sections 6 and 7 were also published in the vernacular newspapers Jansatta (Hindi) and Milap on 21.3.1993. Wide publicity was also given in the locality on 24.6.1993. The land of the land holders was situated in Mohal Kehar Tehsil Sadar, District Mandi. The Land Acquisition Collector made the award. Respondents-land holders filed references against the award made by the Land Acquisition Collector before the Presiding Officer, Fast Track Court, Mandi. According to the Land holders, market value of

the land was more than Rs. 1 lac per bigha. The petitions were contested by the appellants. According to the appellants, adequate compensation was awarded to the land holders by the Land Acquisition Collector. Rejoinder was filed by one of the land holders. Issues were framed by the Fast Track Court on 6.10.2003. Learned Fast Track Court made an award on 30.4.2008 and awarded compensation @ Rs.60,000/- per bigha with all the statutory benefits. Hence, the present appeals.

4. Mr. Parmod Thakur, learned Additional Advocate General has vehemently argued that the compensation awarded by the Reference Court is exorbitant. He has also contended that the sale deeds Ext. RA and RB have wrongly been overlooked by the Reference Court.

5. Mr.G.R. Palsra, has supported the award dated 30.4.2008.

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

7. Pawan Kumar Sharma has appeared as PW-1. He has relied upon sale deed Ext. PA, dated 1.12.1990. According to him, they were paid compensation @ Rs.20,000/- per bigha. Though, they were entitled to Rs. 1 lac per bigha. The acquired land was fertile and irrigated. It was connected with state highway and national highway. The acquired land was in the vicinity of +2 school and Ayurvedic hospital. The land was suitable for growing fresh vegetables. The possession of the land was taken over in the year 1988. However, in his cross-examination he has admitted that National Highway does not adjoin their land, but their land abuts State Highway.

8. PW-2 Bali Ram has deposed that his father has sold 2 biswas of land @ Rs.3000/- per biswa on 1.12.1990. The price of per bigha land was Rs. One lakh bigha and the land was properly irrigated.

9. PW-3 Asha Devi has deposed that she has purchased 2 biswas of land for Rs.6000/- vide sale deed Ext. PA. She has purchased the land for growing vegetables.

10. RW-1 Ram Singh has produced the sale deeds Ext. RA and Ext. RB. In his cross-examination, he has admitted that the sale deeds were in accordance with the market value. He has not denied that the market value is ordinarily less than the actual value reflected in the sale deed.

11. RW-2 Tulsi Ram has deposed that the land was acquired for the construction of Kuhal under the Balh valley irrigation project. He has admitted that vegetables were grown over the acquired land. He has not denied that the lands sold vide Ext. RA and RB were at a distance about 2 kms from the acquired land. He has admitted that vegetables were sown in some parts of kehar mohal.

12. The notification under Section 4 was published on 11.4.1992. It was duly published in vernacular newspapers Jansatta and Dainik Tribune on 28.4.1992 and 30.4.1992 respectively. PW-3 Smt. Asha Devi has purchased 2 biswas of land for Rs.6000/- vide sale deed Ext. PA. This land is situate in the same mohal where the land has been acquired. So far the sale deeds Ext. RA and RB are concerned, the land of these sale deeds was situate at a distance of 2 Kms from the acquired land in a different mohal. The land acquired was irrigated. It was situated near +2 school. Ayurvedic hospital was also nearby the acquired land. It abuts the state highway. PW-3 Asha Devi has purchased the land for growing vegetables. Learned Presiding Officer Fast Track Court, Mandi has rightly awarded Rs.60,000/- per bighas with statutory benefits. The compensation awarded cannot be held to be exorbitant.

13. Accordingly, in view of the discussion and analysis made hereinabove, all the appeals are 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.

Court on its own motion ....Petitioner

Versus

State of Himachal Pradesh and others ....Respondents

CWPIL No. 23/2015
Decided on 26.11.2015

Constitution of India, 1950- Article 226- One vehicle of Hon'ble Judge was stopped and was challaned – Additional Chief Secretary regretted the incident and apprised the Court that disciplinary proceedings had been initiated against the person(s), for unnecessarily stopping and challaning the vehicle of the Hon'ble Judge of the Court- direction issued that no unsavoury incident should happen with the judges/family members travelling in the vehicle in future- further direction issued to issue the permit to the Advocates for plying their vehicles liberally on restricted roads taking into consideration the arduous duties discharged by them within a period of one week- further direction issued to assure that at least 4 taxies are plied from Shilli Chowk to Majitha House- ambulance/any vehicle carrying patient permitted to ply on restricted/sealed road- further direction issued to communicate the rejection of the permit to the applicant- permission for sealed road restricted only to Hon'ble President of India, Hon'ble Vice President of India, Hon'ble Prime Minister of India, Hon'ble Governor of Himachal Pradesh, Hon'ble Chief Minister of Himachal Pradesh, Hon'ble Chief Justice of Himachal Pradesh, Hon'ble Speaker of Himachal Pradesh State Legislative Assembly, General Officer Commanding of ARTRAC and his Second-in-Command.

(Para-4 to 23)

For the Petitioner : Court on its own motion.

For the Respondents : Mr. Anoop Rattan and Mr. V.S. Chauhan, Additional Advocates General, for respondents No.1 to 6.

Ms. Jyotsna Rewal Dua, Senior Advocate with Ms. Shalini Thakur, Advocate, for and alongwith respondents No. 9 and 10.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge (Oral):

CMP No. 11829/2015

The matter was taken up on the basis of a mention made by Ms. Jyotsna Rewal Dua, learned Senior Advocate.

2. Heard. Mr. K.D. Sood and Mr. Sanjeev Sood, are added as respondents No. 9 and 10. Registry is directed to make necessary corrections in the memo of parties in red ink. Application is disposed of.

CWPIL No. 23/2015

3. Heard at length and the petition is being disposed of at the admission stage due to urgency and question of vital public importance involved.

4. Mr. P.C. Dhiman, learned Additional Chief Secretary (Home) is present in the Court. The Court had an interactive session with him. He has regretted the incidents which have happened whereby one vehicle of the Hon'ble Judge was challaned and other was stopped near Railway Board Building. He has assured the Court that such type of incidents shall not happen in future. He has apprised the Court that disciplinary proceedings have been initiated against the person(s), for unnecessarily stopping and challaning the vehicles of the Hon'ble Judges of this Court. The Additional Chief Secretary is directed that no unsavoury incident should happen with the judges/family members travelling in the vehicle in future.

5. Ms. Jyotsna Rewal Dua, learned Senior Advocate, appearing on behalf of respondents No. 9 and 10 has brought to the notice of the Court that the sealed portion starts from the State Bank of India office to the C.T.O. Building and not from the Railway Board Building, as mentioned in Order dated 21.11.2015.

6. Accordingly, Order dated 21.11.2015 is modified. Sealed stretch shall be treated from State Bank of India (in short 'SBI') to C.T.O. building.

7. Mr. Anoop Rattan, learned Additional Advocate General submits that around ten MLA's are also residing in the Metropole and it would cause immense hardships to them, if they are not permitted to ply their vehicles upto the Metropole.

8. Accordingly, Order dated 21.11.2015, is modified further by directing that only those MLAs, who are residing in the Metropole, can ply their vehicles from Shilli Chowk to Metropole, with a rider that the vehicle after dropping the dignity, shall not be parked on the "***Core Mall Road***" area, in any eventuality.

9. It is also stated at the Bar by the learned advocates present that they are not being permitted to ply their vehicles from Winterfield to the D.C. Office. The Additional Chief Secretary (Home) is also directed that the vehicles of the Advocates shall also not, in any manner, be stopped or challaned while approaching from Winterfield to the D.C. Office. The Additional Chief Secretary (Home) is also directed to ensure that the permits are issued to the Advocates for plying their vehicles liberally on Restricted Road from Kennedy Chowk to Boileauganj and back, taking into consideration the arduous duties discharged by them. Permits shall be issued within a period of one week after receipt of the applications. The applications shall be accompanied by a certificate by the Secretary of the Bar Council, that the learned Advocate is a practicing advocate. We clarify by way of abundant precaution that we have never stopped the plying of H.R.T.C. taxis from S.B.I. building to C.T.O. building.

10. It is also brought to the notice of the Court by the learned Advocates, who are practicing in the State Administrative Tribunal that they are facing difficulty in approaching State Administrative Tribunal due to excessive traffic flow on all the roads including the Cart Road and other artery roads. Accordingly, respondent No. 8 is directed to ensure that atleast 4 taxies are plied from Shilli Chowk to Majitha House. The Court can take judicial note of the fact that the vehicles plying on Restricted roads do not maintain proper speed limit as prescribed under Section 10 of The Shimla Road Users and Pedestrians (Public Safety and Convenience) Act, 2007 (hereinafter referred to as 'Act'). It shall be the responsibility of the Director-General of Police, Himachal Pradesh to ensure that the vehicles ply within the speed limit applicable to the restricted and sealed roads to avoid undue inconvenience to the pedestrians/commoners.

11. Mr. K.D. Sood, (respondent No. 9), has brought to the notice of the Court that, at times, ambulances are not permitted to ply through sealed roads/restricted roads. We order the Additional Chief Secretary (Home) that the ambulances, carrying patients to

the hospitals and back should, not be stopped on any of the restricted or sealed roads. It is also made clear by way of abundant precaution that any vehicle carrying patient shall also be treated as an 'ambulance'.

12. Mr. P.C. Dhiman, learned Additional Chief Secretary (Home) has brought to the notice of the Court that a number of Banks are situate on the sealed/restricted roads and in the Core area of the city. He has also brought to the notice of the Court that currency/ cash is brought in the vehicles. It shall be open to the Additional Chief Secretary (Home) to issue need based permits to the Bank to carry currency. It is also made clear that they shall be provided additional security by the State.

13. Taking into consideration the geography/topography of the Shimla town, the Chief Secretary to the Government of Himachal Pradesh and Additional Chief Secretary (Home) are directed to grant special permits in emergent situations to carry out emergency/ salvage operations.

14. Ms. Jyotsna Rewal Dua, Senior Advocate has also brought to the notice of the Court that though the permits applied for, are cancelled but the decision taken thereupon is not conveyed to the concerned persons. The Additional Chief Secretary (Home) is directed to ensure that as and when permits are rejected, decision thereupon shall be conveyed to the aggrieved persons.

15. In deference to the 4th estate, the permits/permission shall be accorded only to the State Level Accredited Correspondents/High Court Accredited Correspondents on the basis of checklist prepared by the Director, Public Relations/Registrar General of this Court. The State machinery shall ensure that only the State Accredited Correspondents/High Court Accredited Correspondents drive themselves or occupy the vehicle while travelling on the restricted roads. In view of this, direction No. 11 (d) of previous Order dated 21.11.2015 is recalled/modified.

16. This Order has been passed in the larger public interest to maintain sanctity of the Shimla town vis-à-vis right of free movement of the citizens. Authorities prescribed under the Act are directed to take reasonable/common sense view while granting and refusing permits taking into consideration where the offices and residences of such persons are located in the sealed/restricted areas.

17. Mr. P.C. Dhiman, learned Additional Chief Secretary (Home), has also assured that the issue pertaining to providing sufficient security at the residences of the Hon'ble Judges, is under active consideration. The learned Additional Chief Secretary (Home) is directed to take a final decision within a period of two weeks from today by taking recourse to the laid down procedure.

18. No permit shall be issued by any authority other than specifically provided under the Act. Mr. P.C. Dhiman, Additional Chief Secretary (Home) has also been directed to ensure that the permits in sealed/restricted road as far as possible are approved by the shortest route to protect the environment and saving of fuel.

19. Mr. Ashok Sharma, learned Assistant Solicitor General of India, has submitted that the General Officer Commanding of ARTRAC and his Second-in-Command, are not permitted to ply their vehicles beyond Railway Board Building. We direct the State machinery to permit the General Officer Commanding of ARTRAC and his Second-in-Command to ply their vehicles with pilot and escort upto the main gate of ARTRAC near S.B.I. building due to threat perception/security reasons but the vehicles shall not be parked in front of the gate of the ARTRAC.

20. We are of the considered view that taking into consideration the glorious history of the Shimla town, which at one time was called "Queen of Hills", the permits of the sealed roads should be minimum. Moreover, permitting the vehicles on sealed roads beyond S.B.I. building to C.T.O. building and Shimla Club to Lift causes immense hardship to the pedestrians. Shimla is primarily a walking town and we must encourage the people to walk on the sealed roads.

21. The categorization for issuance of permits in sealed roads also violates provisions of Article 14 of the Constitution of India. There is no intelligible differentia to distinguish special class created under the Act, to whom the permits for sealed roads have to be given, with the object sought to be achieved. The object sought to be achieved is to protect the sanctity of the town and also to avoid undue hardship, inconvenience and annoyance to the pedestrians. The environment and ecology of Shimla town is fragile. It is a tourist hub. The people come to enjoy serenity of the town. They must be given freedom to move freely on the sealed roads. Rather bringing vehicles upto The Lift and C.T.O. of late has become a status symbol. Our endeavour should be to form a 'classless' society to protect the dignity of every individual.

22. We cannot create a class within the class by permitting few members of the society to use the sealed roads. Moreover, there is neither any big institution nor hospital situated at the "***Core Mall Road***" area necessitating the grant of permits. The letter and spirit of the Act and the sanctity of the town has to be maintained if we want to retain the Shimla town on the International tourist map. It is in these circumstances we reiterate that on all the sealed roads only the vehicles of Hon'ble President of India, Hon'ble Vice President of India, Hon'ble Prime Minister of India, Hon'ble Governor of Himachal Pradesh, Hon'ble Chief Minister of Himachal Pradesh, Hon'ble Chief Justice, Hon'ble Speaker of Himachal Pradesh State Legislative Assembly, General Officer Commanding of ARTRAC and his Second-in-Command upto gate of ARTRAC are permitted to use the sealed roads. The permits issued to the persons for sealed roads shall stand suspended. The permits are liable to be reviewed after hearing the aggrieved persons.

23. Accordingly, the permission for sealed roads is restricted only to Hon'ble President of India, Hon'ble Vice President of India, Hon'ble Prime Minister of India, Hon'ble Governor of Himachal Pradesh, Hon'ble Chief Minister of Himachal Pradesh, Hon'ble Chief Justice, Hon'ble Speaker of Himachal Pradesh State Legislative Assembly, General Officer Commanding of ARTRAC and his Second-in-Command by reading down sections 3 and 4 of the Act, pertaining to use of the sealed roads, in the larger public interest, public safety and convenience.

24. In view of the above directions, the present petition is disposed of, alongwith all the pending applications. Copy dasti.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J

Naro Devi and others . .....Appellants.

Versus

Shri Jeet Singh and others ...Respondents

FAO (MVA) No. 666 of 2008

Date of decision: 27th November, 2015

Motor Vehicles Act, 1988- Section 166- Tribunal had deducted 1/3rd amount towards personal expenses, whereas, 1/5th was to be deducted towards personal expenses- claimants

had lost source of dependency to the extent of Rs.2,700/- per month- multiplier of '12' applicable- therefore, claimants are entitled to the compensation of Rs.2700 x 12 x 12= Rs.3,88,800/- and Rs.10,000/- each under the heads 'loss of funeral expenses', loss of estate', 'loss of consortium' and 'conventional charges' and Rs.26,000/- under the head 'treatment charges'- thus, total compensation of Rs.3,88,800+Rs.20,000+Rs.46,000/- = Rs.4,54800/- awarded. (Para-5 to 8)

Cases referred:
Sarla Verma and others versus Delhi Transport Corporation and another AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120.

For the appellant: Mr. Karan Singh Kanwar, Advocate.
For the respondents: Ms. Leena Guleria, Advocate, for respondents No.1 and 2.
Mr. Jagdish Thakur, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

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

This appeal is directed against the judgment and award dated 1.10.2008, made by the Motor Awqccident Claims Tribunal-II, Sirmaur District at Nahan, H.P. in MAC Petition No. 36-N/2 of 2005, titled *Naro Devi and others versus Shri Jeet singh and others*, for short "the Tribunal", whereby compensation to the tune of Rs.3,62,800/- alongwith interest @ 7.5% per annum was awarded in favour of the claimants, hereinafter referred to as "the impugned award", for short.

2. Owner, insurer and driver have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

3. The claimants have questioned the impugned award on the ground of adequacy of compensation.

4. Thus, the only issue to be determined in this appeal is whether the amount awarded is inadequate. The answer is in affirmative for the following reasons.

5. The Tribunal has made discussion in paras 15 to 25 of the impugned award. The Tribunal has rightly applied the multiplier of "12" but has fallen in error in deducting 1/3rd towards personal expenses of the deceased. 1/5th was to be deducted, in view of the 2nd Schedule of the Motor Vehicles Act, for short "the Act, read with ***Sarla Verma and others versus Delhi Transport Corporation and another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***. It is apt to reproduce para 30 of ***Sarla Verma's*** judgment herein:

> *"30.Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra, the general practice is to apply standardized deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependant family members is 4 to 6, and one-fifth (1/5th) where the number of dependant family members exceed six."*

6. Having said so, it is held that the claimants have lost source of dependency to the tune of Rs.2700/- per month instead of Rs.2200/- per month, as held by the Tribunal. Thus, the claimants are entitled to compensation to the tune of Rs.2700x12x12= Rs.3,88,800/-.

7. The Tribunal has also not awarded any amount under the heads "loss of funeral expenses" and "loss of estate". Thus, the claimants are also held entitled to Rs.10,000/- each under the aforesaid two heads. Besides above, the claimants are also entitled to Rs.10,000/- under the head "loss of Consortium" Rs.10,000/- under the head "conventional charges" and Rs.26,000/- under the head "Treatment Charges", as awarded by the Tribunal.

8. Viewed thus, in all, the claimants are entitled to Rs.3,88,800+Rs.20,000+Rs.46,000/- Total Rs.4,54800/-, along with interest as awarded by the Tribunal from the date of claim petition till is final realization.

9. Accordingly, the impugned award is modified, as indicated hereinabove and the appeal is disposed of.

10. The insurer is directed to deposit the enhanced amount within six weeks from today in the Registry.

11. Registry is directed to release the amount, on deposit by the insurer, in favour of the claimants, strictly, as per the terms and conditions contained in the impugned award, through payee's cheque account.

12. Send down the record, forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAOs No. 530 & 707 of 2008
Decided on: 27.11.2015

FAO No. 530 of 2008

National Insurance Company Ltd. ...Appellant.

Versus

Smt. Jagtamba and others ...Respondents.

.....

FAO No. 707 of 2008

Smt. Jagtamba and others ...Appellants.

Versus

Shashi Bhushan and others ...Respondents.

Motor Vehicles Act, 1988- Section 166- It was contended that accident was outcome of contributory negligence of both drivers and the Tribunal had wrongly saddled the appellant with liability – it was specifically mentioned in the FIR that accident was the result of contributory negligence of the drivers of both the vehicles- held, that prima facie proof is required in motor accident cases- report of the police can be treated as claim petition- final report also shows that accident was the result of contributory negligence- claimants have also deposed regarding this fact- in view of this, insurers of both the offending vehicles saddled with liability in equal share. (Para-11 to 21)

Case referred:
Dulcina Fernandes and others versus Joaquim Xavier Cruz and another, (2013) 10 Supreme Court Cases 646

FAO No. 530 of 2008

For the appellant:	Ms. Shilpa Sood, Advocate.
For the respondents:	Mr. Vijay Verma, Advocate, for respondents No. 1 to 4.
	Mr. Pankaj Sharma, Advocate, for respondent No. 5.
	Nemo for respondents No. 6 and 7.
	Mr. Praneet Gupta, Advocate, for respondent No. 8.
	Mr. J.R. Poswal, Advocate, for respondent No. 9.

.....

FAO No. 707 of 2008

For the appellants:	Mr. Vijay Verma, Advocate.
For the respondents:	Mr. Pankaj Sharma, Advocate, for respondent No. 1.
	Nemo for respondents No. 2 and 3.
	Ms. Shilpa Sood, Advocate, for respondent No. 4.
	Mr. Praneet Gupta, Advocate, for respondent No. 5.
	Mr. J.R. Poswal, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Both these appeals are outcome of a vehicular accident, thus, I deem it proper to determine both these appeals by this common judgment.

2. Challenge in both these appeals is to the judgment and award, dated 31.05.2008, made by the Motor Accident Claims Tribunal, Bilaspur, H.P. (for short "the Tribunal") in M.A.C. Case No. 88 of 2005, titled as Smt. Jagtamba and others versus Shashi Bhushan and others, whereby compensation to the tune of Rs.7,08,400/- with interest @ 6% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimants and appellant-National Insurance Company Limited, i.e. insurer of jeep, bearing registration No. HP-23A-7474, was saddled with liability (for short "the impugned award").

3. Appellant-insurer of the jeep has questioned the impugned award by the medium of FAO No. 530 of 2008, on the grounds taken in the memo of the appeal.

4. By the medium of FAO No. 707 of 2008, the claimants have called in question the impugned award on the ground of adequacy of compensation.

5. The insurer of the motor cycle, bearing registration No. HP-24A-3906, the insured-owners and the drivers of both the offending vehicles have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

FAO No. 530 of 2008

6. Learned counsel for the appellant argued that the accident was outcome of the contributory negligence of both the drivers, namely Shri Shashi Bushan and Shri Kashmir Singh, who were driving the offending vehicles rashly and negligently at the time of the accident and the Tribunal has fallen in an error in saddling the appellant with the entire liability.

7. Thus, the only question to be determined in this appeal is - whether the accident was outcome of the contributory negligence of the drivers of both the offending vehicles?

8. The claimants have specifically pleaded in the claim petition that the accident had taken place due to the rash and negligent driving of the drivers of the jeep and the motor cycle, which has not specifically been denied by the respondents before the Tribunal.

9. On the pleadings of the parties, the Tribunal framed six issues on 25.07.2006. Since the dispute revolves around issues No. 1 and 2, I deem it proper to reproduce only issues No. 1 and 2 herein:

> *"1. Whether the deceased Amar Singh died in the accident due to contributory negligence on the part of the respondent No. 1 & respondent No. 3 by driving their respective vehicles No. HP - 23A - 7474 & HP-24A-3906 respectively, as alleged? ...OPP*
>
> *2. If issue No. 1 is proved in affirmative, to what amount of compensation the petitioners are entitled to and from which of the respondent(s)? ...OPP"*

10. Parties have led evidence in support of their claims.

11. The Tribunal has discussed all the facts and the evidence, oral as well as documentary, but has fallen in an error in holding that the accident was not the outcome of contributory negligence.

12. The Tribunal has held that the FIR, Ext. PW-3/A, is not a conclusive evidence and, *prima facie,* came to the conclusion that accident was outcome of the rash and negligent driving of the driver of the jeep, i.e. Shashi Bhushan.

13. The said finding of the Tribunal is not legally correct for the following reasons:

14. First Information Report (for short "FIR") is the first narration when the accident takes place. FIR, Ext. PW-3/A, does disclose that the accident was outcome of the contributory negligence of the drivers of both the vehicles.

15. The standard of proof in claim petitions is on different footings as compared to the standard of proof required in criminal cases. In a claim petition, only *prima facie* proof is required and strict pleadings and proofs are not required.

16. My this view is fortified by the judgment rendered by the Apex Court in the case titled as **Dulcina Fernandes and others versus Joaquim Xavier Cruz and another,** reported in **(2013) 10 Supreme Court Cases 646.** It is apt to reproduce relevant portion of paras 8 and 9 of the judgment herein:

> *"8. In United India Insurance Co. Ltd. v. Shila Datta, (2011) 10 SCC 509, while considering the nature of a claim petition under the Motor Vehicles Act, 1988 a three-Judge Bench of this Court has culled out certain propositions of which Propositions (ii), (v) and (vi) would be relevant to the facts of the present case and, therefore, may be extracted hereinbelow:*
>
> > *"10. (ii) The rules of the pleadings do not strictly apply as the claimant is required to make an application in a form prescribed under the Act. In fact, there is no pleading where the proceedings are suo motu initiated by the Tribunal.*

* * *

(v) Though the Tribunal adjudicates on a claim and determines the compensation, it does not do so as in an adversarial litigation.....

(vi) The Tribunal is required to follow such summary procedure as it thinks fit. It may choose one or more persons possessing special knowledge of and matters relevant to inquiry, to assist it in holding the enquiry."

9. The following further observation available in para 10 of the Report would require specific note: (Shila Datta case, (2011) 10 SCC 509, SCC p. 519)

"10. .....We have referred to the aforesaid provisions to show that an award by the Tribunal cannot be seen as an adversarial adjudication between the litigating parties to a dispute, but a statutory determination of compensation on the occurrence of an accident, after due enquiry, in accordance with the statute."

(Emphasis added)

17. If the report of the police can be treated as claim petition, how can claimants be asked to plead the things/facts precisely and how can they be asked to prove the said pleadings by applying the principles *stricto sensu* as per the Indian Evidence Act.

18. The report in terms of Section 173 of the Code of Criminal Procedure Code (for short "CrPC") was presented before the Court of competent jurisdiction and both the drivers were tried. The Chief Judicial Magistrate, Bilaspur, District Bilaspur, H.P. (for short "the Magistrate") acquitted both the accused persons on the ground that the prosecution has failed to prove beyond reasonable doubt. The copy of the judgment made by the Magistrate has been produced in the open Court, made part of the file. Thus, both the drivers have not been acquitted on the basis of benefit of doubt.

19. The final report and the FIR are the *prima facie* proofs that the accident was outcome of the contributory negligence. Even otherwise, the claimants have also led evidence and all of them have deposed that the accident was outcome of the contributory negligence. Viewed thus, the findings returned by the Tribunal on issue No. 1 are set aside and it is held that the claimants have proved the said issue.

20. Learned counsel for the insurer of the motor cycle has admitted the factum of insurance and has not argued that there was any breach on the part of the owner-insured of the motor cycle.

21. Having said so, the insurers of both the offending vehicles are to be saddled with liability in equal shares. The impugned award is modified and the appeal is disposed of, as indicated hereinabove.

22. At this stage, learned counsel for the appellant stated at the Bar that the appellant has already deposited the entire awarded amount. Her statement is taken on record.

23. 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.

24. Insurer of the motor cycle, i.e. The New India Assurance Company Ltd. is directed to deposit 50% of the awarded amount with interest before this Registry within six weeks. On deposition of the amount, the same be released in favour of the appellant.

FAO No. 707 of 2008

25. The claimants have filed this appeal for enhancement of the awarded amount.

26. I have gone through the impugned award. The Tribunal has rightly made discussions in para 15 of the impugned award and has awarded Rs.7,08,400/- in favour of the claimants, needs no interference.

27. Having said so, the amount awarded is quite adequate, cannot be said to be meager in any way.

28. Viewed thus, the appeal for enhancement of compensation is dismissed.

29. Send down the record after placing copy of the judgment on the Tribunal's file.

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

Niku Ram. .....Petitioner.

Versus

State of H.P. & others .....Respondents.

CWP No. 1486 of 2008.
Reserved on: 20.11.2015.
Date of Decision : November 27, 2015.

Constitution of India, 1950- Article 226- Brother of the petitioner died in harness- his brother is in government service but is living separately- his mother abandoned her claim for compassionate appointment in favour of the petitioner- petitioner preferred a claim for compassionate ground which was declined- petitioner filed original application before Administrative Tribunal which was dismissed on the ground of delay- held, that delay in filing the claim shows that financial distress or indigency stood over come- the purpose of compassionate appointment is to provide immediate relief to the family- one brother of the petitioner is in government service- therefore, in these circumstances, claim was rightly rejected- petition dismissed. (Para-3 to 6)

For the Petitioner: Mr.Sanjeev Bhushan, Senior Advocate with Ms.Abhilasha Kaundal, Advocate.

For the Respondents: Mr.M.A.Khan, Addl. Advocate General.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge.

The instant petition is directed against the impugned judgment of the learned Himachal Pradesh Administrative Tribunal, rendered in O.A. No.1475 of 2000 of

24.4.2008, whereby it declined to the petitioner herein the relief ventilated therein of Annexure A-3 being quashed and set aside.

2. The facts germane for setting at rest the controversy inter se the parties at lis are of the brother of the petitioner herein having died in harness in a road accident on 25.8.1993. Deceased Sudarshan Kumar left behind the petitioner, his mother, sister and one brother. One of the brothers of the petitioner is admittedly in Government service, yet living separately from the family. The mother of the petitioner being overage, hence she on demise in harness of Sudarshan Kumar abandoned her right to claim compassionate appointment in favour of the petitioner. Also the brother of the petitioner and his sister portrayed their respective non remonstrance to the petitioner applying for his on demise in harness of his deceased brother Sudarshan Kumar being considered for appointment on compassionate basis. The application instituted by the petitioner herein for his being considered by the respondents for appointment on compassionate basis on the demise in harness of his brother Sudarshan Kumar,was affirmatively recommended by the authorities concerned who processed it, to the officers in the higher echelons of the bureaucratic hierarchy, yet respondent No.1 disconcurred with the recommendations transmitted to it by the authorities processing the claim of the petitioner for appointment on compassionate basis. In sequel, Annexure A-3 manifesting the rejection of the claim of the petitioner for appointment on compassionate basis stood communicated by respondent No.1 to the petitioner herein.

3. The learned Himachal Pradesh Administrative Tribunal had on a close application of judicial mind to the factum of the demise in harness of the brother of the petitioner having occurred on 25.8.1993, whereas with respondent No.3 having forwarded to the authority concerned his application for appointment on compassionate basis in December, 1995, which stood ultimately rejected by the competent authority in December, 1996, palpably portrayed imprompt lodging of a claim for appointment on compassionate basis by the petitioner herein before the competent authority, especially when there was non-emanation from the apposite application moved by the petitioner herein before the competent authority qua the date of its submission by him before it for garnering any inference therefrom of the petitioner having promptly on demise of his brother in harness lodged a claim for appointment on compassionate basis before it. In sequel, the learned Himachal Pradesh Administrative Tribunal concluded that the effect of non-disclosure therein qua its submission before the competent authority galvanized an inference of its being not promptly instituted by the petitioner before the competent authority. Consequently, with the salient underlying tenet or cannon governing appointments on compassionate basis is of providing of immediate or prompt financial succor to the surviving family of the deceased for facilitating its overcoming its financial hazards or indigence which beset it or which misfortune befell upon it on their breadwinner dying in harness, necessarily when given the non-disclosure in the apposite application instituted by the petitioner herein before the competent authority ventilating therein his claim for appointment on compassionate basis on demise in harness of his brother, qua its submission being in proximity to the demise in harness of their breadwinner, no inference, hence is drawable of his having promptly lodged his claim for the purpose aforesaid before the competent authority, as a corollary, besides imperatively, the ensuing inference therefrom, is of its having come to be impromptly lodged besides the financial distress or impoverishment with which the family of the deceased employee was beset having stood both subdued as well as mitigated. In sequel with hence the salient underlying rubric governing appointments on compassionate basis remaining un-established besides hence with the financial distress or indigence, if any, which afflicted the surviving members of the family of the deceased Sudarshan Kumar having obviously stood overcome, necessarily the

learned Himachal Pradesh Administrative Tribunal rendered an apt conclusion of the principles governing the appointment on compassionate basis anchored upon providing immediate financial assistance to the surviving family members of the deceased by providing appointment to one of them remaining no longer in subsistence or theirs having come to be mellowed. In aftermath, the act of respondent No.3 under Annexure A-3 communicated to the petitioner herein of his claim for appointment on compassionate basis being oustable, warranting vindication by it.

4. Dehors the above, the petitioner herein even after his claim for appointment on compassionate basis having stood rejected by respondent No.3 in December, 1996 took to belatedly in 2000 impugn Annexure A-3. In sequel, the inordinate procrastination on the part of the petitioner to impugn Annexure A-3, tells upon as also bespeaks of the petitioner herein or his family on the demise in harness of deceased Sudarshan Kumar being no longer in a financially impoverished condition nor in financial distress, whereas only for alleviating the financial distress besetting the surviving members of the family on demise in harness of their deceased breadwinner by providing appointment on a compassionate basis to one of them, is the fulcrum or the essential tenet underlying the policy of the Government to provide appointment on compassionate basis. However, given the indolence on the part of the petitioner to impugn Annexure A-3, the aforesaid salient tenet governing the appointment on compassionate basis stands fortifyingly negated rather annihilated. Consequently, it was not inapt for the learned Himachal Pradesh Administrative Tribunal to conclude that the rejection under Annexure A-3 by respondent No.3 of the claim of the petitioner herein for appointment on compassionate basis was neither suffering from any non-application of mind or mis-application of mind to the apposite rules governing the factual matrix at hand.

5. Even otherwise dehors the relief, if any which has occurred in the regard aforesaid at the instance of the petitioner and its suffocating the claim of the petitioner for appointment on compassionate basis, the factum of the petitioner having not proved the averment constituted in the petition of his surviving brother admittedly in Government service and living separately, hence precluding him to provide financial assistance to the petitioner besides his mother and sister, constrains this Court to infer therefrom of the brother of the applicant, who is in Government service not living separately from the petitioner, hence his being not precluded to provide financial assistance to the petitioner or to other members of his family. Consequently, the imperative inference which as a corollary ensues therefrom is of the brother of the petitioner, who is admittedly in Government service, providing financial assistance to the petitioner and other members of the family with the concomitant effect of neither the petitioner nor other members of his family being either in financial distress or in indigent circumstances for whose overcoming, it was then incumbent upon the respondents concerned to provide financial assistance to them by appointing the petitioner herein on a compassionate basis.

6. Be that as it may, the self-contradictory manifestations in the dependency certificate furnished by the petitioner before the authority concerned comprised in Annexure A-2, inasmuch as in one of the columns constituted therein the petitioner having declared the income of the dependents of the deceased to be nil, whereas in the concluding paragraph thereof his having declared the income of the dependents of the deceased to be Rs.6000/- per se bespeaks of the applicant camouflaging the real income reared by the dependents of the deceased. Apart therefrom, the imperative deduction which emerges therefrom is the petitioner besides other members of his family having an income higher than Rs.6000/- per annum. In sequel with active concealment by the petitioner of the real income reared by him and his other family members also generates an inference of the petitioner, as well as his

other family members nursing an income which is higher than the one for theirs being, hence construed to be in a financially impoverished or in an indigent condition.

7. In trite, the reasonings afforded by the learned Himachal Pradesh Administrative Tribunal in upholding Annexure A-3 do not suffer from any perversity and are upheld. Accordingly, the writ petition is dismissed. Pending application(s), if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company Ltd. ...Appellant(s).
Versus
Jai Chand and others ...Respondents.

FAO No. 439 of 2008
a/w FAO No. 438 of 2008
Decided on: 27.11.2015

Motor Vehicles Act, 1988- Section 166- It was contended that petitions were not maintainable as petitions were filed regarding the death of the owner of the vehicle and his wife- held, that wife of the insured was a third party and not a party to the insurance contract- similarly, parents in-law and minor sons are third parties - therefore, petitions filed by others were maintainable - however, petitions filed regarding the death of the insured was not maintainable- record shows that risk of the owner was covered to the extent of Rs.2,00,000/-, which was not disputed by the insurer- hence, amount of Rs.2,00,000/- awarded along with interest @ 7.5% per annum. (Para-7 to 15)

For the appellant(s): Mr. Lalit K. Sharma, Advocate.
For the respondents: Mr. Ramesh Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Both these appeals are outcome of one vehicular accident, thus, I deem it proper to determine both these appeals by this common judgment.

2. Challenge in both these appeals is to the judgments and awards, dated 02.06.2008, made by the Motor Accident Claims Tribunal, Kinnaur Civil Division at Rampur Bushahr, H.P. (for short "the Tribunal") in M.A.C. Cases No. 82 and 83 of 2006, titled as Sh. Jai Chand and others versus The Oriental Insurance Company Ltd., whereby compensation to the tune of Rs.3,50,000/- and Rs.2,78,800/-, respectively, with interest @ 7.5% per annum from the date of filing of the petitions till its realization came to be awarded in favour of the claimants and the appellant-insurer was saddled with liability (for short "the impugned awards").

3. Claimants filed two claim petitions, i.e. M.A.C. Case No. 82 of 2006 for grant of compensation on account of death of Chander Pal, who was the son of claimants No. 1 &

2 and father of claimant No. 3 and M.A.C. Case No. 83 of 2006 on account of death of Nisha, who was the daughter-in-law of claimants No. 1 & 2 and mother of claimant No. 3.

4. Learned counsel for the appellant(s)-insurer argued that M.A.C. Case No. 82 of 2006 was not maintainable because the claimants have sought compensation in lieu of death of Chander Pal, who was the owner of the offending vehicle. Further stated that M.A.C. Case No.83 of 2006 was also not maintainable for the reason that the claimants have sought compensation in lieu of death of Nisha, who was the wife of the owner-insured, namely Chander Pal.

5. The argument of the learned counsel for the appellant(s)-insurer, though attractive, is devoid of any force for the following reasons:

FAO No. 438 of 2008

6. In M.A.C. Case No. 83 of 2006, which is subject matter of FAO No. 438 of 2008, the claimants have sought compensation in lieu of death of Nisha, daughter-in-law of claimants No. 1 & 2 and mother of claimant No. 3, who was the wife of the owner-insured, Chander Pal.

7. Deceased-Nisha, though was the wife of the owner-insured-Chander Pal, was a third party and not a party to the insurance contract. The claimants, i.e. the parents-in-law and the minor son are also the third parties. Thus, the claim petition, i.e. M.A.C. Case No. 83 of 2006 was maintainable as they have every right to claim compensation by invoking the remedy as provided in terms of Section 166 of the Motor Vehicles Act, 1988 (for short "the MV Act") and the Tribunal has discussed all these issues in the impugned award.

8. Learned counsel for the appellant(s)-insurer was asked to show how the claim petition was not maintainable? He was not able to justify his argument. Virtually, he made a strange argument, which should not be made by a counsel, who is dealing with the cases of the insurance companies right from the entry in the profession.

9. Granting of compensation in terms of the MV Act is a social Legislation and its purpose is to achieve the object and not to defeat the same.

10. Admittedly, deceased-Nisha is not a party to the insurance contract, was a third party. In terms of the insurance contract, Ext. RW-1/A, the seating capacity of the offending vehicle was three. Thus, the risk of deceased-Nisha was covered. Having said so, the argument of the learned counsel for the appellant(s)-insurer is not tenable.

11. It is apt to record herein that the Tribunal has rightly made discussions while deciding M.A.C. Case No. 83 of 2006 and awarded compensation to the tune of Rs.2,78,800/- with interest @ 7.5, which cannot be said to be excessive in any way.

12. Having said so, the impugned award made in M.A.C. Case No. 83 of 2006 is upheld and FAO No. 438 of 2008 is dismissed.

FAO No. 439 of 2008

13. M.A.C. Case No. 82 of 2006, subject matter of FAO No. 439 of 2008, on the face of it, was not maintainable, but the claimants have invoked the jurisdiction of the Tribunal in the year 2006 and are fighting legal battle for the last about ten years and in case no relief is granted to them, it will defeat the very purpose and object of granting of compensation.

14. In terms of the insurance contract, risk of owner is also covered up to Rs.2,00,000/- and in case the claimants approach the competent forum, they will get

Rs.2,00,000/-. Mr. Ramesh Sharma, learned counsel for the claimants stated at the Bar that the said factum was also admitted by the representative of the appellant-insurer before the Lok Adalat. Thus, I deem it proper to award Rs.2,00,000/- to the claimants in M.A.C. Case No. 82 of 2006, which is the liability of the appellant(s)-insurer.

15. Accordingly, the amount awarded in M.A.C. Case

No. 82 of 2006 is reduced and it is held that the claimants are entitled to compensation to the tune of Rs.2,00,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization. It is made clear that this judgment is made in the given facts and circumstances of the case and shall not be treated as precedent.

16. Having said so, the impugned award in M.A.C. Case No. 82 of 2006 is modified and the appeal, i.e. FAO No. 439 of 2008, is disposed of, as indicated hereinabove.

17. Registry is directed to release the awarded amount in both the appeals in favour of the claimants strictly as per the terms and conditions contained in the respective impugned awards after proper identification. Excess amount, if any, in FAO No. 439 of 2008 be released in favour of the appellant-insurer through payee's account cheque.

18. Send down the record after placing copy of the judgment on each of the Tribunal's files.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAO No. 517 of 2008 a/w
FAOs No. 518, 519 of 2008,
11 of 2009 and 15 of 2011
Decided on: 27.11.2015

1. FAO No. 517 of 2008
Oriental Insurance Company ...Appellant.
Versus
Smt. Kaushalya Devi and others ...Respondents.
.....

2. FAO No. 518 of 2008
Oriental Insurance Company ...Appellant.
Versus
Shri Mohinder Singh and others ...Respondents.
.....

3. FAO No. 519 of 2008
Oriental Insurance Company ...Appellant.
Versus
Shri Motu Ram and others ...Respondents.
.....

4. FAO No. 11 of 2009
Oriental Insurance Company ...Appellant.
Versus
Smt. Rukmani Devi and others ...Respondents.
.....

5. FAO No. 15 of 2011

Oriental Insurance Company ...Appellant.

Versus

Smt. Kaushalya Devi and others ...Respondents.

Motor Vehicles Act, 1988- Section 149- Insurer contended that sitting capacity of the vehicle was 42, whereas, 84 persons were travelling in the vehicle at the time of the accident- therefore, there was violation of the terms and conditions of the insurance policy- record shows that only five persons had filed claim petitions before the Tribunal- held, that insurer has to satisfy the award to the extent of risk covered- since, insurance cover was valid for 42 persons, therefore, insurance company was liable to indemnify the insured for the five awards. (Para-6 to 10)

Cases referred:

United India Insurance Company Limited versus K.M. Poonam & others, 2011 ACJ 917

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

National Insurance Company Ltd. versus Smt. Sumna @ Sharda & others, I L R 2015 (II) HP 825

Hem Ram & another versus Krishan Chand & another,, I L R 2015 (III) HP 796

FAO No. 517 of 2008

For the appellant: Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.

For the respondents: Mr. Naveen K. Bhardwaj, Advocate, for respondent No. 1.
Ms. Leena Guleria, Advocate, vice Mr. G.R. Palsra, Advocate, for respondents No. 2 and 3.

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FAO No. 518 of 2008

For the appellant: Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.

For the respondents: Mr. Naveen K. Bhardwaj, Advocate, for respondents No. 1 and 2.
Ms. Leena Guleria, Advocate, vice Mr. G.R. Palsra, Advocate, for respondents No. 3 and 4.

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FAO No. 519 of 2008

For the appellant: Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.

For the respondents: Mr. Naveen K. Bhardwaj, Advocate, for respondens No. 1 to 3.
Ms. Charu Gupta, Advocate, as Court Guardian for respondents No. 4 to 7.
Ms. Leena Guleria, Advocate, vice Mr. G.R. Palsra, Advocate, for respondents No. 8 and 9.

.....

FAO No. 11 of 2009

For the appellant: Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.

For the respondents: Mr. Raman Sethi, Advocate, for respondents No. 1 to 3.

Ms. Leena Guleria, Advocate, vice Mr. G.R. Palsra, Advocate, for respondents No. 4 and 5.

.....

FAO No. 15 of 2011

For the appellant: Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.

For the respondents: Ms. Shashi Kiran, Advocate, vice Mr. Rupinder Singh, Advocate, for respondent No. 1.

Ms. Leena Guleria, Advocate, vice Mr. G.R. Palsra, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

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

This judgment shall govern all the five appeals because these are outcome of one motor vehicular accident.

2. These appeals are outcome of the judgments and awards made by the Motor Accident Claims Tribunal-II, Fast Track Court, Kullu, H.P. (for short "the Tribunal") in five claim petitions on the different dates, which were filed by the claimants being victims of the vehicular accident for grant of compensation, as per the break-ups given in the respective claim petitions (for short "the impugned awards").

3. The claimants have averred in the claim petitions that the driver, namely Shri Nup Ram, has driven the offending vehicle, i.e. bus, bearing registration No. HP-66-1431, rashly and negligently on 21.05.2007, near place Diffi, at about 8.30 A.M. and caused the accident in which five passengers sustained injuries and succumbed to the injuries and 79 passengers sustained injuries.

4. Out of the said passengers, victims/claimants have filed only five claim petitions and compensation came to be awarded in favour of the claimants, details of which are given in the respective impugned awards.

5. The claimants, the owner-insured and the driver of the offending vehicle have not questioned any of the impugned awards on any count, thus, all the impugned awards have attained finality so far the same relate to them.

6. The insurer has questioned the impugned awards on the grounds that the owner-insured has committed breach for the reason that the seating capacity of the offending vehicle was 42 and 84 persons were travelling in the same at the time of the accident, thus, was being driven in violation of the insurance policy read with the mandate of Sections 147 to 149 of the Motor Vehicles Act, 1988, (for short "the MV Act") and the amount awarded in the respective impugned awards is excessive.

7. Thus, the following points are to be determined in these appeals:

(i) Whether the owner-insured has committed breach as more than prescribed/permitted passengers were travelling as passengers in the offending vehicle at the time of the accident?

(ii) Whether the amount awarded is excessive or otherwise?

8. It was for the insurer to plead and prove that the owner-insured has committed any willful breach, has failed to do so. No doubt, more than prescribed

passengers were travelling in the offending vehicle at the time of the accident, but only five persons have filed the claim petitions before the Tribunal. The seating capacity of the offending vehicle was '42' and the factum of the insurance is not in dispute. Thus, the risk of 42 passengers is covered.

12. It is beaten law of land that the insurer has to satisfy the award to the extent of the risk covered and if the claim petitions are more than the risk covered, then it is for the insured-owner to satisfy the same.

13. My this view is fortified by the judgment of the Apex Court in the case titled as **United India Insurance Company Limited versus K.M. Poonam & others,** reported in **2011 ACJ 917.** It is apt to reproduce para 24 of the judgment herein:

> *"24. The liability of the insurer, therefore, is confined to the number of persons covered by the insurance policy and not beyond the same. In other words, as in the present case, since the insurance policy of the owner of the vehicle covered six occupants of the vehicle in question, including the driver, the liability of the insurer would be confined to six persons only, notwithstanding the larger number of persons carried in the vehicle. Such excess number of persons would have to be treated as third parties, but since no premium had been paid in the policy for them, the insurer would not be liable to make payment of the compensation amount as far as they are concerned. However, the liability of the Insurance Company to make payment even in respect of persons not covered by the insurance policy continues under the provisions of sub-section (1) of Section 149 of the Act, as it would be entitled to recover the same if it could prove that one of the conditions of the policy had been breached by the owner of the vehicle. In the instant case, any of the persons travelling in the vehicle in excess of the permitted number of six passengers, though entitled to be compensated by the owner of the vehicle, would still be entitled to receive the compensation amount from the insurer, who could then recover it from the insured owner of the vehicle."*

14. It is also apt to reproduce para 15 of the judgment of the Apex Court in the case titled as **National Insurance Company Limited versus Anjana Shyam & others,** reported in **2007 AIR SCW 5237,** herein:

> *"15. In spite of the relevant provisions of the statute, insurance still remains a contract between the owner and the insurer and the parties are governed by the terms of their contract. The statute has made insurance obligatory in public interest and by way of social security and it has also provided that the insurer would be obliged to fulfil his obligations as imposed by the contract and as overseen by the statute notwithstanding any claim he may have against the other contracting party, the owner, and meet the claims of third parties subject to the exceptions provided in Section 149(2) of the Act. But that does not mean that an insurer is bound to pay amounts outside the contract of insurance itself or in respect of persons not covered by the contract at all. In other words, the insured is covered only to the extent of the passengers permitted to be insured or directed to be insured by the statute and actually covered by the contract. The High Court has considered only the aspect whether by overloading the vehicle, the owner had put the vehicle to a use not allowed by the permit under which the vehicle is used. This aspect is different from the aspect of determining the extent of the liability of the insurance company in respect of the passengers of a stage carriage insured in terms of Section 147(1)(b)(ii) of the Act. We are of the view that the insurance company can be*

made liable only in respect of the number of passengers for whom insurance can be taken under the Act and for whom insurance has been taken as a fact and not in respect of the other passengers involved in the accident in a case of overloading."

15. This Court in batches of appeals, **FAO No. 257 of 2006,** titled as **National Insurance Company Ltd. versus Smt. Sumna @ Sharda & others,** being the lead case, decided on 10.04.2015, and **FAO No. 224 of 2008,** titled as **Hem Ram & another versus Krishan Chand & another,** being the lead case, decided on 29.05.2015, has laid down the same principle, which is not disputed by the learned counsel for the insurer.

16. Learned counsel for the insurer argued that the amount awarded in all the claim petitions, on the face of it, is excessive.

17. I have gone through the record and the assessment made and am of the considered view that the insurer cannot question the impugned awards on account of adequacy of compensation. However, perusal of the files does disclose that the amount awarded is not excessive in any way.

18. Having glance of the above discussions, the impugned awards are upheld and the appeals are disposed of, as indicated hereinabove.

19. 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.

20. Send down the record after placing copy of the judgment on each of the Tribunal's files.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Parkash Chand and another .....Appellants.

Versus

Shri Surinder Singh and others ...Respondents

FAO (MVA) No. 660 of 2008

Date of decision: 27th November, 2015

Motor Vehicles Act, 1988- Section 166- Deceased was a government employee aged 24 years drawing Rs.6809/- per month as salary – he was a bachelor , therefore, half of the amount is to be deducted towards his personal expenses- claimants have lost source of dependency to the extent of Rs.3,500/- per month- claimants have given their age as 42 and 45 years and, therefore, multiplier of '13' applicable- hence, claimants are entitled to the compensation of Rs.3500 x 12 x 13= Rs.5,46,000/- + Rs.10,000/- each under the heads 'loss of funeral expenses', 'loss of estate', 'loss of consortium' and 'loss of love and affection'.

(Para-6 to 10)

Cases referred:

Sarla Verma and others vs Delhi Transport Corporation and another, AIR 2009 SC 3104

Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120

For the appellant: Mr. Ajay Chandel, Advocate.
For the respondents: Mr. Arvind Sharma, Advocate, for respondent No.2.
Mr. B.M Chauhan, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

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

This appeal is directed against the judgment and award dated 1.10.2008, made by the Motor Accident Claims Tribunal-1 Kangra at Dharamshala, H.P. in MACT Petition No. 24-N/II/2005, titled *Parkash Chand and another versus Shri Surinder Singh and others*, for short "the Tribunal", whereby compensation to the tune of Rs.2,75,000/- was awarded in favour of the claimants, hereinafter referred to as "the impugned award", for short.

2. Owner, insurer and driver have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

3. The claimants have questioned the impugned award on the ground of adequacy of compensation.

4. Thus, the only issue to be determined in this appeal is whether the amount awarded is adequate or otherwise.

5. It appears that the amount awarded is too meager and the Tribunal has fallen in an error in assessing the compensation for the following reasons.

6. It was averred in the claim petition that the deceased, namely, Kuldeep Singh was 23 years of age at the time of the accident but the Tribunal has held his age as 24 years which is not in dispute. Accordingly, it is held that the age of the deceased was 24 years at the time of the accident. The deceased was a government employee, drawing Rs.6809/- per month as salary, as is evident from Ext. PW5/A, which can roughly be taken as Rs.7000/- per month.

7. The apex Court has laid down the principles and test how to make deductions in case ***Sarla Verma and others versus Delhi Transport Corporation and another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***.

8. The deceased was a bachelor and one half was to be deducted in view of the ratio laid down in the judgment supra. Thus, it is accordingly held that the claimants have lost source of dependency to the tune of Rs.3500/- per month.

9. The claimants have given their age as 45 and 42 respectively, in the claim petition. Thus, multiplier applicable, as per ***Sarla verma and Reshma Kumar's*** cases, supra is "13".

10. Having said so, claimants are entitled to compensation to the tune of Rs.3500x12x13= Rs.5,46,000/- with interest @7.5% per annum from the date of impugned award till its realization. The claimants are also held entitled to Rs.10,000/- each under the heads, i.e., "loss of funeral expenses" "loss of estate", "loss of consortium" and loss of love and affection". Total Rs.40,000/-.

11. Viewed thus, it is held that the claimants are entitled to compensation to the tune of Rs.5,46,000+Rs.40,000/-. Total Rs.5,86,000/- with interest @ 7.5% per annum as

awarded. The interest on the enhanced amount is payable from the date of the impugned award.

12. Accordingly, the appeal is allowed. The compensation is enhanced and the impugned award is modified as indicated hereinabove.

13. The insurer is directed to deposit the enhanced amount within six weeks from today in the Registry.

14. Registry is directed to release the amount, on deposit by the insurer, in favour of the claimants, strictly, as per the terms and conditions contained in the impugned award, through payee's cheque account.

15. Send down the record, forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

United India Insurance Co. Ltd. .....Appellant.
Versus
Naina Devi @ Meena Devi and others .....Respondents

FAO (MVA) No. 573 of 2008
Date of decision: 27th November, 2015

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not possess a valid driving licence on the date of the accident- driver was driving a maruti Van at the time of accident and he possessed a driving licence to drive a motor cycle and no other vehicle- held, that Tribunal had wrongly saddled the insurer with liability- therefore, right of recovery granted to the insurer. (Para-8 to 13)

For the appellant: Mr. Ashwani K. Sharma, Sr. Advocate with Ms. Monika Shukla, Advocate.
For the respondents: Mr. Bhupinder Pathania, Advocate, for respondents No. 1 to 3.
Mr. Naveen K. Bhardwaj, 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 judgment and award dated 22.5.2007, made by the Motor Accident Claims Tribunal-III, Kangra at Dharamshala in MACP No. 4-P/2000, titled *Naina Devi and others vesus Rikhi Ram and others*, for short "the Tribunal", whereby compensation to the tune of Rs.2,01,500/-/- alongwith interest @ 7.5% per annum was awarded in favour of the claimants, hereinafter referred to as "the impugned award", for short.

2. Claimants, insured and driver have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

3. The insurer has questioned the impugned award on the ground that the driver was not having a valid and effective driving licence to drive the offending vehicle. Thus, the owner has committed breach and insurer was not liable to satisfy the impugned award.

4. The only dispute in this appeal is whether the Tribunal has rightly saddled the insurer with the liability.

5. In order to determine the controversy in this appeal, it is necessary to give a brief résumé of relevant facts. It is averred in the claim petition that Suresh Kumar had driven the offending vehicle, i.e., Maruti Van bearing registration No. HPY-1322, rashly and negligently on 16.8.1999, near Dehra, Tehsil Palampur, District Kangra, H.P. and hit the deceased, namely, Shambhu Ram, who was walking on the road side, sustained injuries and succumbed to the same. It is averred that FIR No. 197/99 came to be registered in

police Station Palampur. The claimants have sought compensation as per the break-ups given in the claim petition.

6. The claim petition was resisted by the respondents and following issues came to be framed.

(i) *Whether the deceased Shambu Ram died due to the rash and negligent driving of vehicle NO. HPY-1322 by respondent No.2.? OPP*

(ii) If issue No.1 is proved in the affirmative, to what amount of compensation, the petitioners are entitled to and from whom? OPP

(iii) Whether the respondent No.2/driver was not holding valid and effective driving licence at the time of accident? OPR

(iv) Whether the vehicle was plied in contravention of the terms and condition of the insurance policy and the petition is not maintainable against the relying respondent? OPR

(v) Relief.

7. Claimants have examined the witnesses and insurer has examined only one witness, namely, Vineet Kumar licence Clerk as RW1.

8. The Tribunal, after scanning the evidence held that the claimants have proved issue No. 1 and saddled the insurer with the liability. There is no dispute qua issue No. 1. Accordingly, the findings returned on issue No. 1 are upheld.

9. Issues No. 2, 3 and 4 are inter-dependent, thus, I deem it proper to determine all these issues together.

10. The driver and owner, neither have produced the driving licence on the record nor have led any evidence.

11. On the last date of hearing, the learned counsel for the owner and driver was directed to produce the copy of driving licence, failed to do so.

12. The insurer has examined RW1, who has deposed that the driver was having the driving licence to drive a motor cycle which was only valid up to 3.11.1998 and no renewal was granted. Further stated that, in terms of the said licence, the driver was competent to drive motor cycle and no other vehicle. He has categorically stated that the driver was not competent to drive jeep, car and taxi.

13. Having said so, the Tribunal has fallen in an error in holding that the insurer has to satisfy the liability.

14. In the given circumstances, it can be safely held that the owner has committed willful breach and the right of recovery has to be granted to the insurer.

15. Accordingly, issues No. 2, 3 and 4 are decided in favour of the insurer and against the owner and driver and it is held that the insurer has to satisfy the award at the first instance with right of recovery from the owner.

16. Registry is directed to release the amount, in favour of the claimants, strictly, as per the terms and conditions contained in the impugned award, through payee's cheque account.

17. The impugned award is modified, as indicated hereinabove and the appeal is disposed of.

18. Send down the record, forthwith, after placing a copy of this judgment.

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

Commissioner of Income Tax .....Appellant.

Versus

M/s Purewal and Associates Ltd. .....Respondent.

ITA No.7 of 2009.
Judgment reserved on : 27.10.2015.
Date of decision: November 30, 2015.

Income Tax Act, 1961- Sections 80 HHC and 143(3)- Assessee received waiver of interest as a result of one time settlement- this amount was shown in the income tax return as income- assessee also claim deduction of this amount- Assessing Officer held that 90% of the income had to be reduced from the profit- assessee filed an appeal against the assessment which was dismissed and the assessment was conformed – further appeal filed by the assessee was allowed by ITAT- held, that any independent income which is not derived from the export activity but is otherwise assessed as business income, 90% of such receipts have to be reduced from the profit of the business - liability incurred by assessee in respect of interest had earlier been allowed as deduction- benefit would only be available on the net interest which had been included in the profit of the business of the assessee- it is clarified that while computing interest, Assessing Officer will take into account the net interest i.e. the gross interest as reduced by expenditure- appeal dismissed. (Para-8 to 25)

Cases referred:

Commissioner of Income-Tax versus K.Ravindranathan Nair [2007] 295 ITR 228 (SC)
Commissioner of Income-Tax vs Shri Ram Honda Power Equip [2007] 289 ITR 475 (Delhi),
Commissioner of Income-Tax v Bhansali Engineering Polymars Ltd. [2008) 306 ITR 194,Bom
Commissioner of Income-Tax versus Sociedade De Fomento Industrial Ltd. [2011] 335 ITR 472 (Bom)

ACG Associated Capsules Pvt. Ltd. versus Commissioner of Income-Tax (2012) 3 SCC 321

For the Appellant : Mr.Vinay Kuthiala, Senior Advocate with Ms.Ashima, Advocate.
For the Respondent : Mr.Vishal Mohan, Advocate with Mr.Aditya Sood and Mr.Sushant Kaprate, Advocates.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This appeal under Section 260-A of the Income Tax Act, 1961, (for short 'Act') has been preferred by the Revenue against the order of Income Tax Appellate Tribunal (ITAT) Chandigarh Bench 'B', Chandigarh, passed in ITA No.211/Chandi/2006 dated 31.07.2008, Assessment Year 2001-02.

2. The brief facts are that during the previous year relevant to Assessment Year 2001-02, the assessee received a waiver of interest of Rs.2,24,46,466/- as a result of one time settlement with Punjab National Bank. This amount was offered in the return as income under Section 41(1) of the Act and the assessee also claimed deduction under Section 80HHC on this entire amount of deemed income. However, the Assessing Officer ('A.O.') vide his order passed under Section 143(3) dated 29.06.2005 held that under clause (baa) of the Explanation to Section 80HHC, ninety percent of the amount of deemed income had to be reduced from the profits of business since such income was of a similar nature as brokerage, commission, interest etc. and was not derived from the exports made by the assessee.

3. The assessee filed an appeal against the assessment before the Commissioner of Income Tax (Appeals), Shimla ('CIT (A)', who vide his order dated 17.01.2006 passed in Appeal No.IT/169/2005-06/SML confirmed the assessment made by the A.O. holding that such deemed income is not derived from exports in view of the judgments of the Hon'ble Supreme Court in the cases of CIT vs. Sterling Foods (237 ITR 579) and Pandian Chemicals vs. CIT (262 ITR 278).

4. The assessee thereafter filed further appeal before the ITAT and the ITAT vide impugned order passed in ITA No.211/Chandi/2006 dated 31.07.2008 allowed the assessee's appeal.

5. It is against the aforesaid orders that the present appeal has been filed. Vide order dated 09.01.2009, the same was admitted on the following substantial question of law:-

> "Whether income chargeable to tax under Section 41(1) of the Income Tax Act is to be excluded under clause (baa) of the Explanation to Section 80 HHC of the Act, for the purposes of computing the deduction allowable to the assessee under that section?"

6. It is vehemently argued by Shri Vinay Kuthiala, Senior Advocate, assisted by Ms.Ashima, Advocate, for the revenue that ITAT has misconstrued the decision of the Hon'ble Supreme Court in ***Commissioner of Income-Tax versus K.Ravindranathan Nair [2007] 295 ITR 228 (SC)*** wherein it has been held by the Hon'ble Supreme Court that under clause (baa) of the Explanation to Section 80HHC, incentive profits and certain independent incomes had to be excluded from the profits for the purpose of this Section, therefore, the receipts had no nexus with the export turnover as it is only the income derived

from export that alone could be considered for deduction and not income from other sources.

7. On the other hand, Shri Vishal Mohan, learned counsel for the assessee, would contend that since the liability incurred by the assessee company in respect of interest had infact earlier been allowed as deduction while computing the profit of the export business and merely because such liability ceases to exist, the same will not undergo a change in its nature and become an independent income.

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

8. Section 80 HHC of the Act reads thus:-

"**Deduction in respect of profits retained for export business.**

80HHC. (1) Where an assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the business of export out of India of any goods or merchandise to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction to the extent of profits, referred to in sub-section (1B), derived by the assessee from the export of such goods or merchandise :

Provided that if the assessee, being a holder of an Export House Certificate or a Trading House Certificate (hereafter in this section referred to as an Export House or a Trading House, as the case may be) issues a certificate referred to in clause (*b*) of sub-section (4A), that in respect of the amount of the export turnover specified therein, the deduction under this sub-section is to be allowed to a supporting manufacturer, then the amount of deduction in the case of the assessee shall be reduced by such amount which bears to the total profits derived by the assessee from the export of trading goods, the same proportion as the amount of export turnover specified in the said certificate bears to the total export turnover of the assessee in respect of such trading goods.

(1A) Where the assessee, being a supporting manufacturer, has during the previous year, sold goods or merchandise to any Export House or Trading House in respect of which the Export House or Trading House has issued a certificate under the proviso to sub-section (1), there shall, in accordance with and subject to the provisions of this section, be allowed in computing the total income of the assessee, a deduction to the extent of profits, referred to in sub-section (1B), derived by the assessee from the sale of goods or merchandise to the Export House or Trading House in respect of which the certificate has been issued by the Export House or Trading House.]

(1B) For the purposes of sub-sections (1) and (1A), the extent of deduction of the profits shall be an amount equal to—

(*i*) eighty per cent thereof for an assessment year beginning on the 1st day of April, 2001;

(*ii*) seventy per cent thereof for an assessment year beginning on the 1st day of April, 2002;

(*iii*) fifty per cent thereof for an assessment year beginning on the 1st day of April, 2003;

(*iv*) thirty per cent thereof for an assessment year beginning on the 1st day of April, 2004,

and no deduction shall be allowed in respect of the assessment year beginning on the 1st day of April, 2005 and any subsequent assessment year.

(2)(*a*) This section applies to all goods or merchandise, other than those specified in clause (*b*), if the sale proceeds of such goods or merchandise exported out of India are received in, or brought into, India by the assessee (other than the supporting manufacturer) in convertible foreign exchange, within a period of six months from the end of the previous year or, within such further period as the competent authority may allow in this behalf.

Explanation.—For the purposes of this clause, the expression "competent authority" means the Reserve Bank of India or such other authority as is authorised under any law for the time being in force for regulating payments and dealings in foreign exchange.

(*b*) This section does not apply to the following goods or merchandise, namely :—

(*i*) mineral oil ; and

(*ii*) minerals and ores (other than processed minerals and ores specified in the Twelfth Schedule).

Explanation 1.—The sale proceeds referred to in clause (*a*) shall be deemed to have been received in India where such sale proceeds are credited to a separate account maintained for the purpose by the assessee with any bank outside India with the approval of the Reserve Bank of India.

Explanation 2.—For the removal of doubts, it is hereby declared that where any goods or merchandise are transferred by an assessee to a branch, office, warehouse or any other establishment of the assessee situate outside India and such goods or merchandise are sold from such branch, office, warehouse or establishment, then, such transfer shall be deemed to be export out of India of such goods and merchandise and the value of such goods or merchandise declared in the shipping bill or bill of export as referred to in sub-section (1) of section 50 of the Customs Act, 1962 (52 of 1962), shall, for the purposes of this section, be deemed to be the sale proceeds thereof.

(3) For the purposes of sub-section (1),—

(*a*) where the export out of India is of goods or merchandise manufactured or processed by the assessee, the profits derived from such export shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such goods bears to the total turnover of the business carried on by the assessee;

(*b*) where the export out of India is of trading goods, the profits derived from such export shall be the export turnover in respect of such trading goods as reduced by the direct costs and indirect costs attributable to such export;

(*c*) where the export out of India is of goods or merchandise manufactured or processed by the assessee and of trading goods, the profits derived from such export shall,—

(*i*) in respect of the goods or merchandise manufactured or processed by the assessee, be the amount which bears to the adjusted profits of the business, the same proportion as the adjusted export turnover in respect of such goods bears to the adjusted total turnover of the business carried on by the assessee; and

(*ii*) in respect of trading goods, be the export turnover in respect of such trading goods as reduced by the direct and indirect costs attributable to export of such trading goods :

Provided that the profits computed under clause (*a*) or clause (*b*) or clause (*c*) of this sub-section shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (*iiia*) (not being profits on sale of a licence acquired from any other person), and clauses (*iiib*) and (*iiic*) of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee :

Provided further that in the case of an assessee having export turnover not exceeding rupees ten crores during the previous year, the profits computed under clause (*a*) or clause (*b*) or clause (*c*) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (*iiid*) or clause (*iiie*), as the case may be, of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee :

Provided also that in the case of an assessee having export turnover exceeding rupees ten crores during the previous year, the profits computed under clause (*a*) or clause (*b*) or clause (*c*) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (*iiid*) of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee, if the assessee has necessary and sufficient evidence to prove that,—

(*a*) he had an option to choose either the duty drawback or the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme; and

(*b*) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme :

Provided also that in the case of an assessee having export turnover exceeding rupees ten crores during the previous year, the profits computed under clause (*a*) or clause (*b*) or clause (*c*) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (*iiie*) of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee, if the assessee has necessary and sufficient evidence to prove that,—

(*a*) he had an option to choose either the duty drawback or the Duty Free Replenishment Certificate, being the Duty Remission Scheme; and

(*b*) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Free Replenishment Certificate, being the Duty Remission Scheme.

Explanation.—For the purposes of this clause, "rate of credit allowable" means the rate of credit allowable under the Duty Free Replenishment Certificate, being the Duty Remission Scheme calculated in the manner as may be notified by the Central Government :

Provided also that in case the computation under clause (*a*) or clause (*b*) or clause (*c*) of this sub-section is a loss, such loss shall be set off against the amount which bears to ninety per cent of—

(*a*) any sum referred to in clause (*iiia*) or clause (*iiib*) or clause (*iiic*), as the case may be, or

(*b*) any sum referred to in clause (*iiid*) or clause (*iiie*), as the case may be, of section 28, as applicable in the case of an assessee referred to in the second or the third or the fourth proviso, as the case may be,

the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee.

Explanation.—For the purposes of this sub-section,—

(*a*) "adjusted export turnover" means the export turnover as reduced by the export turnover in respect of trading goods;

(*b*) "adjusted profits of the business" means the profits of the business as reduced by the profits derived from the business of export out of India of trading goods as computed in the manner provided in clause (*b*) of sub-section (3) ;

(*c*) "adjusted total turnover" means the total turnover of the business as reduced by the export turnover in respect of trading goods ;

(*d*) "direct costs" means costs directly attributable to the trading goods exported out of India including the purchase price of such goods ;

(*e*) "indirect costs" means costs, not being direct costs, allocated in the ratio of the export turnover in respect of trading goods to the total turnover ;

(*f*) "trading goods" means goods which are not manufactured or processed by the assessee.

(3A) For the purposes of sub-section (1A), profits derived by a supporting manufacturer from the sale of goods or merchandise shall be,—

(*a*) in a case where the business carried on by the supporting manufacturer consists exclusively of sale of goods or merchandise to one or more Export Houses or Trading Houses, the profits of the business ;

(*b*) in a case where the business carried on by the supporting manufacturer does not consist exclusively of sale of goods or merchandise to one or more Export Houses or Trading Houses, the amount which bears to the profits of the business the same proportion as the turnover in respect of sale to the respective Export

House or Trading House bears to the total turnover of the business carried on by the assessee.

(4) The deduction under sub-section (1) shall not be admissible unless the assessee furnishes in the prescribed form, along with the return of income, the report of an accountant, as defined in the *Explanation* below sub-section (2) of section 288, certifying that the deduction has been correctly claimed in accordance with the provisions of this section:

Provided that in the case of an undertaking referred to in sub-section (4C), the assessee shall also furnish along with the return of income, a certificate from the undertaking in the special economic zone containing such particulars as may be prescribed, duly certified by the auditor auditing the accounts of the undertaking in the special economic zone under the provisions of this Act or under any other law for the time being in force.

(4A) The deduction under sub-section (1A) shall not be admissible unless the supporting manufacturer furnishes in the prescribed form along with his return of income,—

(*a*) the report of an accountant, as defined in the *Explanation* below sub-section (2) of section 288, certifying that the deduction has been correctly claimed on the basis of the profits of the supporting manufacturer in respect of his sale of goods or merchandise to the Export House or Trading House; and

(*b*) a certificate from the Export House or Trading House containing such particulars as may be prescribed and verified in the manner prescribed that in respect of the export turnover mentioned in the certificate, the Export House or Trading House has not claimed the deduction under this section :

Provided that the certificate specified in clause (*b*) shall be duly certified by the auditor auditing the accounts of the Export House or Trading House under the provisions of this Act or under any other law.

(4B) For the purposes of computing the total income under sub-section (1) or sub-section (1A), any income not charged to tax under this Act shall be excluded.

(4C) The provisions of this section shall apply to an assessee,—

(*a*) for an assessment year beginning after the 31st day of March, 2004 and ending before the 1st day of April, 2005;

(*b*) who owns any undertaking which manufactures or produces goods or merchandise anywhere in India (outside any special economic zone) and sells the same to any undertaking situated in a special economic zone which is eligible for deduction under section 10A and such sale shall be deemed to be export out of India for the purposes of this section.

Explanation.—For the purposes of this section,—

(*a*) "convertible foreign exchange" means foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of [the Foreign Exchange Management Act, 1999 (42 of 1999)], and any rules made thereunder ;

(*aa*) "export out of India" shall not include any transaction by way of sale or otherwise, in a shop, emporium or any other establishment situate in India, not involving clearance at any customs station as defined in the Customs Act, 1962 (52 of 1962) ;]

(*b*) "export turnover" means the sale proceeds, received in, or brought into, India by the assessee in convertible foreign exchange in accordance with clause (*a*) of sub-section (2)] of any goods or merchandise to which this section applies and which are exported out of India, but does not include freight or insurance attributable to the transport of the goods or merchandise beyond the customs station as defined in the Customs Act, 1962 (52 of 1962) ;

(*ba*) "total turnover" shall not include freight or insurance attributable to the transport of the goods or merchandise beyond the customs station as defined in the Customs Act, 1962 (52 of 1962) :

Provided that in relation to any assessment year commencing on or after the 1st day of April, 1991, the expression "total turnover" shall have effect as if it also excluded any sum referred to in clauses (*iiia*), (*iiib*), (*iiic*), (*iiid*) and (*iiie*) of section 28;

(*baa*) "profits of the business" means the profits of the business as computed under the head "Profits and gains of business or profession" as reduced by—

(*1*) ninety per cent of any sum referred to in clauses (*iiia*), (*iiib*), (*iiic*), (*iiid*) and (*iiie*) of section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits ; and

(*2*) the profits of any branch, office, warehouse or any other establishment of the assessee situate outside India ;

(*bb*) [***]

(*c*) "Export House Certificate" or "Trading House Certificate" means a valid Export House Certificate or Trading House Certificate, as the case may be, issued by the Chief Controller of Imports and Exports, Government of India ;

(*d*) "supporting manufacturer" means a person being an Indian company or a person (other than a company) resident in India, manufacturing (including processing) goods or merchandise and selling such goods or merchandise to an Export House or a Trading House for the purposes of export;

(*e*) "special economic zone" shall have the meaning assigned to it in clause (*viii*) of the *Explanation 2* to section 10A.]"

9. In ***K.Ravindranathan Nair's case*** (supra) which has been heavily relied upon by the learned Senior Counsel for the revenue, we find that while interpreting explanation (baa) to section 80HHC of the Act, it was held that the formula in section 80HHC(3) provided for a fraction of export turnover divided by the total turnover to be applied to business profits calculated after deducting 90 per cent of the sums mentioned in clause (baa) of the explanation. Profit incentives like rent, commission, brokerage charges, etc., though formed part of the gross total income, had to be excluded as these were "independent incomes" which had no element of export turnover. All the four variables in the section were required to be kept in mind and if all the four variables are kept in mind, it becomes clear that every receipt is not income and every income would not necessarily

include the element of export turnover. It was further observed that clause (baa) of the Explanation states that 90 per cent of the incentive profits or receipts by way of brokerage, commission, interest, rent, charges or any other receipt of like nature included in business profits have to be deducted from business profits computed in terms of sections 28 to 44D. In other words, receipts constituting independent income having no nexus with exports were required to be deducted from business profits under clause (baa).

10. The Hon'ble Supreme Court observed that a bare reading of clause (baa)(1) indicates that receipts by way of brokerage, commission, interest, rent charges, etc., formed part of the gross total income being business profits. But for the purpose of working out of formula and in order to avoid distortion in arriving at the export profits clause (baa) stood inserted to say that although incentive profits and "independent incomes" constituted part of the gross total income, these had to be excluded from gross total income because such receipts had no nexus with the export turnover.

11. The Hon'ble Apex Court further observed that processing charges, which are part of gross total income, form an item of independent income like rent, commission, brokerage, etc., and, therefore, 90% of the processing charges have also to be reduced from the gross total income to arrive at the business profits and, therefore, it has also to be included in the total turnover in the formula for arriving at the business profits in terms of the clause (baa) of the Explanation to section 80HHC(3). It was further held by the Hon'ble Supreme Court that:-

> "In the above formula there existed four variables, namely, business profits, export turnover, total turnover and 90 per cent. of the sums referred to in clause (baa) to the said Explanation. In the computation of deduction under section 80 HHC all four variables had to be taken into account. All four variables were required to be given weightage. The substitution of section 80 HHC(3) secures profits derived from the exports of eligible goods. Therefore, if all the four variables are kept in mind, it becomes clear that every receipt is not income and every income would not necessarily include element of export turnover. This aspect needs to be kept in mind while interpreting clause (baa) to the said Explanation. The said clause stated that 90 per cent of incentive profits or receipts by way of brokerage, commission, interest, rent, charges or any other receipt of like nature included in business profits, had to be deducted from business profits computed in terms of sections 28 to 44D of the Income-tax Act. In other words, receipts constituting independent income having no nexus with exports were required to be reduced from business profits under clause (baa). A bare reading of clause (baa)(1) indicates that receipts by way of brokerage, commission, interest, rent, charges, etc., formed part of gross total income being business profits. But for the purposes of working out the formula and in order to avoid distortion of arriving at the export profits, clause (baa) stood inserted to say that although incentive profits and "independent incomes" constituted part of gross total income, they had to be excluded from gross total income because such receipts had no nexus with the export turnover. Therefore, in the above formula, we have to read all the four variables. On reading all the variables it becomes clear that every receipt may not constitute sale proceeds from exports. That, every receipt is not income under the Income-tax Act and every income may not be attributable to exports. This was the reason for this court to hold that indirect taxes like excise duty which are recovered by the taxpayers for and on behalf of the Government, shall not be included in the total turnover in the above formula."

....

"Before concluding we state that the nature of every receipt needs to be ascertained in order to find out whether the said receipt forms part of/or that it has an attribute of an export turnover. When an indirect tax is collected by the taxpayer on behalf of the Government the tax recovered is for the Government. It may be an income in the conceptual sense or even under the Income-tax Act but while working out the formula under section 80HHC(3) of the Income-tax Act and while applying the four variables one has to ascertain whether the receipt has an attribute of export turnover."

12. What can be deduced from the judgment in ***K. Ravindranathan Nair's case*** (supra) is that any independent income which is not derived from the export activities in terms of Section 80 HHC (2) of the Act but is otherwise assessed as business income, 90% of such receipts have to be reduced from the profits of the business in terms of Explanation (baa) to Section 80 HHC of the Act.

13. Now, we proceed to deal with the precedents as relied upon by learned counsel for the assessee to canvass that since all liability incurred by the assessee-company in respect of the interest had infact earlier been allowed as deduction while computing the profit of the export business, then merely because such liability ceases to exist, the same will not undergo a change in its nature and become an independent income.

14. In ***Commissioner of Income-Tax versus Shri Ram Honda Power Equip [2007] 289 ITR 475 (Delhi)***, after taking into consideration the entire law on the subject, the learned Division Bench of Delhi High Court summarized the legal position as follows:-

"To summarise our conclusions:

(i) In computing what the profits derived from exports for the purposes of 80HHC(1) read with 80HHC(3) are, the nexus test has to be applied to exclude that which does not partake of profits that can be said to have been derived from the business of exports.

(ii)In the specific context of Clause (baa) of the Explanation to Section 80HHC, while determining the 'profits of the business', the AO has to undertake a two-step exercise in the following sequence. He has to first 'compute' the profits of the business under the head "profits and gains of business or profession." In other words, he will have to compute business profits, in terms of the Act, by applying the provisions of Sections 28 to 44 thereof.

(iii) In arriving at profits of the business by the above method, the AO will exclude all such incomes which partake the character of 'income from other sources' which in any event are treated under Sections 56 and 57 of the Act and are therefore not to be reckoned for the purposes of Section 80HHC. The AO will apply the law as explained in the judgments of the Kerala High Court referred to above which have been affirmed by the Hon'ble Supreme Court in Ravindra Nathan's case supra.

(iv) Where surplus funds are parked with the bank and interest is earned thereon it can only be categorised as income from other sources. This Page 0528 receipt merits separate treatment under Section 56 of the Act which is outside the ring of profit and gains from business and profession. It goes entirely out of the reckoning for the purposes of Section 80HHC.

(v) Interest earned on fixed deposits for the purposes of availing credit facilities from the bank, does not have an immediate nexus with the export business and therefore has to necessarily be treated as income from other sources and not business income.

(vi) Once business income has been determined by applying accounting standards as well as the provisions contained in the Act, the assessed would be permitted to, in terms of Section 37 of the Act, claim as deduction, expenditure laid out for the purposes of earning such business income.

(vii) In the second stage, the AO will deduct from the profits of the business computed under the head profits and gains of business or profession the following sums in order to arrive at the 'profits of the business' for the purposes of Section 80HHC(3):

(a) 90% of any sum referred to in Clauses (iiia), (iiib) and (iiic) of Section 28 i.e. export incentives;

(b) 90% of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits; and

(c) profits of any branch, office, warehouse or any other establishment of the assessed situate outside India.

(viii) The word "interest" in clause (baa) of the Explanation connotes "net interest" and not "gross interest". Therefore, in deducting such interest, the AO will take into account the net interest i.e. gross interest as reduced by expenditure incurred for earning such interest. The decision of the Special Bench of the ITAT in Lalsons [2004] 8 ITR 25 (Delhi) to this effect is affirmed. In holding as above, we differ from the judgments of the Punjab & Haryana High Court in Rani Paliwal [2004] 268 ITR 220 and the Madras High Court in Chinnapandi [2006] 282 ITR 389 and affirm the ruling of the Special Bench of the ITAT in Lalsons [2004] 8 ITR 25 (Delhi).

(ix) Where, as a result of the computation of profits and gains of business and profession, the AO treats the interest receipt as business income, then deduction should be permissible, in terms of Explanation (baa) of the net interest i.e. the gross interest less the expenditure incurred for the purposes of earning such interest. The nexus between obtaining the loan and paying interest thereon (laying out the expenditure by way of interest) for the purpose of earning the interest on the fixed deposit, to draw an analogy from Section 37, will require to be shown by the assessed for application of the netting principle."

15. In ***Commissioner of Income-Tax versus Bhansali Engineering Polymars Ltd. [2008) 306 ITR 194 (Bom)***, it was held by a learned Division Bench of the Bombay High Court that the interest received on delayed payments from sundry debtors to whom the industrial unit of the assessee had sold goods could be treated as interest income derived from such industrial undertaking even though the assessee had realised income from other sources.

16. In ***Commissioner of Income-Tax versus Sociedade De Fomento Industrial Ltd. [2011] 335 ITR 472 (Bom)*** a learned Division Bench of the Bombay High Court held that though the main object of the assessee was to extract iron ore and export the same, the interest received from the bank and intercorporate deposits earned out of surplus funds by the assessee could not be said to be an activity which was not includible in

the business profits for the purpose of Section 80 HHC. In such a situation, it could not be said that the assessee had not carried out the business of placing various deposits and earning interest therefrom. It was further held that the activity carried out could be definitely held business activity and hence an income earned therefrom was to be taxed business income only. The interest income had to be taken into account for the purpose of Section 80 HHC.

17. In ***ACG Associated Capsules Pvt. Ltd. versus Commissioner of Income-Tax (2012) 3 SCC 321*** while affirming the view taken by the Delhi High Court in ***Shri Ram Honda's case*** (supra), it was held by the Hon'ble Supreme Court that the profits of business "as contemplated under Explanation (baa) means the profit of business as computed under the head "profits and gains of business or profession" as reduced by the receipts of the nature mentioned in clauses (1) and (2) of Explanation (baa). Thus, profits of the business of an assessee will have to be first computed under the head "profits and gains of business or profession" in accordance with the provisions of Sections 28 to 44-D of the Act. In the computation of such profits of business, all receipts of income which are chargeable as profits and gains of business under Section 28 of the Act will have to be included. Similarly, in computation of such profits of business, different expenses which are allowable under Sections 30 to 44-D have to be allowed as expenses. After including such receipts of income and after deducting such expenses, the total of the net receipts are profits of the business of the assessee computed under the head " profits and gains of business or profession" from which deductions are to be made under clauses (1) and (2) of Explanation (baa).

18. It was held that under clause (1) of Explanation (baa), ninety per cent of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in any such profits are to be deducted from the profits of the business as computed under the head "profits and gains of business or profession". The expression "included any such profits" in clause (1) of the Explanation (baa) would mean only such receipts by way of brokerage, commission, interest, rent, charges or any other receipt which are included in the profits of the business as computed under the head "profits and gains of business or profession". Therefore, if any quantum of the receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature is allowed as expenses under Sections 30 to 44D of the Act and is not included in the profits of business as computed under the head "profits and gains of business or profession", ninety per cent of such quantum of receipts cannot be reduced under Clause (1) of Explanation (baa) from the profits of the business. In other words, only ninety per cent of the net amount of any receipt of the nature mentioned in clause (1) which is actually included in the profits of the assessee is to be deducted from the profits of the assessee for determining "profits of the business" of the assessee under Explanation (baa) to Section 80HHC.

19. It was further held that Explanation (baa) has to be construed on its own language and as per the plain natural meaning of the words used in Explanation (baa), the words "receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits" will not only refer to the nature of receipts but also the quantum of receipts included in the profits of the business as computed under the head "profits and gains of business or profession" referred to in the first part of the Explanation (baa). Accordingly, if any quantum of any receipt of the nature mentioned in clause (1) of Explanation (baa) has not been included in the profits of business of an assessee as computed under the head "profits and gains of business or profession", ninety per cent of such quantum of the receipt cannot be deducted under Explanation (baa) to Section 80HHC.

20. Finally, after interpreting the provisions of Explanation (baa), it was held that if the rent or interest is a receipt chargeable as profits and gains of business and chargeable to tax under Section 28 of the Act and if any quantum of the rent or interest of the assessee is allowable as an expense in accordance with Sections 30 to 44-D of the Act and is not to be included in the profits of the business of the assessee as computed under the head "profits and gains of business or profession", 90% of such quantum of the receipt of interest or rent will not be deducted under clause (1) of Explanation (baa) to Section 80 HHC. In other words, 90% of not the gross rent or gross interest but only the net interest or net rent which has been included in the profits of business of the assessee as computed under the head "profits and gains of business or profession" is to be deducted under clause (1) of Explanation (baa) to Section 80 HHC for determining the profits of the business.

21. Now what emerges from the aforesaid exposition of law is that as per Section 80 HHC deduction is to be allowed from the profits derived by the assessee from the exports of goods or merchandise while computing the gross total income and the object of this Section is to grant an incentive to earners of foreign exchange and the matter, therefore, essentially has to be considered with reference to that object. Under sub-section (3) of Section 80 HHC, the mechanism for determination of profits derived from export of goods or merchandise has been prescribed for the purposes of sub-section (1). Clause (a) thereof deals with an assessee where the business is export of goods or merchandise manufactured by the assessee. Clause (b) relates to an assessee whose business is of export outside India of trading goods, whereas, clause (c) applies to an assessee whose business comprised both export of manufactured goods and also of trading goods. The computation referred to above is to be made having regard to the "profits of the business" which are determined in terms of clause (baa) of the Explanation to Section 80 HHC of the Act. The said Explanation provides that the expression "profits of the business" means, the profits as computed under the head "profits and gains of business or profession", as reduced by 90% of the sums referred to in clauses (iiia), (iiib) and (iiic) of Section 28 or any receipt by way of brokerage, commission, interest, rent, charges and any other receipt of the similar nature included in such profits.

22. It would also be noticed that Section 41(1) creates a legal fiction and can be extended for the purpose of allowing deduction from "profits of the business" as referred to in Section 80 HHC of the Act. The income chargeable to tax under Section 41(1) of the Act is from reversal of any loss, expenditure or trading liability which had extinguished or ceased to exist. The legal fiction can only be extended to the extent that the provisions of Section 80 HHC have to be understood excluding the legal fiction created by deeming provisions contained in Section 41(1) of the Act as the source of income which is chargeable cannot be related to export of goods or merchandise because if any other meaning is assigned to the aforesaid fiction created with respect to Section 41(1), it would be against the basic purpose and object of Section 80 HHC of the Act. If that be so, then the exclusion of 90% of the deemed income under Section 41(1) of the Act is not in accordance with the correct interpretation of Explanation (baa) to Section 80 HHC of the Act and, therefore, the ITAT, in such circumstances, has rightly allowed the appeal of the assessee.

23. That apart, it would also be noticed that the liability incurred by the assessee company in respect of the interest had infact been earlier allowed as deduction while computing the profits of the export business, the same will not now undergo a change in its nature and become an independent income. However, in terms of the judgment passed by the Hon'ble Supreme Court in ***ACG Associated's case*** (supra), the benefit would only be available on the net interest which had been included in the profits of the business of the assessee as computed under the head "profits and gains of business or profession"

that alone will be deducted under clause (1) of the Explanation (baa) to Section 80 HHC of the Act for determining the profits of the business and not the gross interest.

24. The question is accordingly answered in the aforesaid terms. However, it is once again clarified that while computing the interest under clause (baa) of the Explanation, the Assessing Officer will take into account the net interest i.e. gross interest as reduced by expenditure incurred for earning such interest.

25. In view of the aforesaid discussion, there is no merit in this appeal and the same is dismissed with the aforesaid clarification, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

Himachal Education Society ...Petitioner

Vs.

State of HP & Others ...Respondents.

CWP No. 5169 of 2014
Judgment reserved on: 28.10.2015
Date of decision: November 30, 2015

Constitution of India, 1950- Article 226- Petitioner challenged the approval granted to respondent no. 7 for starting GNM/B.Sc (N) course in private sector on the ground that proposed institute does not fall in the area notified in the advertisement- it is alleged that the institute was to be opened in the Mandi district within 30 kms but it was being opened in different sub division Chachiot- held, that applicants themselves do not fulfill the requirements and lack the basic required infrastructure- petitioner, therefore, cannot be permitted to the question of essentiality certificate granted in favour of respondent No. 7- further held, that Tehsil Chachiot is an integral part of District Mandi and the respondents have filed affidavits that place where institute was being opened was only 28 kms away from the Mandi town- no interference is required in the approval granted to respondent No. 7- hence, writ petition dismissed. (Para-10 to 24)

Cases referred:

Unni Krishnan, J.P. and others vs. State of Andhra Pradesh and others, AIR 1993 SC 2178
State of Maharashtra vs. Vikas Sahebrao Roundale (1992) 4 SCC 435

For the Petitioner : Mr. Sandeep Sharma, Senior Advocate with Mr.Ajeet Sharma, Advocate.

For the Respondents : Mr. Shrawan Dogra, AG with Mr. V.S.Chauhan, Mr.Anup Rattan, Addl. AGs and Mr.J.K. Verma, Dy. AG for respondents No. 1 to 5.
Mr. Ravinder Thakur, Central Government Standing Counsel, for respondent No.6.
Mr. Ajay Mohan Goel, Advocate, for respondent No.7.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J,

By the medium of this writ petition, petitioner has questioned the approval granted to respondent No.7 for starting GNM/BSc (N) course in private sector on the ground that the said institute does not fall in the area notified in the advertisement.

The facts lie in a narrow compass.

2. The official respondents vide advertisement dated 22.10.2013 decided to call EOI's from the desirous parties for the establishment of GNM/B.Sc (N) Institution(s) under preferred location in private sector as under:

Sr.No.	Preferred location	Name of course & No. of seats	
		GNM	B.Sc.(Nursing)
1.	Rohru	40	-
2.	Sarkaghat	40	-
3.	Mandi	40	20
4.	Jogindernagar	-	40
5.	Sundernagar	40	-
6.	Chamba	-	40

The petitioner as also respondent No.7 alongwith two other applicants applied for the preferred location 'Mandi' and ultimately the essentiality and feasibility certificate/NOC was granted in favour of respondent No.7.

3. The petitioner has assailed this approval on the ground that respondent No. 7 does not fall within the preferred location 'Mandi' as its institute is not only situate at a distance of more than 30 Kms but that apart the institute is located in a different Tehsil, thus, making respondent No.7 ineligible. It is also averred that in terms of the notification dated 28.8.2008, the sub divisional level inspection was to be conducted by the Sub Divisional Magistrate of the concerned area being the Chairman which essentially meant that it was the SDM, Mandi, who was required to carry out such inspection whereas in the instant case, SDM, Mandi vide his letter dated 3.12.2013 refused to carry out the inspection as respondent No.7 institute did not fall within his jurisdiction and thereafter it was the SDM, Chachoit at Gohar who carried out the inspection as the institute of respondent No.7 fell within his territorial jurisdiction.

4. The official respondents have opposed the petition by filing reply and have submitted that the government had notified Mandi for opening of one GNM School and one B.Sc Nursing college and all the four applicants including respondent No. 7 who applied were having the proposed institutions within the distance of 30 Kms from the preferred location and were therefore, considered for evaluation. All the applicants fulfilled the first stage criteria as approved by the government and were thereafter considered for the next stage of evaluation, wherein the evaluation criteria is on the basis of 'those who own their own land, 'those who have their own building on the said land' and 'preference to those who have building where no other educational institution is running.

5. As per the inspection report, the proposed area and the building shown to be used for establishment of nursing institute of one of the applicant namely Vidyarthi Kalyan Shiksha Samiti was not considered to be eligible as it was not partitioned while the cases of

remaining three applicants were considered for next stage of evaluation which pertain to 'preference to those who have own building with proper space for use as per Indian Nursing Council (for short the 'INC') requirements. Since none of the applicants owned adequate space as per INC requirements, the evaluation committee adopted a criteria for ranking all the applicants based upon the parameters approved by the government and Indian Nursing Council norms and on the basis of said criteria, the evaluation of the petitioner, respondent No. 7 and the other applicants was as follows:

Name of applying trust/society / organization	Course applied	Parameters for evaluation adopted by the committee				Total points awarded
		Land		Constructed area		
		Total Land	Points awarded	Total constructed area	Points awarded	
2	3	4	5	6	7	8
1.Abhilashi Educational Society, Nerchowk, Tehsil Sadar, District Mandi. Open Education Development Research Welfare Society, Shimla	GNM+ B.Sc (N)	4	20	61360	20	40
2.Jagriti College of Nursing (Jagriti Associates), Vill. Nalasar, PO Rajgarh, Tehsil Sadar, District Mandi, HP.	GNM+ B.Sc (N)	2.5	17	2538	2	19
3.Himachal Education Society, Paddal Town, Mandi	GNM+ B.Sc (N)	5	20	1023	2	22

6. It was further averred that although no distance criteria had been applied for ranking the applicants with regard to preferred locations as advertised, the distance of the applicant's location from preferred location 'Mandi' as reported by the sub divisional level committee was as follows:

Sr. No.	Name of Applying Trust /Society/ Organization	Distance of proposed institution from the preferred location (in Km)
1	2	3
1.	Abhilashi Educational Society, Nerchowk, Tehsil Sadar, District Mandi. Open Education Development Research Welfare Society, Shimla	28
2.	Jagriti College of Nursing (Jagriti Associates), Vill Nalasar, PO Rajgarh, Tehsil Sadar, District Mandi, HP	2
3.	Himachal Education Society, Paddal Town, Mandi	2

7. It is thereafter averred that the distance of the proposed institution as per INC norms should be 30 Kms and respondent No.7 duly qualified for the same since its institution as per report of the sub divisional level committee was located at a distance of 28 Kms from the affiliated hospital. It is also averred that as against the constructed area of 61360 sq. ft. of respondent No.7, petitioner only had a constructed area of 1023 sq. ft. Lastly, it was pointed out that the recommendations of the evaluation committee were accepted by the respondent State during Cabinet meeting held on 10.2.2014 and thereafter the government decided to grant the essentiality and feasibility/NOC to run GNM/B.Sc Nursing courses in favour of respondent No.7.

8. Respondent No.7, on the other hand, has filed a separate reply and has tried to justify the grant of essentiality certificate in its favour by contending that in response to the advertisement the replying respondent had clearly stated that he intended to open a Nursing School, Naugrawn (Chail-Chowk), Tehsil Chachiot, District Mandi, H.P. which was at a distance of less than 30 Kms from the affiliated/attached hospital.

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

9. At the outset, it may be observed that even as per the case set up by the petitioner, the proposed institution in terms of the guidelines of the Nursing Council of India is required to be situated within the radius of 15-30 Kms. from the affiliated hospital as would be clear from the averments made in para - 9 of the petition, the relevant portion whereof reads as follows:

> *"9……It is not out of place to mention here that as per the guidelines of the Nursing Council of India the Institution should be within radius of 15-30 Kms and as the purpose of mentioning the distance may be to provide the better and safe training to the girl students as such the shortest distance should have been preferred whereas, the respondent-Institution is situated at another place which is more than 30 Kms from the preferred location and the institution of petitioner-Society is situated 2 kms which surrounding the Mandi City…"*

10. The grievance of the petitioner is primarily two fold. Firstly, that the institution of respondent No.7 is located at a distance of more than 30 kms. i.e. 31.235 km.

and secondly, that the respondent No.7 institution is not even located in Mandi Town or even Tehsil Mandi, rather the same is situated Nawgrawn (Chail Chowk), Sub Division Chachiot, that too, in Tehsil Gohar, District Mandi and was thus ineligible for even consideration much less being granted the essentiality certificate/NOC etc.

11. According to the petitioner, the identification of the places where the institutions were to be opened was not an empty formality as there was a conscious decision to this effect and that is why despite four out of six preferred locations being in District Mandi, they were identified by their names and find mention as such i.e. Sarkaghat, Mandi, Jogindernagar and Sundernagar. If it was not so, then conveniently the name of Tehsil or District alone could have been sufficient rather than giving the specific name of preferred location. Therefore, in such circumstances, it was required to be ensured that the petitioner-institute is situate within the preferred location itself and if not then atleast in the same Tehsil, whereas the respondent No.7-institute admittedly falls in Tehsil Gohar and was thus not eligible for being considered much less being granted approval to establish the institute.

12. On the other hand, learned Advocate General as also Mr. Ajay Mohan Goel, Advocate appearing for the respondents have vehemently argued that the preferred locations as notified in the advertisement were only for the purpose of identification and had to be considered bearing in mind the location of the Government hospital to which the institution was required to be attached. The dominant object of starting these courses in the private institute according to them was to attach these institutions with the government hospital at the preferred location and according approval for the same was to ensure that only the institution which is finally approved should apart from meeting the distance criteria should also meet with the basic infrastructural requirements.

13. Before we proceed any further, it is necessary that we set out the details of the infrastructure available with both the petitioner as well as respondent No.7, which are as follows:

"a) Physical facilities (GNM):

Sr. No.	Particulars	INC Norms (area in Sq. ft.)	**Petitioner** **Existing at the time of inspection**	**Respondent No. 7.** **Existing at the time of inspection**
1	Total Built up area (60 students)	54,470		**61360 sq. ft.**
	(i) Constructed area for teaching block	23,720		**28206 sq. ft.**
	a) Lecture Hall (4 Nos.)	@ 1080 sq.ft. = 4320	**1023 sq.ft.**	**Lect hall=2 1102 sq. ft.** **lect. Hall 2= 720 sq. ft. Total= 1822 x 2 = 3644 sq. ft.**

	b) Fundamental of Nursing	1500 sq.	-	**1560 sq. ft.**
	c) CHN	900	-	**912 sq. ft.**
	d) Nutrition	900	-	**1320 sq. ft.**
	e) OBG	900	-	**1080 sq. ft.**
	f) Computer Lab.	1500	-	**1610 sq. ft**
	g) Multipurpose Hall	3000	-	**3000 sq. ft.**
	h) Common Room	2000	-	**2403 sq. ft.**
	i) Staff Room	1000		**1197 sq. ft.**
	j) Principal Room	300	**324 sq. ft.**	**360 sq. ft.**
	K) Vice-Principal	200	-	**360 sq. ft.**
	l) Library	2400	-	**1216 sq. ft.**
	m) A.V. Aids Room	600	-	**720 sq. ft.**
	n) One room for each HOD	800	-	**851 sq. ft.**
	o) Faculty Room	2400	-	**1311 sq. ft.**
	p) Provision for toilets	1000	-	**1000 sq. ft.**
		Other circulation area	-	**5626 sq. ft.**
	ii) Constructed Area for hostel block	30, 750 Sq. ft.	-	**33154 sq. ft.**
	a) Single Room	2400	-	**25134 sq. ft.**
	b) Double Room	-	-	-
	c) Sanitary (One latrine & one bathroom for 5 students)	500	-	**1620 sq. ft**
	d) Visitor Room	500		**1000 sq. ft.**
	e) Reading Room	250	-	**500 sq. ft.**
	f) Store Room	500	-	**1000 sq. ft.**
	g) Re-creation Room	500	-	**1000 sq. ft.**
	h) Dining Hall	500	-	**1200 sq. ft.**
	i) Kitchen &	1500	-	**1700 sq. ft.**

	Store			

b) Office Requirement:

Sr. No.	Particulars	INC Norms	**Petitioner** **Existing at the time of inspection**	**Respondent No. 7** **Existing at the time of inspection**
1	Principal's office	Separate Office with attach toilet at provision for visitors room independent telephone and intercom facilities connected with hospital and hostel	**Yes**	**Yes, available with all amenities**
2	Office for Vice-Principal	Separate Office with attach toilet at provision for visitors room independent telephone and intercom facilities connected with hospital and hostel	-	**Yes, available with all facilities.**
3	Common Room	A minimum three common rooms	**No**	**Three common rooms available**
4.	Record Room		**No**	**Yes, available**
5.	Other facilities	Safe drinking water adequate sanitary/toilet facilities, separately for male and female	**Yes**	**Drinking electricity, Sanitary/toilets facilities (male and female) available.**
6.	Garage		**No**	**Yes, available**
7.	Fire Extinguishers		**Yes**	**Yes, available**
8.	Playground		**Yes**	**Yes, available**

14. It is evident from the above that the petitioner in comparison to respondent No. 7 has relatively less infrastructure and that is the precise reason that as against 40 points awarded to respondent No. 7, the evaluation committee awarded only 22 points to the petitioner in its report as referred to in para 5 supra. Notably, the award of points save

and except insofar as they relate to the distance of respondent No.7 institute has not been assailed.

15. Nurses play a very important role in the field of health care. From helping patients with basic hygienic tasks to assisting in surgery, nurses are trained and educated to help patients to the best of their ability. Nurses pursue a very responsible job that is a branch of health care. Other branches include, for example, the care of elderly persons or children. Nurses care for, treat and look after sick people all around the clock and they watch after patients physical and mental condition. In addition to personal care and movement of patients the administration of medication and assistance with medical examinations and surgical procedures belong to their tasks. They also use and monitor medical devices. Nurses even advise patients and their families about caring after the time in the hospital. Planning of care measures, organizational and administrative work and care documentation are also parts of their daily work.

16. It has repeatedly been held by the Hon'ble Supreme Court that private institutions cannot be permitted to have educational shops in the country and it is for this reason that there are statutory prohibitions for establishing and administering the educational institutions without prior permission or approval of the concerned authority.

17. Education has never been commerce in this country. Making it one is opposed to the ethos, tradition and sensibilities of this nation. The argument to the contrary has an unholy ring to it. Imparting of education has never been treated as a trade or business in this country since times immemorial. It has been treated as a religious duty. It has been treated as a charitable activity. But never as trade or business. (Refer: ***Unni Krishnan, J.P. and others vs. State of Andhra Pradesh and others, AIR 1993 SC 2178).***

18. Earlier to this, a three Judges Bench of the Hon'ble Supreme Court in ***State of Maharashtra vs. Vikas Sahebrao Roundale (1992) 4 SCC 435*** observed "slackening the standard and judicial fiat to control the mode of education and examining system are detrimental to the efficient management of the education."

19. In this background, the further question which arises for consideration is as to whether the petitioner, who lacks even the basic infrastructure to start any institution and can offer an accommodation which is hardly sufficient to be let out to a middle class family for residential purposes can be permitted to question the grant of essentiality certificate in favour of respondent No.7, that too, on mere technicalities.

20. Even if it is assumed that respondent No.7 institute is at a distance of 31.235 km from the preferred location as against the prescribed distance of 30 Kms., we would still not like to interfere, because of the peculiar facts of this case. Reason being that the petitioner, who does not even possess the basic infrastructure cannot be permitted to question the essentiality certificate granted in favour of respondent No. 7. At this stage, it may be clarified that insofar as the official respondents are concerned, they have categorically stated on affidavit that the distance of the institute of respondent No. 7 from the preferred location is 28 Kms. and we see no reason to disbelieve the same.

21. Coming to the other contention regarding preferred location being District Mandi, whereas the institute being situated in Tehsil Gohar, suffice it to say that in case the distance of the proposed institution is within radius of 30 Kms from the prescribed location, therefore even if the institute is located in a different Tehsil, but within the same district, we in absence of bias or malafide find no irregularity or illegality in the same.

22. That apart, this Court is not oblivious to the fact that in a State like Himachal Pradesh, such problems because of its terrain, topography and lack of availability of such a huge space in and around or adjoining the urban/semi urban areas are not uncommon. It is not in dispute that even Tehsil Chachiot is an integral part of District Mandi and as observed earlier, the distance of the proposed institute from the preferred location falls within the prescribed norms.

23. The underlying object of opening nursing institute is to impart knowledge and training to the students which in absence of requisite infrastructure cannot be imparted. Since the petitioner lacks the basic infrastructure for opening a GNM/ B.Sc. (Nursing) Institute, it cannot be permitted to challenge and assail the essentiality certificate granted in favour of respondent No.7 on technical grounds, more particularly, when the respondent No.7 complies with and fulfills majority of the requirements as are required for the opening of GNM/B.Sc. (Nursing) Institute.

24. Having said so, we find no merit in this petition and the same is accordingly dismissed alongwith pending application(s), 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.

Sh. Rikhi Ram & another ....Petitioners

Versus

State of H.P. & others ...Respondents

CWP No. 2927 of 2015-C
Date of decision: 30.11.2015

Constitution of India, 1950- Article 226- Division Office was shifted from Balakrupi to Jaisinghpur – a writ petition was filed challenging the shifting order on the ground that order is against the public interest, bad in law, arbitrary and mala fide- respondents pleaded that it is for the government to decide the suitability of Division Office and the decision was made in the public interest- held, that Court should not interfere in the policy decision, unless there is arbitrariness- State had examined all aspects and had taken the decision thereafter- it cannot be said that process of decision making is bad- - petition dismissed. (Para-3 to 10)

Cases referred:

Sidheshwar Sahakari Sakhar Karkhana Ltd. Vs. Union of India and others, 2005 AIR SCW 1399

Manohar Lal Sharma Vs. Union of India and another, (2013) 6 SCC 616

Asha Sharma versus Chandigarh Administration and others, 2011 AIR SCW 5636

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

For the petitioners: Mr. Deepak Kaushal, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Additional Advocate General and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

By the medium of this writ petition, the petitioner has sought quashment of notification dated 01.06.2015, (Annexure P-4), whereby H.P.P.W.D Division, Balakrupi was shifted to Jaisinghpur, on the grounds taken in the memo of the writ petition.

2. It is averred that the respondents-State Government without any reason have issued notification dated 1.6.2015 (Annexure P-4), whereby decision was made to shift the Division Office from Balakrupi to Jaisinghpur, which is not in the interest of inhabitants of the area and the general public. The shifting order dated 1.6.2015 (Annexure P-4) is against the public interest, bad in law, arbitrary and mala fide.

2. The respondents have filed reply and resisted the petition on the ground that it is for the Government to decide the suitability of the Division Office and that they have made a conscious decision, in the public interest.

3. It is a beaten law of land that Government decision and policy cannot be subject matter of a writ petition, unless its arbitrariness is shown in the decision making process.

4. The Apex Court in **Sidheshwar Sahakari Sakhar Karkhana Ltd. Vs. Union of India and others, 2005 AIR SCW 1399**, has laid down the guidelines and held that Courts should not interfere in the policy decision of the Government, unless there is arbitrariness on the face of it.

5. The Apex Court in a latest decision reported in **Manohar Lal Sharma Vs. Union of India and another, (2013) 6 SCC 616,** also held that interference by the Court on the ground of efficacy of the policy is not permissible. It is apt to reproduce paragraph 14 of the said decision as under:

> "***14. On matters affecting policy, this Court does not interfere unless the policy is unconstitutional or contrary to the statutory provisions or arbitrary or irrational or in abuse of power. The impugned policy that allows FDI up to 51% in multi-brand retail trading does not appear to suffer from any of these vices."***

6. The Apex Court in the case titled as **Mrs. Asha Sharma versus Chandigarh Administration and others,** reported in **2011 AIR SCW 5636** has held that policy decision cannot be quashed on the ground that another decision would have been more fair, wise, scientific or logical and in the interest of society. It is apt to reproduce para 10 of the aforesaid judgment herein:

> ***"10. The Government is entitled to make pragmatic adjustments and policy decisions, which may be necessary or called for under the prevalent peculiar circumstances. The Court may not strike down a policy decision taken by the Government merely because it feels that another decision would have been more fair or wise, scientific or logic. The principle of reasonableness and nonarbitrariness in governmental action is the core of our constitutional scheme and structure. Its interpretation will always depend upon the facts and circumstances of a given case. Reference in this regard can***

also be made to Netai Bag v. State of West Bengal [(2000) 8 SCC 262 : (AIR 2000 SC 3313)].”

7. It appears that the respondents-State Government have examined all aspects and made the decision. Thus, it cannot be said that the decision making process is bad. The Court cannot sit in appeal and examine the correctness of the policy decision.

8. The Apex Court in the case titled as **Bhubaneswar Development Authority and another versus Adikanda Biswal and others,** reported in **(2012) 11 SCC 731** has laid down the same principle. It is apt to reproduce para 19 of the judgment, *supra*, herein:

> ***“19. We are of the view that the High Court was not justified in sitting in appeal over the decision taken by the statutory authority under Article 226 of the Constitution of India. It is trite law that the power of judicial review under Article 226 of the Constitution of India is not directed against the decision but is confined to the decision making process. The judicial review is not an appeal from a decision, but a review of the manner in which the decision is made and the Court sits in judgment only on the correctness of the decision making process and not on the correctness of the decision itself. The Court confines itself to the question of legality and is concerned only with, whether the decision making authority exceeded its power, committed an error of law, committed a breach of the rules of natural justice, reached an unreasonable decision or abused its powers.”***

9. This Court in the judgments delivered in **CWP No. 621 of 2014,** titled as ***Nand Lal & another* versus *State of H.P. & others*** and **CWP No. 4625 of 2012, ,** titled as **Gurbachan versus State of Himachal Pradesh & others,** decided on 15.07.2014, has also laid down the same proposition of law.

10. Applying the test to the instant case, the writ petition merits to be dismissed. Accordingly, it is dismissed alongwith pending applications.

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

Satish Jamwal and others .....Appellants

Vs.

State of H.P. and others .....Respondents

LPA No. 8 of 2011
Reserved on: 02.11.2015
Date of decision: November 30, 2015.

Constitution of India, 1950- Article 226- Appellants were working as Panchyat Inspectors and the private respondents were working as Auditors with the respondent no. 2- prior to the year 1999, the Auditors used to be promoted as D.A.O. (12 posts) and Panchayat Inspector as Instructor (6 posts)- rules were amended on 15.7.1996 and the provision of promotion to the extent of 50% to the category of Auditors and 50% to the category of

Panchayat Inspectors was made for the post of D.A.O.- rules were again amended in the year 2007, and the provision of 50% reservation was done away with - it was provided that Auditors and Panchyat Inspectors having five years of service were eligible for promotion to the post of D.A.O.- these rules were challenged by way of writ petition on the plea of arbitrariness and other grounds- writ petition was dismissed by the Writ Court holding that rules were based upon rationality and reasoning- in writ appeal held, that rules though not being in tune with executive instructions shall prevail over executive instructions- chances of promotion as pleaded by appellants was not condition of service but condition of service was right to be considered for promotion- questions relating to constitution, pattern, nomenclature of posts, cadres, categories, creation and other conditions of service pertaining to the field of policy are within exclusive discretion and jurisdiction of the State, subject to certain limitations provided by the Constitution- it is not for the Courts to direct the Government to have a particular method of recruitment or criteria for further promotion- appeal is without merits and dismissed. (Para-6 to 12)

Cases referred:

Dhole Govind Sahebrao vs. Union of India (2015) 6 SCC 727

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

For the Appellants	:	Mr. R. K. Gautam, Senior Advocate with Ms. Archana Dutt, Advocate.
For the Respondents	:	Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr. Romesh Verma, Addl. Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 and 2.

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 on 30.12.2010 whereby the prayer of the petitioners/appellants for quashing the Recruitment and Promotion Rules for the post of District Audit Officer/Instructor (Class-II) in the Department of Panchayati Raj, Himachal Pradesh has been dismissed.

2. Briefly stated, the facts of the case are that the appellants were working as Panchayat Inspectors, whereas the private respondents

as Auditors with the respondent No.2. Prior to the year 1999, the Auditors used to be promoted as D.A.O. (12 posts) and Panchayat Inspector as Instructor (6 posts), but in order to give equal opportunities to both categories, the Recruitment and Promotion Rules were amended on 15.7.1996 wherein the provision of 50% to the category of Auditors and 50% to the category of Panchayat Inspectors was made for promotion to the post of District Audit Officer and Panchayat Instructors respectively.

3. The Rules were again amended in the year 2007 whereby both the categories i.e. Auditors and Panchayat Inspectors having 5 years of service were made eligible for promotion to the post of District Audit Officers/Panchayat Instructors, but the reservation of 50% earlier provided to each of the category was done away with and consequently the application of the roster was also done away with. Rule 11 of the amended Rules, reads as follows:

"11.In case of recruitment by promotion, deputation/ transfer, grades from which promotion, deputation/ transfer to be made:	*By promotion from amongst the Auditors/Panchayat Inspectors who possess five years' regular service or regular combined with continuous adhoc service rendered, if any, in the grade prior to regular appointment to the post.* *Provided that for the purpose of promotion a combined seniority list of eligible Auditors and Panchayat Inspectors on the basis of length of service without disturbing their cadre-wise inter se-seniority shall be prepared."*

4. The amendment carried out in the Rules was assailed before the learned writ Court on number of grounds taken therein. However, the learned writ Court dismissed the petition by holding that there was rationality and reasoning in the approach of the respondent-State whereby both the categories have been made eligible to common higher posts on the basis of the joint seniority.

5. Mr. R.K.Gautam, Senior Advocate, assisted by Ms. Archana Dutt, Advocate, learned counsel for the appellants has primarily raised three contentions:

(i) that the Recruitment and Promotion Rules are contrary to the executive instructions issued by the Government ;

(ii) that the amendment is liable to be struck down as it affects the chances of promotion of the appellants and:

(iii) that the amendment deserves to be struck down as it is not only illegal, arbitrary but is against the basic principles of service law.

Whereas, the learned Advocate General has supported the judgment rendered by the learned writ Court.

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

6. Insofar as the first contention regarding the rules not being in tune with the executive instructions is concerned, suffice it to say that such argument proceeds on erroneous assumptions because it is the executive instructions that have to be in tune with the statutory rules and not vice-versa. This aspect of the matter has already been considered in detail by this Bench in case titled ***Priyanka Gautam and others*** vs. ***State of H.P. and others,*** CWP No. 354 of 2014 decided on 31st May, 2014, wherein it was held:

"13. It is settled proposition of law that executive instructions cannot overrule or override the statutory Rules. Therefore, in case there is a conflict between the executive instructions and the rules made under Article 309, the rules made under Article 309 will prevail and in case there is conflict between the rules framed under Article 309 and the law made by the legislature will prevail. It is further trite that administrative instructions or orders can only be issued in matters of which the Rules made under Article 309 are silent, therefore, administrative instructions can only supplant the Rules but cannot supplement the same. Even a policy decision taken by the Government cannot

have the force of rule made under Article 309 of the Constitution of India. Needless to state that Article 162 whereby the Government is competent to issue administrative instructions/orders and Article 309 operate in different area. In exercising the powers under Article 162, the Government cannot ignore the Rules framed under Article 309. Thus, any appointment or regularisation of an appointment made in contravention of the rules made under Article 309 shall be void. It is equally settled law that the rules framed under Article 309 cannot be amended or modified by an administrative order or instruction even by way of adding to the provisions of the statutory rule, unless there is a gap in the rule which required to be fill up. Therefore, what essentially follows is that the Government cannot amend or supersede the statutory Rules by administrative instructions and it is only when the Rules are silent on any particular point can the Government fill up the gaps and supplant the Rules or the law by issuing instructions that too not inconsistent with the Rules. Thus, an administrative instruction cannot abridge or run counter to statutory provision or Rule."

7. Coming to the second contention of the appellants regarding the amended rules affecting their chances of promotion, it may be observed that it is more than settled that such contention could have been accepted only if chances of promotions are treated as conditions of service, but then it is also settled that the mere chances of promotions are not conditions of service and the fact that there is reduction in the chances of promotion does not tantamount to a change in the conditions of service. A right to be considered for promotion is a term of service, but mere chances of promotion are not. Reference in this regard can conveniently be made to a recent judgment of the Hon'ble Supreme Court in ***Dhole Govind Sahebrao vs. Union of India (2015) 6 SCC 727*** wherein it was held as under:

"31. We shall now venture to deal with another aspect of the matter, emerging out of the impugned order passed by the High Court. The conclusions drawn by the High Court, as have been recorded in paragraph 46 of the impugned judgment and order dated 13.4.2007, emerged out of a consideration which was noticed in paragraphs 38 to 45. Paragraphs 38 and 43 to 46 of the impugned judgment and order, have already been extracted hereinabove. A perusal of the above consideration reveals, that the High Court was swayed by the co-incidental prejudice suffered by the erstwhile members of the ministerial cadre, resulting in lost chances of promotion. The aforesaid consideration could have been justified only if chances of promotion are treated as conditions of service. Insofar as the instant aspect of the matter is concerned, this Court has repeatedly examined the issue whether chances of promotion constitute conditions of service. In this behalf, reference may be made to a few judgments rendered by this Court:

32. First of all, we may advert to the decision rendered by this Court in State of Maharashtra & Anr. v. Chandrakant Anant Kulkarni & Ors., (1981) 4 SCC 130, wherein a three Judge Bench of this Court held as under: (SCC pp. 141-42, para 16)

"16. Mere chances of promotion are not conditions of service and the fact that there was reduction in the chances of promotion did not tantamount to a change in the conditions of service. A right to be considered for promotion is a term of service, but mere chances of promotion are not. Under the Departmental Examination Rules for STOs, 1954, framed by the former State Government of Madhya

Pradesh, as amended on January 20, 1960, mere passing of the departmental examination conferred no right on the STIs of Bombay, to promotion. By passing the examination, they merely became eligible for promotion. They had to be brought on to a select list not merely on the length of service, but on the basis of merit-cum-seniority principle. It was, therefore, nothing but a mere chance of promotion. In consequence of the impugned orders of reversion, all that happened is that some of the STIs, who had wrongly been promoted as STOs Grade III had to be reverted and thereby lost a few places. In contrast, the conditions of service of ASTOs from Madhya Pradesh and Hyderabad, at least so far as one stage of promotion above the one held by them before the reorganisation of States, could not be altered without the previous sanction of the Central Government as laid down in the Proviso to sub-section (7) of Section 115 of the Act."

(emphasis in original).

33. Reference may also be made to the decision of this Court in Palaru Ramkrishnaiah & Ors. v. Union of India & Anr., (1989) 2 SCC 541, wherein a three Judge Bench of this Court held as under: (SCC pp. 552 & 554, paras 12 & 15)

"12. In the case of Ramchandra Shankar Deodhar, (1974) 1 SCC 317, the petitioners and other allocated Tahsildars from ex-Hyderabad State had under the notification of the Raj Pramukh dated September 15, 1955 all the vacancies in the posts of Deputy Collector in the ex-Hyderabad State available to them for promotion but under subsequent rules of July 30, 1959, 50 per cent of the vacancies were to be filled by direct recruitment and only the remaining 50 per cent were available for promotion and that too on divisional basis. The effect of this change obviously was that now only 50 per cent vacancies in the post of Deputy Collector being available in place of all the vacancies it was to take almost double the time for many other allocated Tahsildars to get promoted as Deputy Collectors. In other words it resulted in delayed chance of promotion. It was, inter alia, urged on behalf of the petitioners that the situation brought about by the rules of July 30, 1959 constituted variation to their prejudice in the conditions of service applicable to them immediately prior to the reorganisation of the State and the rules were consequently invalid. While repelling this submission the Constitution Bench held: (SCC p. 329, para 15)

'15.....All that happened as a result of making promotions to the posts of Deputy Collectors divisionwise and limiting such promotions to 50 per cent of the total number of vacancies in the posts of Deputy Collector was to reduce the chances of promotion available to the petitioners. It is now well settled by the decision of this Court in State of Mysore v. G. B. Purohit, 1967 SLR 753 (SC), that though a right to be considered for promotion is a condition of service, mere chances of promotion are not. A rule which merely affect chances of promotion cannot be regarded as varying a condition of service. In Purohit case (supra), the districtwise seniority of sanitary inspectors was changed to Statewise seniority, and as a result of this

change the respondents went down in seniority and became very junior. This, it was urged, affected their chances of promotion which were protected under the proviso to Section 115, sub-section (7). This contention was negatived and Wanchoo, J., (as he then was), speaking on behalf of this Court observed: 'It is said on behalf of the respondents that as their chances of promotion have been affected their conditions of service have been changed to their disadvantage. We see no force in this argument because chances of promotion are not conditions of service.' It is, therefore, clear that neither the Rules of 30-7-1959, nor the procedure for making promotions to the posts of Deputy Collector divisionwise varies the conditions of service of the petitioners to their disadvantage."

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15. It cannot be disputed that the Director General of Ordnance Factories who had issued the Circular dated November 6, 1962 had the power to issue the subsequent Circular dated January 20, 1966 also. In view of the legal position pointed out above the aforesaid circular could not be treated to be one affecting adversely any condition of service of the Supervisors 'A'. Its only effect was that the chance of promotion which had been accelerated by the Circular November 6, 1962 was deferred and made dependent on selection according to the Rules. Apparently, after the coming into force of the order dated December 28, 1965 and the Circular dated January 20, 1966 promotions could not be made just on completion of two years' satisfactory service under the earlier Circular dated November 6, 1962 the same having been superseded by the later circular. It is further obvious that in this view of the matter Supervisors 'A' who had been promoted before the coming into force of the order dated December 28, 1965 and the Circular dated January 20, 1966 stood in a class separate from those whose promotions were to be made thereafter. The fact that some Supervisors 'A' had been promoted before the coming into force of the order dated December 28, 1965 and the Circular dated January 20, 1966 could not, therefore, constitute the basis for an argument that those Supervisors 'A' whose cases came up for consideration for promotion thereafter and who were promoted in due course in accordance with the rules were discriminated against. They apparently did not fall in the same category."

34. This Court had also declared the position of law, on the above aspect of the matter, in Syed Khalid Rizvi & Ors. v. Union of India & Ors., 1993 Supp. (3) SCC 575, wherein a three Judge Bench observed as under: (SCC pp. 601-03, paras 30-31)

"30. The next question is whether the seniority is a condition of service or a part of rules of recruitment? In State of M.P. v. Shardul Singh, (1970) 1 SCC 108, this Court held that the term conditions of service means all those conditions which regulate the holding of a post by a person right from the time of his appointment (emphasis supplied) to his retirement and even beyond, in matters like pensions etc. In I.N. Subba Reddy v. Andhra University, (1977) 1 SCC 554, the same view was reiterated. In Mohd. Shujat Ali v. Union of India, (1975) 3 SCC 76,

a Constitution Bench held that the rule which confers a right to actual promotion or a right to be considered for promotion is a rule prescribing a condition of the service. In Mohd. Bhakar v. Krishna Reddy, 1970 SLR 768, another Constitution Bench held that any rule which affects the promotion of a person relates to his condition of service. In State of Mysore v. G.B. Purohit, 1967 SLR 753, this Court held that a rule which merely affects chances of promotion cannot be regarded as varying a condition of service. Chances of promotion are not conditions of service. The same view was reiterated in another Constitution Bench judgment in Ramchandra Shankar Deodhar v. State of Maharashtra, (1974) 1 SCC 317. No doubt conditions of service may be classified as salary, confirmation, promotion, seniority, tenure or termination of service etc. as held in State of Punjab v. Kailash Nath, (1989) 1 SCC 321, by a Bench of two Judges but the context in which the law therein was laid must be noted. The question therein was whether non-prosecution for a grave offence after expiry of four years is a condition of service? While negativing the contention that non-prosecution after expiry of 4 years is not a condition of service, this Court elaborated the subject and the above view was taken. The ratio therein does not have any bearing on the point in issue. Perhaps the question may bear relevance, if an employee was initially recruited into the service according to the rules and promotion was regulated in the same rules to higher echelons of service. In that arena promotion may be considered to be a condition of service. In A.K. Bhatnagar v. Union of India, (1991) 1 SCC 544, this Court held that seniority is an incidence of service and where the service rules prescribe the method of its computation it is squarely governed by such rules. In their absence ordinarily the length of service is taken into account. In that case the direct recruits were made senior to the recruits by regularisation although the appellants were appointed earlier in point of time and uninterruptedly remained in service as temporary appointees along with the appellants but later on when recruited by direct recruitment, they were held senior to the promotees.

31. No employee has a right to promotion but he has only the right to be considered for promotion according to rules. Chances of promotion are not conditions of service and are defeasible. Take an illustration that the Promotion Regulations envisage maintaining integrity and good record by Dy. S.P. of State Police Service as eligibility condition for inclusion in the select-list for recruitment by promotion to Indian Police Service. Inclusion and approval of the name in the select-list by the UPSC, after considering the objections if any by the Central Government is also a condition precedent. Suppose if 'B' is far junior to 'A' in State Services and 'B' was found more meritorious and suitable and was put in a select- list of 1980 and accordingly 'B' was appointed to the Indian Police Service after following the procedure. 'A' was thereby superseded by 'B'. Two years later 'A' was found fit and suitable in 1984 and was accordingly appointed according to rules. Can 'A' thereafter say that 'B' being far junior to him in State Service, 'A' should become senior to 'B' in the Indian Police Service. The answer is obviously no because 'B' had stolen a march over 'A' and became senior to 'A'. Here maintaining integrity and good record are conditions

of recruitment and seniority is an incidence of service. Take another illustration that the State Service provides - rule of reservation to the scheduled castes and scheduled tribes. 'A' is a general candidate holding No. 1 rank according to the roster as he was most meritorious in the State service among general candidates. 'B' scheduled castes candidate holds No. 3 point in the roster and 'C', scheduled tribe holds No. 5 in the roster. Suppose Indian Police Service Recruitment Rules also provide reservation to the Scheduled Castes and Scheduled Tribes as well. By operation of the equality of opportunity by Articles 14, 16(1), 16(4) and 335, 'B' and 'C' were recruited by promotion from State Services to Central Services and were appointed earlier to 'A' in 1980. 'A' thereafter in the next year was found suitable as a general candidate and was appointed to the Indian Police Service. Can 'A' thereafter contend that since 'B' and 'C' were appointed by virtue of reservation, though were less meritorious and junior to him in the State service and gradation list would not become senior to him in the cadre as IPS officer. Undoubtedly 'B' and 'C', by rule of reservation, had stolen a march over 'A' from the State Service. By operation of rule of reservation 'B' and 'C' became senior and 'A' became junior in the Central Services. Reservation and roster were conditions of recruitment and seniority was only an incidence of service. The eligibility for recruitment to the Indian Police Service, thus, is a condition of recruitment and not a condition of service. Accordingly we hold that seniority, though, normally an incidence of service, Seniority Rules, Recruitment Rules and Promotion Regulations form part of the conditions of recruitment to the Indian Police Service by promotion, which should be strictly complied with before becoming eligible for consideration for promotion and are not relaxable."

(emphasis in original)

35. More recent in time, is the judgment rendered by another three Judge Division Bench in S.S. Bola & Ors. v. B.D. Sardana & Ors., (1997) 8 SCC 522. The majority opinion in the above judgment was rendered by Justice K. Ramaswamy. In the process of consideration, he observed as under: (SCC p. 622, para 145)

"145. It is true that the Rules made under the proviso to Article 309 of the Constitution can be issued by amending or altering the Rules with retrospectivity as consistently held by this Court in a catena of decisions, viz., B.S. Vadera v. Union of India, AIR 1969 SC 118; Raj Kumar v. Union of India, (1975) 4 SCC 13; K. Nagaraj v. State of A.P., (1985) 1 SCC 523; T.R. Kapur v. State of Haryana, 1986 Supp. SCC 584, and a host of other decisions. But the question is whether the Rules can be amended taking away the vested right. As regards the right to seniority, this Court elaborately considered the incidence of the right to seniority and amendment of the Act in the latest decision in Ashok Kumar Gupta v. State of U.P., (!977) 5 SCC 201, relieving the need to reiterate all of them once over. Suffice it to state that it is settled law that a distinction between right and interest has always been maintained. Seniority is a facet of interest. The rules prescribe the method of selection/recruitment. Seniority is governed by the existing rules and is required to be worked out accordingly. No one has

a vested right to promotion or seniority but an officer has an interest to seniority acquired by working out the Rules. It would be taken away only by operation of valid law. Right to be considered for promotion is a rule prescribed by conditions of service. A rule which affects the promotion of a person relates to conditions of service. The rule merely affecting the chances of promotion cannot be regarded as varying the conditions of service. Chances of promotion are not conditions of service. A rule which merely affects the chances of promotion does not amount to change in the conditions of service."

36. Consequent upon the above detailed consideration, K. Ramaswamy, J. recorded his conclusion in paragraph 153. On the issue in hand, sub-paragraph AB of paragraph 153 is relevant and is being extracted hereunder: (S.S.Bola case, SCC p. 634)

"AB. A distinction between right to be considered for promotion and an interest to be considered for promotion has always been maintained. Seniority is a facet of interest. The rules prescribe the method of recruitment/selection. Seniority is governed by the rules existing as on the date of consideration for promotion. Seniority is required to be worked out according to the existing rules. No one has a vested right to promotion or seniority. But an officer has an interest to seniority acquired by working out the rules. The seniority should be taken away only by operation of valid law. Right to be considered for promotion is a rule prescribed by conditions of service. A rule which affects chances of promotion of a person relates to conditions of service. The rule/provision in an Act merely affecting the chances of promotion would not be regarded as varying the conditions of service. The chances of promotion are not conditions of service. A rule which merely affects the chances of promotion does not amount to change in the conditions of service. However, once a declaration of law, on the basis of existing rules, is made by a constitutional court and a mandamus is issued or direction given for its enforcement by preparing the seniority list, operation of the declaration of law and the mandamus and directions issued by the Court is the result of the declaration of law but not the operation of the rules per se."

(emphasis in original)

37. S. Saghir Ahmad, J. concurred with the view expressed by Justice K. Ramaswamy, J. A dissenting view was recorded by G.B. Pattanaik, J. On the subject in hand, however, there was no dissent. The conclusions recorded by G.B. Pattanaik, J. were to the following effect (S.S. Bola case, SCC pp. 665-66 & 675 – 77, paras 199-202 & 212)

"199. To the said effect the judgment of this Court in the case of State of Punjab v. Kishan Das, (1971) 1 SCC 319, wherein this Court observed an order forfeiting the [pic]past service which has earned a government servant increments in the post or rank he holds, howsoever adverse it is to him, affecting his seniority within the rank to which he belongs or his future chances of promotion, does not attract Article 311(2) of the Constitution since it is not covered by the expression reduction in rank.

200. Thus to have a particular position in the seniority list within a cadre can neither be said to be accrued or vested right of a government

servant and losing some places in the seniority list within the cadre does not amount to reduction in rank even though the future chances of promotion get delayed thereby. It was urged by Mr Sachar and Mr Mahabir Singh appearing for the direct recruits that the effect of redetermination of the seniority in accordance with the provisions of the Act is not only that the direct recruits lose a few places of seniority in the rank of Executive Engineer but their future chances of promotion are greatly jeopardised and that right having been taken away the Act must be held to be invalid. It is difficult to accept this contention since chances of promotion of a government servant are not a condition of service. In the case of State of Maharashtra v. Chandrakant Anant Kulkarni, (1981) 4 SCC 130, this Court held: (SCC p. 141, para 16)

> *'6. Mere chances of promotion are not conditions of service and the fact that there was reduction in the chances of promotion did not tantamount to a change in the conditions of service. A right to be considered for promotion is a term of service, but mere chances of promotion are not.'*

201. To the said effect a judgment of this Court in the case of K. Jagadeesan v. Union of India, (1990) 2 SCC 228, wherein this Court held: (SCC pp. 230-31, para 7)

> *'7……The only effect is that his chances of promotion or his right to be considered for promotion to the higher post is adversely affected. This cannot be regarded as retrospective effect being given to the amendment of the rules carried out by the impugned notification and the challenge to the said notification on that ground must fail.'*

202. Again in the case of Union of India v. S.L. Dutta, (1991) 1 SCC 505, this Court held: (SCC p. 512, para 17)

> *'17…..In our opinion, what was affected by the change of policy were merely the chances of promotion of the Air Vice-Marshals in the Navigation Stream. As far as the posts of Air Marshals open to the Air Vice-Marshals in the said stream were concerned, their right or eligibility to be considered for promotion still remained and hence, there was no change in their conditions of service.'*

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212. So far as the rules dealing with Irrigation Branch are concerned, the said rules namely the Punjab Service of Engineers (Irrigation Branch) Class I Service Rules, 1964 have not been considered earlier by this Court at any point of time. One Shri M.L. Gupta was appointed to the post of Assistant Executive Engineer as a direct recruit on 27-8-1971, pursuant to the result of a competitive examination held by the Haryana Public Service Commission in December 1970. The said Shri Gupta was promoted to the post of Executive Engineer on 17-9-1976. He made a representation to the State Government to fix up his seniority in accordance with the service rules but as the said representation was not disposed of for more than three years he approached the High Court of Punjab and Haryana by filing CWP No. 4335 of 1984. That petition was disposed of by the High Court on the

undertaking given by the State that the seniority will be fixed up soon. The said undertaking not having been complied with, the said Shri Gupta approached the High Court in January 1986 by filing a contempt petition. In September 1986 the State Government fixed the inter se seniority of the said Shri Gupta and other members of the Service and Gupta was shown at Serial No. 72. Two promotees had been shown at Serial Nos. 74 and 75. Those two promotees filed a writ petition challenging the fixation of inter se seniority between the direct recruits and promotees and the High Court of Punjab and Haryana by its judgment passed in May 1987 quashed the order dated 29-9-1986 whereunder the seniority of the direct recruits and promotees has been fixed and called upon the State Government to pass a speaking order assigning position in the gradation list. The State Government issued a fresh notification on 24-7-1987 giving detailed reasons reaffirming the earlier seniority which had been notified on 29-9-1986. Prior to the aforesaid notification of the State Government Shri Gupta had filed a writ petition in the Punjab and Haryana High Court which had been registered as CWP No. [pic]6012 of 1986 claiming his seniority at No. 22 instead of 72 which had been given to him under the notification dated 29-9-1986. The promotees also filed a writ petition challenging the government order dated 24-7-1987 which was registered as CWP No. 5780 of 1987. Both the writ petitions, one filed by the direct recruit, Shri Gupta, (CWP No. 6012 of 1986) and the other filed by the promotees (CWP No. 5780 of 1987) were disposed of by the learned Single Judge by judgments dated 24-1-1992 and 4-3-1992, respectively, whereunder the learned Single Judge accepted the stand of the promotees and Shri Gupta was placed below one Shri O.P. Gagneja. The said Shri Gupta filed two appeals to the Division Bench against the judgment of the learned Single Judge, which was registered as Letters Patent Appeals Nos. 367 and 411 of 1992. The aforesaid letters patent appeals were allowed by judgment dated 27-8-1992. This judgment of the Division Bench of the Punjab and Haryana High Court was challenged by the State of Haryana in the Supreme Court which has been registered as CAs Nos. 1448-49 of 1993. This Court granted leave and stayed the operation of the judgment in the matter of fixation of seniority. The promotees also challenged the said judgment of the Division Bench in this Court which has been registered as CAs Nos. 1452-1453 of 1993. During the pendency of these appeals in this Court, an Ordinance was promulgated on 13-5-1985 as Ordinance No. 6 of 1995 and the said Ordinance was replaced by the impugned Act 20 of 1995 by the Haryana Legislature. The validity of the Act was challenged by the said Shri Gupta and pursuant to the order of this Court the said writ petition having been transferred to this Court has been registered as TC No. 40 of 1996. So far as the validity of the Act is concerned, the question of any usurpation of judicial power by the legislature does not arise in relation to the Irrigation Branch inasmuch as the Recruitment Rules of 1964 framed by the Governor of Punjab in exercise of power under proviso to Article 309 of the Constitution which has been adapted by the State of Haryana on and from the date Haryana was made a separate State had not been considered by this Court nor has

any direction been issued by this Court. The legislative competence of the State Legislature to enact the Act had also not been assailed and in our view rightly since the State Legislature has the powers under Entry 41 of List II of the Seventh Schedule to frame law governing the conditions of service of the employees of the State Government. That apart Article 309 itself stipulates that the appropriate legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State subject to the provisions of the Constitution. Proviso to Article 309 confers power on the President in connection with the affairs of the Union and on the Governor in connection with the affairs of the State to make rules regulating the recruitment and the conditions of service until provision in that behalf is made by or under an Act of the appropriate legislature under Article 309 main part. In this view of the matter, the legislative competence of the State Legislature to enact the legislation in question is beyond doubt. The only question which, therefore, arises for consideration and which is contended in [pic]assailing the validity of the Act is that under the Act the direct recruits would lose several positions in the gradation list and thereby their accrued and vested rights would get jeopardised and their future chances of promotion also would be seriously hampered and such violation tantamounts to violation of rights under Part III of the Constitution. For the reasons already given while dealing with the aforesaid contention in connection with the Public Health Branch and the Buildings and Roads Branch the contention raised in the transfer case cannot be sustained and, therefore, the transfer case would stand dismissed. The Act in question dealing with the service conditions of the engineers belonging to the Irrigation Branch must be held to be a valid piece of legislation passed by the competent legislature and by giving it retrospective effect no constitutional provision has been violated nor has any right of the employee under Part III of the Constitution been infringed requiring interference by this Court."

38. Finally, reference may be made to a decision rendered by this Court in Union of India & Ors. v. Colonel G.S. Grewal, (2014) 7 SCC 303, wherein this Court observed as under: (SCC p. 315, para 28)

> *"28. As pointed out above, the Tribunal has partly allowed the OA of the respondent primarily on the ground that the decision contained in the Government Order dated 23-4-2010 amends the promotion policy retrospectively thereby taking away the rights already accrued to the respondent in terms of the earlier policy. It is also mentioned that the revised policy fundamentally changes the applicant's prospects of promotion. What is ignored is that the promotions already granted to the respondent have not been taken away. Insofar as future chances of promotions are concerned, no vested right accrues as chance of promotion is not a condition of service. Therefore, in the first instance, the Tribunal will have to spell out as to what was the vested right which had already accrued to the respondent and that is taken away by the Policy decision dated 23-4-2010. In this process, other thing which becomes relevant is to consider that once the respondent is permanently seconded in DGQA and he is allowed to remain there, can*

there be a change in his service conditions vis--vis others who are his counterparts in DGQA, but whose permanent secondment is not in cloud? To put it otherwise, the sole reason for issuing Government Policy dated 23-4-2010 was to take care of those cases where permanent secondment to DGQA was wrongly given. As per the appellants, since the respondent had suffered final supersession, he was not entitled to be seconded permanently to DGQA. This is disputed by the respondent. That aspect will have to be decided first. That apart, even if it be so, as contended by the appellants, the appellants have not recalled the permanent secondment order. They have allowed the respondent to stay in DGQA maintaining his promotion as Colonel as well, which was given pursuant to this secondment. The question, in such circumstances, that would arise is whether the respondent can be treated differently even if he is allowed to remain in DGQA viz. whether not allowing him to take further promotions, which benefit is still available to others whose permanent secondment is not in dispute, would amount to discrimination or arbitrariness thereby offending Articles 14 and 16 of the Constitution of India. In our opinion, these, and other related issues, will have to be argued and thrashed out for coming to a proper conclusion."

39. It is apparent from a collective perusal of the conclusions recorded in the judgments extracted in the foregoing paragraph, that chances of promotion do not constitute a condition of service. In that view of the matter, it is inevitable to hold, that the High Court erred in recording its eventual determination on the basis of the fact that the promulgation of the TA Rules, 2003 and the STA Rules, 2003 was discriminatory and arbitrary with regard to the fixation of the inter se seniority, since the same seriously prejudiced the chances of promotion of the erstwhile members of the ministerial cadre, namely, those members of the original ministerial cadre, who had not opted for appointment/absorption into the cadre of Data Entry Operators, with reference to and in comparison with, those members of the original ministerial cadre who had opted for appointment/absorption into the cadre of Data Entry Operators.

40. As a proposition of law it is imperative for us to record, that chances of promotion do not constitute conditions of service, and as such, mere alteration of chances of promotion, would not per se call for judicial interference. The above general proposition would not be applicable, in case the chances of promotion are altered arbitrarily, or on the basis of considerations which are shown to be perverse or mala fide."

8. Finally, coming to the question as to whether the Rules are arbitrary, unconstitutional or contrary to service law as alleged, it would be noticed that prior to the year 1996, there were 69 sanctioned posts of Auditors and they used to be eligible for promotion to the 12 posts of District Audit Officers. On the other hand 69 Panchayat Inspectors were eligible to be promoted to six posts of Panchayati Raj Department Instructors. This means that the persons with much longer service in the Auditors category were being deprived of their promotion in comparison with the persons who had joined much later as Panchayat Inspectors and attained promotion only on account of the reservation in the roster.

9. It is not in dispute that both the Auditors and Panchayat Inspectors were in the same scale of pay and both were constituted in the feeder category for filling up the

higher posts of District Audit Officers and Panchayati Raj Department Instructors. Obviously, when there were less avenues of promotion provided to the Auditors, there was a lot of heart burning and unrest which ultimately led to the amendment in the Rules.

10. It is otherwise more than settled that the question relating to constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service pertain to the field of policy and within the exclusive discretion and jurisdiction of the State, though obviously subject to certain limitations or restrictions envisaged in the Constitution and, therefore, it is not for the statutory tribunals or the Courts at any rate to direct the Government to have a particular method of recruitment or eligibility criteria for further promotion as held by the Hon'ble Supreme Court in ***P.U.Joshi and others vs. Accountant General, Ahmedabad and others (2003) 2 SCC 632*** as under:

> "*10. "We have carefully considered the submissions made on behalf of both parties. Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of Policy and within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and it is not for the Statutory Tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose itself by substituting its views for that of the State. Similarly, it is well open and within the competency of the State to change the rules relating to a service and alter or amend and vary by addition/subtraction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time to time, as the administrative exigencies may need or necessitate. Likewise, the State by appropriate rules is entitled to amalgamate departments or bifurcate departments into more and constitute different categories of posts or cadres by undertaking further classification, bifurcation or amalgamation as well as reconstitute and restructure the pattern and cadres/categories of service, as may be required from time to time by abolishing existing cadres/posts and creating new cadres/posts. There is no right in any employee of the State to claim that rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a Government servant has no right to challenge the authority of the State to amend, alter and bring into force new rules relating to even an existing service."*

11. Even otherwise, we do not find any irrationality or illegality in the action of the respondents whereby two feeder categories in the same pay scale have been integrated by way of joint seniority list on the basis of length of service and thereafter further the promotions are to be made on the basis of the combined seniority list of both the feeder categories.

12. In view of the aforesaid discussion, we find no merit in this appeal and the same is accordingly dismissed alongwith pending application, if any. The parties are left to bear their costs.

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