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INDIAN LAW REPORTS

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INDEX

Nominal table
I L R 2013 (I1) HP 1

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SUBJECT INDEX

'C'

petition was filed but the Act was repealed – Himachal Pradesh Agriculture and Horticulture Produce Marketing (Development and Regulation) Act, 2005 was passed – a fresh demand notice was issued which was challenged – writ petition was disposed of with a direction to approach the Competent Authority – Competent Authority found that order was not proper- a writ petition was filed, which was again disposed of with a direction to Secretary to pass an order- Secretary passed an assessment order directing the Company to deposit an amount of Rs. 5,20,10,292/- - aggrieved from the order, the present writ petition has been filed- held that the assessment had been made by the Secretary – hence, the Secretary was a Competent Authority – Assessing Authority has to decide on the basis of evidence whether each transaction is a stock transfers or not – he shall have to give reasons for every transfer and only thereafter can he make assessment- both parties will have to give an opportunity to lead evidence- Katha is different from the Khair wood- Writ petition partly allowed- order of Assessing Officer set aside and matter remanded to Assessing Authority to determine whether the transactions are stock transfers or sales to third parties. (Para-10 to 42)

Title: Mahesh Udyog Vs. Agriculture Produce Market Committee, Una (D.B.)

Page-83

Constitution of India, 1950- Article 226- The predecessor-in-interest of the petitioners and proforma respondent No. 8 was the tenant of the disputed land- mutation was attested in his favour declaring him to be the owner in possession- revision was filed which was allowed- aggrieved from the order, the present writ petition has been filed- held that respondents No.2 and 3 had filed a civil suit in the Civil Court and it was held in that suit that mutation was void as it was attested by A.C. 2nd Grade – an appeal was filed, which was dismissed- Financial Commissioner had also taken this fact into consideration that mutation was attested by A.C. 2nd Grade, whereas, it should have been attested by A.C. 1st Grade- further, owner was not present at the time of attestation of mutation – order was rightly passed by the Financial Commissioner and is within the parameters of law- writ petition dismissed.

Title: Nirmala Devi Vs. The Financial Commissioner (Appeals), Himachal Pradesh

Page-10

'I'

Indian Penal Code, 1860- Section 302- Accused was seen beatings his wife by PW-1- accused was having knife in his hand- PW-1 tried to intervene but the accused warned him to mind his own business- PW-1 informed the police- when the police arrived, the wife of the accused was found dead- accused was present at the spot- his hands and clothes were stained with blood – he was tried and convicted by the Trial Court- held in appeal that Medical Officer found sharp injuries on the person of the deceased- the cause of death was hemorrhagic shock due to cutting of major arteries and veins of the neck by sharp weapon- injuries could have been caused by the knife recovered from the accused- blood stains on the knife matched the blood group of the deceased- defence version was not established- accused was rightly convicted by the Trial Court- appeal dismissed.

Title: Gopal Singh Vs. State of Himachal Pradesh (D.B.) Page-1

Indian Penal Code, 1860- Section 302, 382, 201 read with Section 34- U ran a Public Call Office – she also used to run a taxi- A was employed by her as a driver- accused K used to assist U in her shop- M and A were residents of area where the shop of U was located- deceased R and his brother were whole sale dealers and used to supply articles at various places- R used to go every Thursday to collect money from the shopkeepers- he left Damtal in his Maruti car, which was being driven by V- car was found in a burnt condition in which dead bodies of R and V were lying- investigations were conducted and it was found that U and K had conspired to kill R- all the accused went to the place of crime in the van of U- accused U brought R to the same place and accused K attacked R and stabbed him with dagger/Khukhari – all the four accused attacked R with knives and daggers- V was also brought to the spot and was beaten to death - bodies were put into the car and the car was burnt- accused A turned an approver - remaining accused were tried and convicted by the Trial Court- held in appeal that Medical Officer found that injuries were ante mortem in nature- an empty can was found in the car in which traces of kerosene oil were found by the Forensic Laboratory – petrol tank of the car is intact which rules out the possibility that the car had caught fire accidently- the approver was illiterate and it is not explained as to who had written the application to the Court in which he had expressed his desire to become an approver - his statement was self exculpatory - his statement is not in accordance with the prosecution version and does not inspire confidence- theory of last seen was also not proved- testimonies of PW-8 and PW-10 were not satisfactory- recovery at the instance of the accused U was not proved –recovered money was not connected to the deceased- investigation was not fair- prosecution case was not proved beyond reasonable doubt- appeal allowed and accused acquitted after giving the benefit of doubt.

Title: Kuldeep Kumar son of Pritam Chand Vs. State of Himachal Pradesh (D.B.)

Page-47

Indian Penal Code, 1860- Section 341, 367, 333, 506 read with Section 34- The Informant and PW-2 were on patrolling duty- a van was found parked on the road side- accused H and C were on the front seat, whereas, accused P and N were sitting in the back portion of the vehicle- the informant inquired as to why the van was parked on the road side- accused attacked the informant and PW-2- informant shouted for help on which people gathered at the spot and rescued the informant from the accused- fracture of the nasal bone was detected on x-ray- accused were tried and convicted by the Trial Court- held in appeal that there are no major contradictions in the statements of witnesses- evidence of the prosecution witnesses corroborates each other on material facts- minor contradictions do not disprove the case of the prosecution- FIR was lodged promptly- defence version was not probable- motive was not proved- appeals dismissed.

Title: Chand Ram alias Khem Chand Vs. State of Himachal Pradesh

Page- 30

'M'

Motor Vehicles Act, 1988- Section 166- A vehicle met with accident due to the negligence of the driver - claimants filed claim petitions, which were allowed- aggrieved from the award, separate appeals have been preferred- held that deceased was a house

wife- she was aged 41 years- hence, would be entitled for the compensation of Rs. 3000 x 12 x 13= Rs. 4,68,000/-- additional sum of Rs.50,000/- is awarded and the claimants held entitled a sum of Rs. 6 lacs with interest @ 8% per annum- in another case, deceased aged was 38 years- multiplier of 15 would be applicable and the compensation of Rs. 5,40,000/- would be payable- a sum of Rs.50,000/- is added as an additional charge- Rs.10,000/- awarded as funeral expenses- thus, amount of Rs. 6 lacs awarded with interest @ 8% per annum.

Title: Oriental Insurance Company Ltd. Vs. Mool Chand Bisht Page- 68

Motor Vehicles Act, 1988- Section 166- MACT awarded compensation of Rs.25,000/- for the damage caused to his building by the fall of the truck on the kitchen and upper portion of the building- petitioner filed the present appeal seeking enhancement of compensation - held that it was not disputed that truck had fallen on the roof and kitchen of the building of the petitioner causing damage to the property- petitioner stated that he had suffered loss of Rs. 1,50,000/- - PW-3 prepared the report, however, he has not specified that he was competent to assess and value the damaged structure -simply because, he retired as an Executive Engineer would not mean that he falls within the definition of expert -petitioner has not produced the receipt of the material or the details of the money spent by him for repair- Tribunal had rightly awarded the compensation of Rs.25,000/- - appeal dismissed.

Title: Pyare Lal Vs. Sansar Chand Sahani Page- 101

'N'

N.D.P.S. Act, 1985- Section 15- Accused was transporting 1500 grams of poppy husk- he was tried and convicted by the Trial Court- held in appeal that report of FSL shows that tests were conducted for meconic acid and morphine- both tests were found positive- poppy husk has not been defined in the Act but poppy straw has been defined- opium poppy means all plants except seeds of plant of the species of papaver somniferm-L or a plant of any other species of papaver from which the opium or any other phenanthrene alkaloid can be extracted and which the Central Government by notification in the Official Gazette has declared to be opium poppy for the purpose of the Act- no tests were conducted to determine the presence of the plant of the species of papaver from which opium or any phenanthrene alkaloid can be extracted and which the Central Government by notification has declared to be opium poppy for the purposes of the Act- hence, report does not prove that the accused was found in possession of opium poppy or poppy straw- appeal allowed- judgment of the Trial Court set aside- accused acquitted.

Title: Hardev Singh Vs. State of Himachal Pradesh Page- 98

N.D.P.S. Act, 1985- Section 18(c)- Accused was found in possession of 50 grams of opium- he was tried and convicted by the Trial Court- held in appeal that the option memo does not mention that accused was apprised of his legal right to be searched by the Gazetted Officer or Magistrate- recovery was effected after the personal search and there was no compliance of Section 50 of the N.D.P.S. Act- further, link evidence is

missing – sample seal was not produced and facsimile of seal is not legible- appeal allowed and accused acquitted.

Title: Amrik Singh alias Bau Vs. State of Himachal Pradesh Page-107

'W'

Wakf Act, 1995- Section 85- Objection petitions were filed by the Wakf Board in the petition for the execution of the orders passed by Rent Controller claiming that the property was a wakf property- objection petitions were dismissed by the Trial Court- appeals were filed, which were allowed and directions were issued to dispose of the objection after settling the issue- appeals were filed against this order but were dismissed- Wakf Board claimed before the Executing Court that jurisdiction lies with the Wakf Tribunal and matter should be sent to the Tribunal for adjudication- Wakf Tribunal held that matter falls within the purview of Rent Controller and not the Tribunal- aggrieved from the order, present petition has been filed- held that the question whether the property belongs to wakf or not can be decided only by the Tribunal in view of Section 85 of the Wakf Act and not by any other Courts- however, in view of Section 7 if the question was raised prior to the commencement of the Act, Tribunal will have no jurisdiction to decide such dispute- Rent Controller cannot decide the question of title but has to decide relationship between the parties- however, High Court had directed the Executing Court to determine the question of title- hence, Executing Court has to decide whether objector is the owner of the property or not- hence, direction issued to the Executing Court to decide whether objectors are owners of the property or not and in case it is found that they are owners of the property, landlord would not be entitled to execute the decree.

Title: Himachal PradeshWakf Board Vs. Rajiv Dutta (D.B.) Page-22

TABLE OF CASES CITED

'A'

A.V. Papayya Sastry and others Vs. Govt. of A.P. and others (2007) 4 Supreme Court Cases 221

Abhijit Ghosh Dastidar vs. Union of India and others (2009) 16 Supreme Court Cases 146

Aher Raja Khima vs. State of Saurashtra, AIR 1956 SC 217

Amrit Bhanu Shali and others vs. National Insurance Company Ltd. and Others, 2012 ACJ 2002

Arjun Mahato vs. State of Bihar (2008)15 SCC 604

Arum Kumar Agrawal and Anothers vs. National Insurance Company Limited and Others, (2010)9 SCC 218

'B'

Balwant Singh and another Vs. Daulat Singh and others (1997) 7 Supreme Court Cases 137

Besru Vs. Shibu1999 (1) Shim. L.C. 343

'C'

C. Magesh and others vs. State of Karnataka (2010)5 SCC 645

C. Maniappan and others v. State of Tamil Nadu, AIR 2010 SC 3718

Chanmuniya vs. Virendra Kumar Singh Kushwaha and another (2011) 1 SCC 141

Collector and others Vs. P. Mangamma and others (2003) 4 Supreme Court Cases 488

'D'

Dagdu and others vs. State of Maharashtra, (1997) 3 SCC 68

Dalip Singh vs. State of Punjab, AIR 1953 SC 364

Dayal v. State of Madhya Pradesh, 1994 CRI.L.J. 10

Dev Dutt Vs. Union of India and others (2008) 8 Supreme Court cases 725

Dudh Nath Pandey vs. State of U.P. AIR 1981 SC 911

Durga Das Vs. Collector and others (1996) 5 Supreme Court Cases 618

'E'

Earabhadrappa alias Krishnappa v. State of Karnataka, 1983 SCC (Cri) 447

'G'

Guli Chand vs. State of Rajasthan (1974)3 SCC 698

'H'

Hardev Singh vs. Union of India and another (2011) 10 Supreme Court Cases 121

Heinz India Private Limited and another versus State of Uttar Pradesh and others, (2012) 5 Supreme Court Cases 443

Himachal Pradesh marketing Board and others versus Shankar Trading Co. Pvt. Ltd. and others, (1997) 2 Supreme Court Cases 496

'J'

Jagriti Devi v. State of Himachal Pradesh, (2009) 14 SCC 771

'K'

Krishi Utpadan Mandi Samiti, Ghaziabad and another versus Metal Craft and others, (2008) 7 Supreme Court Cases 780

Krishna Mochi vs. State of Bihar, (2002)6 SCC 81

Kuldeep Singh v. State of Haryana, AIR 1996 SC 2988

'L'

Lata Wadhwa and Others vs. State of Bihar and Others, (2001)8 SCC 197

'M'

Madhya Pradesh High Court) and Jamuna Prasad and another v. State of U.P. 2002 CRI.L.J. 2073 (DB Allahabad High Court)

Mahila Bajrangi and others Vs. Badribai and another (2003) 2 Supreme Court Cases 464

Maslati vs. State of U.P. AIR 1965 SC 202

'N'

Narcotics Control Bureu Vs. Sukh Dev Raj Sodhi, (2011) 6 SCC 392

National Insurance Company Limited vs. Kusuma and Another, (2011)13 SCC 306

New India Assurance Co.Ltd. vs. Satender & Ors., AIR 2007 SC 324

'O'

Om Parkash, Conductor vs. State of Haryana and others 2006 (3) SLR 46

'P'

Phirari Singh vs. State of U.P. and others 1990 Cri.L.J.884

Pune Municipal Corpn. Vs. State of Maharashtra and others (2007) 5 Supreme Court Cases 211

'R'

R.P. Kapur vs. State of Punjab, AIR 1960 SC 866

Rajiv Kumar @ Guglu *versus* State of H.P. 2008 (1) Shim.LC168

Ram Singh Versus State of Himachal Pradesh and the connected matters, 2012(2) Him L.R. (DB) 837

Rampal Pithwa Rahidas and others vs. State of Maharashtra, 1994 Supp (2) Supreme Court Cases 73

Ruli Ram and another vs. State of Haryana (2002)7 SCC 691

'S'

S.B. Bhattacharjee vs. S.D. Majumdar and others (2007) 10 Supreme Court Cases 513

Sajjan Sharma vs. State of Bihar (2011)2 SCC 206

Sampath Kumar vs. Inspector of Police, AIR 2012 SC 1249

Sanjiv Kumar v. State of Punjab (2010)3 SCC (Cri.) 330

Sankalchan Jaychandbhai Patel and others Vs. Vithalbhai Jaychandbhai Patel and others (1996) 6 Supreme Court Cases 433

Sarla Verma vs. Delhi Transport Corporation, 2009 ACJ 1298 (SC)

Sarwan Singh vs. State of Punjab, AIR 1957 SC 637

State of U.P. Vs. Amar Singh and others (1997) 1 Supreme Court Cases 734

State of H.P. Vs. Chander Dev and others, Latest HLJ 2007 (HP) 728

State of H.P. Vs. Harish Thakur, Latest HLJ 2010 (HP) 1472

State of Haryana vs. Ram Singh 2002 SCC (Cri) 350

State of U.P. v. Lakhmi, AIR 1998 SC 1007, Sukka v. State of M.P., 1998 CRI.L.J. 3118 (DB)

State of U.P. vs. Babu Ram, AIR 2000 SC 1735

Sucha Singh and another vs. State of Punjab, (2003)7 SCC 643

Suresh vs. State of Haryana (2009)13 SCC 538

'U'

Union of India and another vs. S.K. Goel and others (2007) 14 Supreme Court Cases 641

'V'

Vidyadharan vs. State of Kerala (2004)1 SCC 215

Vijaysinh Chandubha Jadeja Vs. State of Gujarat, (2011) 1 SCC 609

'Y'

Yamunabai Anantrao Adhav vs. Anantrao Shivram Adhav and another AIR 1988 SC 644

BEFORE HON'BLE MR. JUSTICE R.B. MISRA, J. AND HON'BLE MR. JUSTICE SURINDER SINGH, J.

Gopal Singh son of Shri Karma Singh, resident of village and Post Office Upper Behli, Tehsil Sundernagar, District Mandi, HP, presently Village and Post Office Kala Amb, Trilokpur Road, Tehsil Nahan, District Sirmour, HP. .. Appellant.

Versus

State of Himachal Pradesh .. Respondent.

Cr. Appeal No.266 of 2011.

Judgment reserved on 11th December, 2012.

Date of Decision: 1st January, 2013.

Indian Penal Code, 1860- Section 302- Accused was seen beatings his wife by PW-1- accused was having knife in his hand- PW-1 tried to intervene but the accused warned him to mind his own business- PW-1 informed the police- when the police arrived, the wife of the accused was found dead- accused was present at the spot- his hands and clothes were stained with blood – he was tried and convicted by the Trial Court- held in appeal that Medical Officer found sharp injuries on the person of the deceased- the cause of death was hemorrhagic shock due to cutting of major arteries and veins of the neck by sharp weapon- injuries could have been caused by the knife recovered from the accused- blood stains on the knife matched the blood group of the deceased- defence version was not established- accused was rightly convicted by the Trial Court- appeal dismissed. (Para-13 to 31)

Cases referred:

Jagriti Devi v. State of Himachal Pradesh, (2009) 14 SCC 771

Earabhadrappa alias Krishnappa v. State of Karnataka, 1983 SCC (Cri) 447

Dayal v. State of Madhya Pradesh, 1994 CRI.L.J. 10

Kuldeep Singh v. State of Haryana, AIR 1996 SC 2988

State of U.P. v. Lakhmi, AIR 1998 SC 1007, Sukka v. State of M.P., 1998 CRI.L.J. 3118 (DB)

Madhya Pradesh High Court) and Jamuna Prasad and another v. State of U.P. 2002 CRI.L.J. 2073 (DB Allahabad High Court)

For the appellant: Mr. Ajay Sharma, Advocate.

For the respondent: Mr. R.K. Sharma, Senior Additional Advocate General and with Mr. J.S. Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

Per SURINDER SINGH, J.

The appellant was convicted and sentenced by the learned trial Court for the offence punishable under Section 302 of the Indian Penal Code, in Sessions Trial No.16 - ST/7 of 2009/2011, decided on 5.5.2011/11.5.2011, to undergo imprisonment

for life and to pay a fine of Rs. 10,000/- with the default clause, for allegedly committing murder of his wife Smt. Neelam Kumari. Hence the present appeal.

A-	**PROSECUTION CASE**

2. In short, the prosecution case can be stated thus. The appellant, hereinafter to be referred as 'the accused' was originally resident of Sundernagar, District Mandi. He had married Smt. Neelam Kumari, sister of PW6 Upender. To establish his business he shifted to Kala-Amb and initially started work in a factory. Later he opened a grocery shop. By his earning, he had also constructed his two storeyed house at Kala-Amb where he resided with his wife and three minor children.

2.(ii) On 28.10.2008 in the early hours of the morning, around 4.00 am, PW1 Shyam Lal, the tenant of the accused residing in the lower storey was awaken-up by his wife PW3 Maya Devi who had heard noise of quarrel from the upper-storey, occupied by the accused, fearing some thing wrong, Shyam Lal came out and went upstairs, he saw the accused was beating his wife. He was having a knife (Ex.P1) in his hand. Though, he tried to intervene, but accused warned him to mind his own business as it was his personal matter and asked him to leave immediately apprehending of happening of some untoward incident, Shyam Lal straightway went to Police-Post, Kala Amb and informed police. PW19 ASI Parveen Rana recorded his complaint in daily- diary Ext.PW14/A and proceeded to the spot alongwith some police officials and Shyam Lal where they reached around 5.20 a.m. and found Neelam Kumari, lying dead in the pool of blood with a slit throat on the stairs leading to the roof of the house.

2.(iii) Police had also joined the photographer and took photographs A-1 to A-17. PW19 aforesaid examined the dead-body and found a sharp edge bleeding wound measuring 2"x4" on her neck. He also noticed blood on the stairs and Verandah. One leg of the deceased was lying on the bed while right leg was on the floor. Broken bangles, 'Dupatta' and 'Chappel' of the deceased were lying on the spot.

2.(iv) The accused was present on the spot. His hands and clothes were stained with blood. On enquiry by PW19 ASI Parveen Rana, he told him that he had done whatever he wanted to do.

2.(v) The blood stained knife Ext.P1, lying on the spot was taken into possession vide memo Ext.PW1/A. Its sketch-map Ext.PW19/F was also prepared. The broken bangles Ext.P.2 lying on the floor, were taken into possession vide memo Ext.PW1/B. Her slippers Exts.P4 and 5 were also taken into possession vide memo Ext.PW1/C. Blood lying on the spot was picked up with the help of cotton and blood stained cotton Ext.P.3 was put into a small bottle and after packing and sealing the same was also taken into possession vide memo Ext.PW1/D. 'Ruqa' Ext.PW19/A was sent to the Police Station to lodge FIR (Ext.PW19/B)

under Section 302 of the Indian Penal Code. The Investigating Officer also prepared the site-plan Ext.PW19/D.

2.(vi) On receiving information about the incident in question Dy.S.P. alongwith S.H.O. Subhash Chand visited spot. The dead-body of the deceased was taken into possession after having prepared the inquest papers Ext.PW20/B, it was sent for autopsy.

2.(vii) The postmortem examination was conducted by PW9 Dr. Sunil Gupta and Dr. Manisha Aggarwal. On examining the dead body, the doctors noticed the following injuries:

(i) One incised wound [size 10.5 cm x 4.5 cm x 5.5 cm] was present on the front of neck 2½" above supra sternal notch placed horizontally, edges and margins were clean cut and smooth. Major arteries and veins of neck were cut smoothly through and through bilaterally. Trachea, oesophgus, muscles were also cut through and through transversely. Depth of wound on extreme right and left were same. Whole of the cavity of wound was found filled with blood.

(ii) One incised wound 2 cm x 1 cm x .5 cm was placed on right lateral side of chest, 10" behind and 4" below right nipple. Margins edges were cut clean and smoothly.

(iii) One incised wound 5 cm x 1 cm x skin deep on anterior surface of right shoulder 2 cm right and

2.5 cm below lateral of end of right clavicle margins and edges were cut clean and smoothly.

(iv) One incised wound 3 cm x .3 cm x 2.5 cm on neck 1 cm below the wound No.1 and was placed 3 cm left to midline edges and margins were cut cleanly and smoothly.

In the opinion of the doctors, the cause of death was heamorrhagic shock due to cutting of major arteries and veins of the neck by sharp weapon.

Probable time between injury and death was within three minutes and between death and postmortem is 14 to 26 hours. The postmortem report is Ext.PW9/B. In the opinion of the doctor, injuries aforesaid could be caused by knife Ext.P.1.

2.(viii) Viscera and blood stained clothes were sent for the chemical examination. As per forensic examination report Ext.PW18/B, human blood of Group 'A' was found on the knife Ext.P.1 and the pieces of bangles were similar on the basis of colour and design (Ex.PW20/L), but however no poisonous substance was found in the Viscera.

2.(ix) The accused was arrested and was got medically examined from PW8 Dr. S.M. Ali on the same day, i.e., 28.10.2008 on the written request Ext.PW8/A of the police. Doctor did not find any visible injury on

his person. However, history of washing of his hands was mentioned. The grey- coloured pants worn by him, was having blood stains mainly on lower and anterior parts. History of not changing the Pants was stated. Doctor issued his Medico Legal Certificate Ext.PW8/B. Pants Ext.P.6 was sealed and sent for forensic examination, which also contained human blood of "A" group. The report is Ext.PW18/A.

3. On completing investigation, police came to the co nclusion that the accused had committed murder because he suspected the deceased-wife, of illicit relations with PW11 Ajay Kumar, @ 'Bihari Babu'. The Challan was presented in the Court for the trial of the accused.

4. The accused was accordingly charge-sheeted for murder under Section 302 of the Indian Penal Code to which he pleaded not guilty and claimed trial.

5. To prove its case, the prosecution examined its witnesses.

B-	**DEFENCE VERSION PUT TO THE PROSECUTION WITNESSES AND HIS PLEA UNDER SECTION 313 OF THE CODE OF CRIMINAL PROCEDURE**

6. The deceased mother of three children, was alleged to be of a loose character, having affairs with PW11 Ajay Kumar (Bihari Babu), who was said to be an affluent person as compared to the accused. It is ventilated that the deceased used to take lift on his motorcycle from her shop to her house. The deceased allegedly wanted to live with him. The accused is said to have complained to his neighbours that his wife did not obey him and because of the above conduct of the deceased the accused used to remain in a pensive-mood.

7. Further that 5/6 days prior to the alleged incident deceased alongwith her daughter had allegedly gone to her native place and the accused left Kala-Amb alongwith his two sons next-day. Deceased returned on 26.10.2008 and broke-open the locks of her residence and next-day the accused came there with his sons. It is alleged in defence that during intervening night of 27/28.10.2008 the accused and his son Khushal Rana (PW7) had slept in a separate room and the deceased alongwith minor son and daughter were in the adjoining room. The deceased is alleged to have come out from her room and met her paramour Ajay Kumar on the stairs of her house. Said Ajay Kumar pushed the accused and escaped. The above story was being projected in the statements of hostile witnesses and PW7, the son of the accused.

8. The case of the accused under Section 313 of the Code of Criminal Procedure was that during the intervening night of 27/28.10.2008 he saw his wife in the arms of Ajay Kumar, on this, he got flared-up. Ajay Kumar pushed him aside and escaped. Neelam was having a knife in her hand. To defend himself, he caught hold of her hands, in scuffle the knife struck against the neck of the deceased and sustained a cut injury. He also stated that he was very much infuriated with anger on seeing her in compromising position with her paramour Ajay Kumar or someone else and pleaded innocence.

9. The accused was also called upon to enter into his defence. He examined DW1 Ravinder Singh, a neighbour to prove the photographs Ext.D.1 to D.4 of the family of accused and DW2 Shri Devinder Verma, Nodal Officer of Bharti Airtel Limited to prove the certificates Ext.D.1 and D.2 with respect to the call details of the mobile phone numbers given therein. But none of the cell-phone numbers could be connected with the deceased, nor the accused could capitalize anything from the photographs.

C-	**TRIAL COURT'S FINDINGS.**

10. The learned trial Court discarded the defence version but while taking note of the hostility of unfavourable prosecution witnesses, with a motive to save the accused by suppressing truth and while relying upon the prosecution evidence convicted and sentenced the accused as aforesaid, which is under challenge in the present appeal.

D-	**CONTENTIONS RAISED BEFORE THIS COURT.**

11. Shri Ajay Sharma, learned Counsel for the accused, has led us through the evidence on record and vehemently argued that PW1 Shyam Lal did not support the case of the prosecution as such declared hostile and the other witnesses of the vicinity also did not support the prosecution case, rather probablised the defence version. The learned Counsel submitted that the circumstances on record suggest that the accused was attacked by his wife with a knife when she was noticed in the company of paramour and in order to save himself in exercise of his self defence he caught hold of her, from both the hands, in that process she sustained the cut injuries on her neck. He alternatively argued that if in any event the accused is proved to have caused fatal blows to the deceased-wife it was attributable to the grave and sudden provocation on seeing her in a compromising position with her paramour. To substantiate his point he also referred to the statement of PW7 Khushal Rana (13 years), son of the accused.

12. On the other hand, Shri R.K. Sharma, learned Senior Additional Advocate General duly assisted by Shri J.S. Rana, learned Assistant Advocate General, supported the impugned judgment of conviction and sentence and argued that the defence version of the accused is a cock and bull story only coined to save himself. It is also pointed out that PW1 Shyam Lal though declared hostile, but he admitted the case of the prosecution on material particulars and immediately without any loss of time, he had reported the matter to police and material facts were recorded in the daily-diary. When the police reached the spot the wife of the accused was found dead in pool of blood as stated above with a slit throat and other cut injuries and that the accused was also present on the spot with blood stained clothes and hands and admitted to have committed the offence. It is also argued that there was no reference of third person being present when both, i.e., accused was beating deceased and the knife was seen in the hands of the accused, thereafter she was found dead. It is further argued that the statement of Khushal Rana (PW7) son of the accused is wrong and manipulated one, made under influence and pressure of his grand-parents, only to secure benefit to the accused. Further that PW7 aforesaid was residing in the same

family of the accused and admitted in the Court that his deceased-mother was a good person and even that he also loved his accused/father. He further stated that his grand-parents had accompanied him to Nahan three days prior to his examination in the Court, though denied having tortured him. Shri Sharma further argued that neither it is a case of self- defence nor of grave and sudden provocation. Rather it is proved to be a case of clear cut murder for which the accused was rightly convicted and sentenced. It is also ventilated that the hostile witnesses stand fully contradicted with their earlier statements and they have tried to suppress the truth with obvious motives.

E-	**RE-ASSESSMENT OF EVIDENCE AND FINDINGS OF THIS COURT IN APPEAL.**

13. We have given our thoughtful consideration to the rival contentions of the parties and have carefully and cautiously reappraised and scanned the evidence on record.

14. First of all we would like to see where the case hinges from the evidence view point on factual aspects.

15. As already stated above, PW1 Shyam Lal was a neighbour of the accused, residing in the ground floor and the accused was residing with his wife in the upper storey alongwith three minor children. During the intervening night of 27/28.10.2008 deceased Neelam Kumari was in the company of her accused/husband. In the wee hours of the morning PW3 Maya Devi, wife of PW1 Shyam Lal, was attracted by some quarreling noise coming from the upper storey. She woke-up her husband (PW1) and told him that some altercation was going on inter se the accused and his wife. PW1 went up-stairs and saw that the accused was beating his wife and was having a knife in his hand. When he tried to separate him, he told him that it was his personal affair and he should leave the place. Immediately thereafter he went to Police Post, Kala Amb and informed police which was recorded in the daily diary Ext.PW14/A in the same manner to which he stated and the same was duly signed by him. PW1 Shyam Lal though declared hostile, but testified when examined in the Court that he had informed the police and his information was taken down in the Police-Post and police had also accompanied him to the spot. When they reached the spot, they saw that Neelam Kumari (deceased) was lying dead with slit throat. He also deposed that the accused had told police that he had killed his wife. The knife Ext.P.1 was lying on the stairs. Police picked it up with the help of holder (Chimti) vide memo Ext.PW1/A. Though on further questioning by the learned Public Prosecutor he stated that on hearing the cries he did not go up- stairs before visiting the Police-Post, thus, he was declared hostile and permitted to be cross- examined. Pertinently then he also stated that he had seen the accused beating his wife and at that time he was possessed of knife. He also reiterated that the accused told him not to interfere it being a personal matter and that the accused had told police that he had dragged his wife from the roof where water-tank was situated, to the stairs of his house and also pointed out the said place regarding which memo Ext.PW1/E was prepared, which was signed by him.

16. Importantly, PW19 ASI Parveen Rana proved authenticity of the daily-diary Ext.PW14/A having been recoded at the instance of PW1 Shyam Lal whereby the

brief account of the incident seen by PW1 was recorded. He had visited the spot alongwith photographer and other police officials and Shyam Lal (PW1) and found Neelam Kumari lying dead on the stairs with a bleeding injury on the neck within an hour of their quarrel. The accused was also found present there. He stated that his hands and clothes were smeared with blood. On enquiry, he informed PW19 ASI Parveen Rana that he had done whatever he wanted to do. The accused was arrested and medically examined. His pant was taken into possession and sent for forensic examination.

17. On the postmortem examination, PW9 Dr. Sunil Gupta noted as many as four sharp injuries as referred above. The cause of death was heamorrhagic shock due to cutting of major arteries and veins of the neck by sharp weapon and time between injury and death was within three minutes.

18. On the scrutiny of the aforesaid evidence, it is clear that PW1 Shyam Lal was the only witness who had seen the accused having knife in the hand of the accused and he had also witnessed the beatings being given by the accused to the deceased. The accused, did not tell as to why he was beating his wife. Rather he warned Shyam Lal aforesaid to leave the place and not to intervene as it being his personal matter. When Shyam Lal returned with police within an hour, Neelam Kumari was lying dead with the silt throat. The deceased was present on the spot. He stated to police that he had done whatever he wanted to do. All the circumstances lead us to the conclusion that the accused had attacked his wife with knife causing as much as four injuries on the vital part of the body which resulted into her death.

19. Further, PW9 Dr. Sunil Gupta stated opined that the injuries in question found on the dead body of Neelam Kumari could be caused with knife Ext.P1. The knife aforesaid was sent for the forensic examination which contained the blood stains of the same group as it was found on the wearing apparels of the deceased, corroborates the prosecution story.

20. Now the question arises whether any sort of self- defence was available to the accused as being pleaded? For that only the statement of PW1 Shyam Lal is sufficient to dislodge this version. The perusal of his statement categorically proves when he had gone up-stairs and saw the accused with the knife Ext.P.1 in his hand when he was beating his wife. Thus, it was not the deceased who was having the knife in her hand; which caused any apprehension to the accused of causing some bodily injury or death nor it gives any impression that the injuries were caused while defending herself as alleged.

21. Further, the accused has projected another story in the cross-examination that when he found the deceased in a compromising position with her paramour, the accused got flared up and pleaded that his action was attributable to grave and sudden provocation.

22. We have also examined this case from this angle. The accused tried to probablise his defence that the deceased wife was carrying illicit relations with PW11 Ajay Kumar. Said Shri Ajay Kumar was working in Green Line Appliances in a factory at Kala Amb for the last about four years from the date of alleged incident. He had been residing in the factory premises. He was a follower of 'Braham Kumari's' sect. On holidays, as stated by him, he used to attend 'Satsang' where 14/15 persons of the

same sect used to assemble. He testified that all 'Satsangies' were having brotherhood relationship amongst them. Deceased Neelam Kumari was also its member. She occasionally referred to her disturbed family life and used to complain that her husband had been harassing her. Further that 'Satsang' was organized at Nahan by 'Braham Kumaries'. Deceased alongwith her son had taken lift on his motorcycle to attend 'Braham Bhoj', from her shop to Nahan. After taking feast there, they returned to Kala Amb. He categorically stated that on 27.10.2008 he took three days leave and went to Delhi alongwith Subhash to meet his father, who was serving there. On his return on 30.10.2008 he came to know that deceased Neelam Kumari had been murdered by her husband. He denied that during the intervening night of 27/28.10.2008 he had conversation with the deceased on her telephone. He also denied that around 3.00 a.m. he had sex with her at her residence and also that when the deceased was lying with him in the compromising condition he was caught by the accused. It is also denied that he got up and gave a push to the accused and ran away. He categorically stated that he was not present there nor he had such relations with the deceased. He further denied that he was also known as 'Bihari Babu' at Kala Amb.

23. Another witness is PW7 Khushal Rana (PW13 years), the son of the accused from deceased Neelam Kumari. He was declared hostile and was contradicted with his statement under Section 161 of the Code of Criminal Procedure. However, he stated that his parents had been quarreling with each other for sometimes past. His mother had also made a complaint to Pradhan. He also stated that his father used to ask his mother as to why she had been roaming with 'Bhaiya', but she told that he was a rich man and this was the cause of their verbal duel. According to him, because of this tension his mother had left for the house of his maternal-uncle alongwith his sister and brother and thereafter his father had also gone to Behli. His mother had come back to Kala Amb a day earlier, to his father. She broke-open the locks and next day his father also reached there. On Diwali night his father had heard some sound and both of them searched the rooms. The door was bolted from outside and they went to another inter-linked room and saw his mother with said 'Bhaiya' on the stairs of the house holding each other in arms. 'Bhaiya' pushed his father and climbed down the stairs. This caused hot exchange of words inter se his parents. Thereafter his mother tried to hit his father and knife was snatched. He also stated that his mother used to tell his father that Ajay Kumar (PW11) was a rich man and he should be given a room in their residence. On this, his father got enraged. Pertinently, he admitted that after stabbing by his father, police had come to the house. He also stated that his mother was of good natured woman, but stated not later as she used to give them beatings with slaps and at same time he stated that he loved his father as well. He also admitted that he was residing with his grand-parents, who were accompanying him, but denied that he was tutored to save his father. Further according to him, the room was bolted from outside but they came out from the room through the adjoining room which was not bolted from outside and found the deceased in the company of Ajay Kumar. The story which was stated by him cannot be taken as a gospel truth for more than one reason. Firstly, he is the son of accused to whom he loved. Secondly, his mother is dead, he did not want to loose his father. Thirdly, he was residing with his grand parents and was amenable to be influenced by them to give favourable statement to secure acquittal. Fourthly, he is of a tender age and did not know what to do in such a difficult situation, but succumbed to the pressure of his elderly.

24. Further, his testimony gets tainted in view of the Site plan Ext.PW19/B prepared by the Investigating Officer. It does not show that both these rooms which were opposite to the bath-room and the kitchen were interconnected by a door or even window in between to come to another room as stated by him. Had she bolted the room from outside, she could have also bolted the interconnected door to avoid the presence of accused. Thus, if the door was bolted from outside in absence of any other alternative route to another room the accused and the said witness could not have come out. Therefore, this story cannot be accepted on its face value.

25. Therefore, the story propounded in defence is false and there is no probability of grave and sudden provocation in the instant case justifying the murder of his wife.

26. Further, PW2 Yash Pal is the Pradhan of the Gram Panchayat stated that the deceased had come to him to make a complaint against his husband. He had asked from the deceased about the reasons. In cross-examination he stated that the deceased had come to him a day prior to the occurrence and asked him to tell her husband not to come there as she wanted to live with another person. Upon this, he told her that this was not possible which is contrary to the social norms. He also admitted that 'Bihari Babu' was an affluent person and was man of means and she wanted to live with him. His statement is also a tainted version qua the second part, through the deceased must have complained to him about the untoward behaviour of the accused.

27. PW4 Suman Sharma and another Suman PW5 were the neighbours of the deceased. PW4 had heard the noise coming from the house of the deceased. She had recently delivered a baby, but denied any male voice. Both were declared hostile and did not know whether the deceased was roaming astray for the last about one month from the day of occurrence. According to PW5, she did not hear the accused quarreling with any body during his stay for the last few years in the locality. Though she stated that deceased Neelam Kumari used to roam astray and people suspected her character, however, stated that on account of rumors the accused always remained pensive.

28. PW6 Upender was also declared hostile to the prosecution, but in cross-examination by the accused he gave another story admitting that the accused had told him that Neelam ran away with 'Bihari Babu' and also stated that on enquiry by him, she told that she did not want to live with the accused.

29. All the above hostile witnesses are from the place of the accused who had tried to save the accused by suppressing truth. They stand fully contradicted with their statements recorded under Section 161 of the Code of Criminal Procedure. However, one important thing do emerge from their statements that the accused might have suspected his deceased-wife of infidelity, which caused tension in the family life and it served as a motive to kill her by the accused, whereas, the story which has been put-forth with respect to the presence of allegedparamour PW11 Ajay Kumar during the intervening night of 27/28.10.2008 could not be probablised. There is also nothing to dislodge the sworn testimony of PW11 Ajay Kumar.

30. The learned Counsel for the accused has cited judgment of the Supreme Court rendered in **Jagriti** Devi v. State of Himachal Pradesh, (2009) 14 SCC 771 and ventilated that it was a case of culpable homicide not amounting to murder. He

also put reliance upon the judgments **Earabhadrappa alias** Krishnappa v. State of Karnataka, 1983 SCC (Cri) 447, Dayal v. State of Madhya Pradesh, 1994 CRI.L.J. 10, **Kuldeep Singh** v. **State of Haryana, AIR 1996 SC 2988, State of U.P.** v. **Lakhmi, AIR 1998 SC 1007**, **Sukka** v. **State of M.P., 1998 CRI.L.J. 3118 (DB Madhya Pradesh High Court)** and **Jamuna Prasad and another** v. **State of U.P. 2002 CRI.L.J. 2073 (DB Allahabad High Court)** to further support his point

31. We have gone through these judgments carefully which are distinguishable on facts. The *ratio decidendi* of these judgments are not disputed, but its application in the fact situation is quite difficult. Since, we have already held that there was no grave and sudden provocation proved by preponderance of probabilities nor it was a case of exercise of a private defence or accidental death, rather it being a clear-cut case of murder, accordingly, the defence pleas are rejected as not proved even by probabilities. As such, the appeal sans merits and is accordingly dismissed.

32. Send down the record.

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

Nirmala Devi, widow of Sh. Trilok Chand & Others ..Petitioners.

Vs.

The Financial Commissioner (Appeals), Himachal Pradesh, Shimla-2 & Ors. ..Respondents.

Smt. Sarla, widow of late Sh. Ashok Kumar, son of late Sh. Panchi Ram, resident of Village Kushwar, P.O. Jahu, Tehsil Bhoranj, District Hamirpur, H.P. ..Proforma respondent.

CWP No.1312 of 2007-F.
Reserved on : 19.12.2012
Decided on : 03.01.2013

Constitution of India, 1950- Article 226- The predecessor-in-interest of the petitioners and proforma respondent No. 8 was the tenant of the disputed land- mutation was attested in his favour declaring him to be the owner in possession- revision was filed which was allowed- aggrieved from the order, the present writ petition has been filed- held that respondents No.2 and 3 had filed a civil suit in the Civil Court and it was held in that suit that mutation was void as it was attested by A.C. 2nd Grade – an appeal was filed, which was dismissed- Financial Commissioner had also taken this fact into consideration that mutation was attested by A.C. 2nd Grade, whereas, it should have been attested by A.C. 1st Grade- further, owner was not present at the time of attestation of mutation – order was rightly passed by the Financial Commissioner and is within the parameters of law- writ petition dismissed. (Para-6 to 19)

Cases referred:
State of H.P. Vs. Chander Dev and others, Latest HLJ 2007 (HP) 728

Collector and others Vs. P. Mangamma and others (2003) 4 Supreme Court Cases 488
Pune Municipal Corpn. Vs. State of Maharashtra and others (2007) 5 Supreme Court Cases 211
A.V. Papayya Sastry and others Vs. Govt. of A.P. and others (2007) 4 Supreme Court Cases 221
Durga Das Vs. Collector and others (1996) 5 Supreme Court Cases 618
Sankalchan Jaychandbhai Patel and others Vs. Vithalbhai Jaychandbhai Patel and others (1996) 6 Supreme Court Cases 433
State of U.P. Vs. Amar Singh and others (1997) 1 Supreme Court Cases 734
Balwant Singh and another Vs. Daulat Singh and others (1997) 7 Supreme Court Cases 137
Mahila Bajrangi and others Vs. Badribai and another (2003) 2 Supreme Court Cases 464
Besru Vs. Shibu1999 (1) Shim. L.C. 343

For the petitioners : Mr. Romesh Verma, Advocate.
For respondent No. 1 : Mr. Vikas Rathore, Deputy Advocate General.
For respondents No. 2 and 3 :Mr. Bhupender Gupta, Senior Advocate, with Mr. Neeraj Gupta, Advocate.
None for respondents No. 4 to 8.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge:

Essential facts necessary for adjudication of this petition are that the petitioners and proforma respondent No. 8 claimed that their predecessor-in-interest late Sh. Panchhi Ram was tenant under the then owners of land as entered against Khata Khatauni No. 8/9, Kite-5, measuring 10.5 bighas and the land as entered against Khata No. 20, Khatauni No. 27, Kite 6, measuring 10.15 bighas, total measuring 21 bighas, situated at Mauja Khalini, Shimla, Tehsil and District Shimla. The Halqua Patwari, by order of Assistant Collector 2nd Grade, Shimla, entered mutation No. 94 on 23.08.1979. The Kanungo of the area verified this mutation on 01.11.1979. The mutation was then attested by the Assistant Collector 2nd Grade on 30.11.1979 and Sh. Panchhi Ram was held to be owner in possession of the land. The respondents No. 2 to 7 filed a revision petition before the Financial Commissioner (Appeals) on 08.10.2003 against the order, dated 30.11.1979. The delay was condoned by the learned Financial Commissioner on 18.07.2005. The revision petition was allowed by the learned Financial Commissioner (Appeals) on 22.08.2006.

2. This writ petition is directed against the order, dated 22.08.2006, passed by the learned Financial Commissioner (Appeals), Himachal Pradesh.

3. Mr. Romesh Verma, learned counsel for the petitioners has strenuously argued that the order, dated 22.08.2006, was barred by delay and laches. He then contended that delay of 27 years in filing the revision petition has not been explained satisfactorily. He has supported the order, dated 30.11.1979. According to him, the learned Financial Commissioner (Appeals) has not taken into consideration the

judgment, dated 27.10.1959, rendered by the learned Senior Sub Judge, Mahasu in case No. 35/1 of 1958, judgment, dated 28.10.2003, rendered by the learned Sub Judge, 1st Class (1), Shimla in Civil Suit No. 24/1 of 1997. He further contended that the predecessor-in-interest of the petitioner was tenant and the proprietary rights upon him have been conferred automatically after coming into force the Himachal Pradesh Tenancy and Land Reforms Act w.e.f. 21.02.1974.

4. Mr. Bhupender Gupta, learned Senior Advocate for respondents No. 2 and 3 has vehemently argued that the order, dated 30.11.1979 is without jurisdiction, since the same has been passed by the AC 2nd Grade instead of AC-1st Grade. He then contended that the mutation has been attested in violation of the mandatory provisions of the H.P. Tenancy and Land Reforms Act and the Rules framed thereunder. He also contended that the owners were not present at the time when the attestation was carried out by the authorities concerned. He further contended that no proprietary rights could be conferred upon the tenants where the land was owned by the State.

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

6. Respondents No. 2 and 3 have filed a civil Suit in the Court of learned Sub Judge, 1st Class (1), Shimla on 28.04.1997 for declaration with consequential relief of possession and permanent prohibitory injunction. Learned Sub Judge 1st Class (1), Shimla has framed the following issues on 25.07.2002:

"1. Whether the plaintiff is entitled for the possession of the suit land and the property, as alleged? OPP

2. Whether the mutation No. 94, sanctioned on 30.11.1979 in respect of suit land conferring proprietory rights on Panchi Ram and defendants No. 1 to 5 is illegal, null and void, as alleged? OPP

3. Whether the revenue entries on the basis of aforesaid mutation is also null and void, as alleged?OPP

4. Whether the sale deed or transfer deeds executed by Panchi Ram or by defendants No. 1 to 5 in favour of the defendants No. 6 to 13 are wrong, null and void, as alleged? OPP

5. Whether the plaintiff is entitled for the relief of mandatory injunction? OPP

6. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction? OPP

7. Whether the suit is not maintainable? OPDs.

8. Whether the suit is barred by limitation? OPDs.

9. Whether the plaintiff has no cause of action?OPD

10. Whether the suit is not properly valued for the purpose of court fee and jurisdiction, if so, what is correct valuation? OPDs.

11. Relief."

7. Learned Sub Judge, 1st Class (1), Shimla while returning findings on issues No. 2,3 and 8 has held that the mutation attested vide Ex. DW1/V on 30.11.1979 was void abinitio, since it was attested by the AC 2nd Grade. He also held that since the order passed vide Annexure DW1/V was without jurisdiction, there was no limitation involved in challenging this mutation.

8. Now, as far as issues No. 1 and 4 are concerned, learned Sub Judge came to the conclusion that the plaintiffs were not entitled to possession of the suit land. He has referred to the judgment rendered by the learned Senior Sub Judge, Mahasu vide judgment, dated 27.10.1959, Ex.-DW1/A. Sh. Panchhi Ram, predecessor-in-interest of the petitioners and respondent No.8 was held to be a tenant over the suit land since 1939. Learned Sub Judge, 1st Class (1), Shimla while deciding issues No. 5 and 6, has held that since the plaintiffs were not in possession of the suit land, they were not entitled to the relief of injunction. Learned Sub Judge 1st Class (1), Shimla, H.P. dismissed the suit on 28.10.2003. The petitioners have assailed the judgment of the learned Sub Judge, dated 28.10.2003 by filing Civil Appeal No. 76-S/13 of 2005/04 before the learned District Judge (F), Shimla. He dismissed the same on 21.11.2006. Plaintiffs have also filed an appeal against the judgment and decree, dated 28.10.2003, before the learned Additional District Judge, Fast Track Court, Shimla, Himachal Pradesh, bearing Civil Appeal No. 147-S/13 of 2005/04. The same was dismissed by the learned Additional District Judge, Fast Track Court, Shimla, H.P. on 27.08.2009. The copies of the judgment, rendered by the learned Sub Judge, 1st Class (1), Shimla in Civil Suit No. 24/1 of 1997 on 28.10.2003, copy of the judgment, dated 21.11.2006, rendered in Civil Appeal No. 76-S/13 of 2005/04 and copy of the judgment, dated 27.08.2009, rendered in Civil Appeal No. 147-S/13 of 2005/04, have been placed on record by the petitioners.

9. What emerges from the previous litigation between the parties, is that though Sh. Panchhi Ram was declared to be tenant over the suit land, but the mutation attested on 30.11.1979 was held to be without jurisdiction. Respondents No. 2 and 3 have filed a revision petition against the mutation, dated 30.11.1979 before the Financial Commissioner (Appeals). It was barred by limitation. The application under Section 5 of the Limitation Act was filed alongwith the revision petition. The learned Financial Commissioner (Appeals) condoned the delay on 18.07.2005 by observing that since the order, dated 30.11.1979 was void abinitio, the question of limitation was not involved and the matter was required to be heard on merit. Consequently, the revision petition was admitted for hearing. Learned Financial Commissioner (Appeals) has passed the order on 22.08.2006.

10. The anchorsheet of respodnents No. 2 and 3 before the learned Financial Commissioner was that the order of mutation passed on 30.11.1979 was without jurisdiction. According to Mr. Bhupender Gupta, learned counsel for respondents No. 2 and 3, the mutation could only be attested by A.C. 1st Grade and not by A.C. 2nd Grade. He has also drawn the attention of the Court to Annexure P-1. It is evident from Annexure-P1 that the mutation has been attested by AC 2nd Grade. The Financial Commissioner has also taken into consideration that the owners were not present at the time when the mutation was attested by the A.C. 2nd Grade. Learned Financial Commissioner has noticed that in copy of mutation sheet, initially it was recorded on

30.11.1979 that some of the owners were dead, but this line had been scratched out and the mutation has been attested on the same date. The Court has also seen the original record at pages No. 49/50. In fact, there is an overwriting by the A.C. 2nd Grade in order, dated 15.11.1979. The petitioner has also filed a copy Annexure-P1, whereby the order, dated 01.11.1979, 23.08.1979 and 15.11.1979 have been passed. Surprisingly, in the copy filed by the petitioner Annexure P-1, there are no cuttings. The Court deprecates the practice adopted by the petitioners. The petitioners ought to have filed the correct copy of Annexure P-1 on record, which was available before the Financial Commissioner. The order of attesting the mutation has been passed behind the back of the owners. The owners ought to have been heard before the mutation was attested. There is no tangible evidence placed on record that the owners of the land/legal heirs or representatives were informed of the date of attestation of mutation. Thus, there is violation of the principles of natural justice, which renders the order, dated 30.11.1979 void abinitio. The mutation could only be attested by the AC 1st Grade under Chapter IX of the Himachal Pradesh Tenancy and Land Reforms Act, 1972. There is a detailed procedure, the manner in which the attestation has to be carried out as per Rules 28 and 29. The Patwari is required to enter the mutation of ownership in the mutation register in favour of the non-occupancy tenants, on whom the proprietary right under rule 27 vested and the Revenue Officer thereafter is required to attest the mutation in the presence of the parties. The procedure prescribed under the H.P. Land Revenue Act, i.e., Sections 22 and 23 is also required to be followed, which in the present case has not been followed. It is established from Annexure P-1 that the owners were not present at the time of attestation of the mutation. According to the mutation, though the predecessor-in-interest of the petitioners has been conferred with proprietary rights qua the private land, but the proprietary rights have also been conferred of the Government land, which was not permissible as per the Amendment Act 6 of 1988.

11. A Division Bench of this Court in **State of H.P.** Vs. **Chander Dev and others**, Latest HLJ 2007 (HP) 728 has held that proviso added by Amendment Act 6 of 1988 will have retrospective effect and the rights of the State as land owner automatically vested on tenants before the amendment Act No. 6 of 1988 were taken away by proviso added by the amendment Act. The Division Bench has held as under:

> *"22. The thrust of the argument of Mr. G.D. Verma, learned Senior Advocate, is that it is well recognised rule of interpretation that in the absence of express words or appropriate language from which retrospective application may be inferred, an amendment which is not procedural in nature and affects substantive rights is always deemed to be prospective in nature. There is no quarrel with this proposition of law. There is also no dispute with regard to the proposition canvassed by Mr. Verma that under the Act as it stood before, its amendment the rights of the land owners (including the State) vested in the tenant(s) free from all encumbrances automatically from the date of notification of the publication of the rules. Reference in this behalf may be made to Daulat Ram etc. Vs. The State of Himachal Pradesh etc. (1978) 7 ILR 742. In the present case the legislature in its wisdom specifically made the proviso retrospectively applicable. Sub Section (3) of Section 1 of the Amendment Act clearly lays down the amendments the amendments would come into*

force from the date of commencement of the H.P. Tenancy and Land Reforms Act. The proviso which has been inserted is deemed to have been inserted from the date when the Act came into force. The rules were framed later on. By virtue of the amendment being given retrospective effect the proviso is deemed to have been incorporated in the Act prior to the framing of the Rules. Therefore, on the date when the rules came into existence, non-occupancy tenant under the Government could have been granted proprietary rights. Once the legislature has clearly laid down that the amendment taking away substantial rights shall have retrospectively application, the court cannot violate the plain and simple language of the amendment Act and make it prospective in nature. On the one hand, the learned Judge deciding Dinesh Kumar's case held that the amendment is retrospective, but on the other hand went on to hold that the intention of the legislature did not appear to be to take away the vested rights of the tenant. With due respect to the learned Judge, we are unable to subscribe this view. We are of the view that the latter judgment delivered by Justice Kamlesh Sharma must be held to be per incuriam in view of the fact that it did not notice the earlier judgment delivered by Justice Devinder Gupta."

12. This aspect should have also been taken into consideration by the learned Financial Commissioner (Appeals) while deciding the revision petition, since amendment No. 6 has already come into force. In the instant case, learned Civil Court has also held, as noticed above that the mutation could not be attested by the A.C. 2nd Grade. Ultimately, learned Financial Commissioner has accepted the revision and the order of the Assistant Collector, 2nd Grade, dated 30.11.1979, conferring proprietary rights of land in favour of Shri Panchhi Ram, was set aside. The case was remanded to the Land Reforms Office, Shimla to conduct a thorough enquiry into the matter and proceed thereafter in accordance with law. The order passed by the learned Financial Commissioner (Appeals) is within the legal parameters. There is neither any perversity nor any procedural impropriety in the order, dated 22.08.2006.

13. Mr. Romesh Verma, learned counsel for the petitioners has also argued that the Financial Commissioner (Appeals) could not entertain the revision petition after a gap of 27 years. In the instant case, the respondents have also moved an application under Section 5 of the Limitation Act alongwith revision petition. This application was allowed by the learned Financial Commissioner by a very reasoned order on 18.07.2005. The order of A.C. 2nd Grade, dated 30.11.1979 was without jurisdiction. It was passed in negation of the mandatory provisions of the H.P. Tenancy and Land Reforms Act and Rules 26 to 29 of the H.P. Tenancy and Land Reforms Rules, 1975. The A.C. 2nd Grade has absolutely no jurisdiction to confer proprietary rights upon the predecessor-in-interest of the petitioners. This order could only be passed by the A.C. 1st Grade upon whom the power has been conferred under Section 86 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972. Mr. Romesh Verma, learned counsel for the petitioner has also argued that the learned Financial Commissioner has no jurisdiction to hear the revision petition. It is clear from the plain language of Section 114 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 that with respect to all matters dealt with under Chapter IX, the Financial Commissioner has the same

power to call for examine and revise the proceedings of the Land Reforms Officer, or the Collector or the Commissioner as provided in Section 65 of the Act. The order, dated 30.11.1979, passed by the A.C. 2nd Grade was without jurisdiction and the same has rightly been interfered with by the learned Financial Commissioner. Normally, the power of revision is to be exercised within a reasonable period, but in those cases where there are glaring illegalities, the power of revision can be exercised at any time to advance the cause of justice.

14. Their Lordships of the Hon'ble Supreme Court in **Collector and others** Vs. **P. Mangamma and others** (2003) 4 Supreme Court Cases 488 have held that a reasonable period would depend upon the factual circumstances of the case concerned. There cannot be any empirical formula to determine that question. Their Lordships have held as under:

> *"5. A reasonable period would depend upon the factual circumstances of the concerned case. There cannot be any empirical formula to determine that question. The Court/ authority considering the question whether the period is reasonable or not has to take into account the surrounding circumstances and relevant factors to decide that question.*
>
> *6. In State of Gujarat v. Pate/ Raghav Natha and Ors. (AIR 1969 SC 1297) it was observed that when even no period of limitation was prescribed, the power is to be exercised within a reasonable time and the limit of the reasonable time must be determined by the facts of the case and the nature of the order which was sought to be varied. This aspect does not appear to have been specifically kept in view by the Division Bench. Additionally, the points relating to applicability of the Prohibition Act, and even if it is held that the Act was applicable, the reasonableness of the time during which action should have been initiated were also not considered. It would be hard to give an exact definition of the word "reasonable". Reason varies in its conclusions according to the idiosyncrasy of the individual and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic stands now like the jingling of a child's toy. But mankind must be satisfied with the reasonableness within reach; and in cases not covered by authority, the decision of the judge usually determines what is "reasonable" in each particular case; but frequently reasonableness "belong to the knowledge of the law, and therefore to be decided by the Courts". It was illumi-natingly stated by a learned author that an attempt to give a specific meaning to the word "reasonable" is trying to count what is not number and measure what is not space. It means pr/ma facie in law reasonable in regard to those circumstances of which the actor, called upon to act reasonably, knows or ought to know. [See Municipal Corporation of Delhi v. M/s Jagan Nath Ashok Kumar and Anr. (AIR 1987 SC 2316) arid Gujarat Water Supply and Sewerage Board v. Unique Erectors (Gujarat) (P.) Ltd. and Anr. (AIR 1989 SC 973)]. As observed by Lord Romilly M.R. in Labouchere v. Dawson (1872) L.R. 13 Eg. Ca. 325) it is impossible a priori to state what is reasonable as such in all cases. You must have the particular facts of each case established before you can ascertain what is reasonable under*

the circumstances. Reasonable, being a relative term is essentially what is rational according to the dictates of reason and not excessive or immoderate on the facts and circumstances of the particular case."

15. Their Lordships of the Hon'ble Supreme Court in **Pune Municipal Corpn.** Vs. **State of Maharashtra and others** (2007) 5 Supreme Court Cases 211 have held that the Revisional authority must consider extent of delay and whether revision was filed within reasonable time, intervening circumstances and subsequent events so as to conclude whether revisional jurisdiction should be exercised or not. Their Lordships have further held that the Revisional jurisdiction of State Govt. cannot only be exercised by it suo motu but can also be invoked by a party aggrieved. Their Lordships have also held that though no period of limitation is prescribed, but revisional jurisdiction must be invoked within a reasonable time and what would amount to reasonable time would depend upon fact and circumstances of each case. Their Lordships have held as under:

"22. Section 34 of the Act confers on Government revisional jurisdiction. It reads thus;

34. Revision by State Government._The State Government may, on its own motion, call for and examine the records of any order passed or proceeding taken under the provisions of this Act and against which no appeal has been preferred under Sec. 12 or Sec. 30 or Sec. 33 for the purpose of satisfying itself as to the legality or propriety of such order or as to the regularity of such procedure and pass such order with respect thereto as it may think fit; Provided that no such order shall be made except after giving the person affected a reasonable opportunity of being heard in the matter.

23. The learned counsel for the appellant- Corporation submitted that the Act does not confer right to file revision upon a person aggrieved. The State alone is empowered to exercise revisional power. The counsel submitted that such power can be exercised by the State Government on its own motion (suo motu) calling for and examining the records of any order passed under the Act for the purpose of satisfying itself of the legality and propriety of such order. It is, therefore, implicit that a party cannot invoke revisional jurisdiction under Section 34 of the Act.

24. We are, however, unable to uphold the said contention. It is true that Section 34 enables the State Government to exercise revisional powers suo motu. That, however, does not mean that a party cannot invoke such jurisdiction. A revision can also be filed by party aggrieved and it can invite the attention of the Revisional Authority as to illegality or impropriety of any order passed under the Act. The revision filed by the land-owners, therefore, could not be held to be not maintainable.

31. In the facts and circumstances of the case, in our opinion, the Revisional Authority was duty bound to take into account the length of delay, intervening circumstances and subsequent events from 1977 to 1995 and to consider whether the powers should have been exercised or not. Since no such exercise has been undertaken, the order suffers from legal infirmity and must be quashed.

16. Their Lordships of the Hon'ble Supreme Court in **A.V. Papayya Sastry and others** Vs. **Govt. of A.P. and others** (2007) 4 Supreme Court Cases 221 have held that the judgment , decree or order obtained by fraud has to be treated as non est and nullity, whether by court of first instance or by the final court. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings. Their Lordships have further held that the principle of "finality of litigation" cannot be stretched to the extent of an absurdity that it can be utilized as an engine of oppression by dishonest and fraudulent litigants. Their Lordships have further held that when the basis, on which the said officer proceeded to determine surplus land, was found to be non-existent and non est, the State Govt. was justified in setting aside the order in exercise of the suo motu revisional power. Their Lordships have held as under:

> *"17. Having given anxious consideration to the rival contentions of the parties, in our opinion, no case has been made out by the appellants for interference with the order passed by the High Court allowing the applications and recalling earlier order. The High Court has considered the matter in detail. The case of land- owners was that advance possession was taken over by Port Trust Authorities in August, 1972. The subsequent facts and letter by Chief Engineer of Port Trust in 1985 clearly revealed that it was not so. Possession of land was never with the land owners and was not given to Port Trust Authorities. From the record it is clear that neither the land-owners nor the Port Trust Authorities were in actual or physical possession of land, but it was occupied by tenants and disputes were also going on between the tenants and land owners. Therefore, the basis on which the Special Officer and Competent Authority, Urban Land Ceiling proceeded to decide the matter was non-existent and non est.*
>
> *19. We are further of the view that the State Government, in the facts and circumstances of the case, was right in exercising revisional jurisdiction under Section 34 of the Act. Mr. Venugopal is indeed right in submitting that even though no period of limitation is prescribed for exercise of revisional jurisdiction by the State Government suo motu, such power must be exercised within a reasonable time [vide State of Gujarat v. Patel Raghav Natha, (1969) 2 SCC 187]. But taking into account the facts and circumstances in their entirety and in particular, a letter of Chief Engineer, Visakhapatnam Port Trust of December 19, 1985, it cannot be said that the power had not been exercised within a reasonable period. It is also pertinent to note that the subsequent development shows as to how some of the Officers of the Port Trust were parties to fraud said to have been committed by land-owners. In this connection, the respondents are right in inviting our attention to a letter dated August 21, 1989 by the Port Trust Authorities to the Commissioner of Land Reforms stating therein that the Government intended to exercise suo motu power under Section 34 of the Act but there was no necessity to reopen proceedings and suitable directions were required to be issued to District Collector, Visakhapatnam to pass an award in respect of land sought to be acquired under the Land Acquisition Act. In view of these developments, in our opinion, the High Court was fully justified in recalling the earlier order.*

22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non est in the eye of law. Such a judgment, decree or order _by the first Court or by the final Court_ has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings.

26. Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of 'finality of litigation' cannot be stretched to the extent of an absurdity that it can be utilized as an engine of oppression by dishonest and fraudulent litigants.

38. The matter can be looked at from a different angle as well. Suppose, a case is decided by a competent Court of Law after hearing the parties and an order is passed in favour of the applicant/plaintiff which is upheld by all the courts including the final Court. Let us also think of a case where this Court does not dismiss Special Leave Petition but after granting leave decides the appeal finally by recording reasons. Such order can truly be said to be a judgment to which Article 141 of the Constitution applies. Likewise, the doctrine of merger also gets attracted. All orders passed by the courts/authorities below, therefore, merge in the judgment of this Court and after such judgment, it is not open to any party to the judgment to approach any court or authority to review, recall or reconsider the order.

39. The above principle, however, is subject to exception of fraud. Once it is established that the order was obtained by a successful party by practising or playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non-existent and non est and cannot be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by fraud has to be treated as nullity, whether by the court of first instance or by the final court. And it has to be treated as non est by every Court, superior or inferior.

17. Their Lordships of the Hon'ble Supreme Court in **Durga Das** Vs. **Collector and others** (1996) 5 Supreme Court Cases 618, **Sankalchan Jaychandbhai Patel and others** Vs. **Vithalbhai Jaychandbhai Patel and others** (1996) 6 Supreme Court Cases 433, **State of U.P.** Vs. **Amar Singh and others** (1997) 1 Supreme Court Cases 734, **Balwant Singh and another** Vs. **Daulat Singh and others** (1997) 7 Supreme Court Cases 137 and **Mahila Bajrangi and others** Vs. **Badribai and another** (2003) 2 Supreme Court Cases 464 have held that mutations do not confer any title. Their Lordships have further held that these entries are relevant only for the purpose of collecting land revenue.

18. The learned Single Judge of this Court in **Besru** Vs. **Shibu** 1999 (1) Shim. L.C. 343 has held that the Assistant Collector 2nd Grade has no jurisdiction to

attest the mutations and the same was declared to be void abinitio. Learned Single Judge has considered Rules 28 and 29 of the H.P. Tenancy and Land Reforms Rules, 1975 as well as Sections 22 and 23 of the H.P. Land Revenue Act. The learned Single Judge has held as under:

> *"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 Collector1st 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 far 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."*

19. Accordingly, in view of the observations and analysis made hereinabove, there is no merit in this writ 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 V.K. SHARMA, J.

Parveen Dogra S/o Sh. Mohar Singh Dogra and others ....Petitioners.

Vs.

State of Himachal Pradesh. ....Respondent.

Cr.MMO No . 02 of 2013-G.
Decided on: 3.1.2013.

Code of Criminal Procedure, 1973- Section 91 and 311- A prayer was made for sending the second part of the sample and bulk of recovered contraband to FSL- application was allowed- aggrieved from the order, the present petition has been filed- held that the power of the Court to lead additional evidence includes power to examine witness and to take on record the reports which are per se admissible – this power is available at the stage of the trial and the appellate stage- application was rightly allowed by the Trial Court- petition dismissed. (Para-3)

Case referred:
Ram Singh Versus State of Himachal Pradesh and the connected matters, 2012(2) Him L.R. (DB) 837

For the petitioners. : Mr. Deepak Kaushal, Advocate.
For the respondent. : Mr. Ramesh Thakur, Asstt. Advocate General.

The following judgment of the Court was delivered:

V.K. Sharma, Judge *(Oral).*

Heard.

2. The petitioners, who are standing trial in the court of learned Special Judge-II, District Sirmaur at Nahan, H.P., for the offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short "NDPS Act'), are aggrieved by an order dated 1.12.2012, passed by the learned Special Judge allowing the prayer of the prosecution under Section 311 read with Section 91 of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.') for sending the second part of the sample and bulk of the recovered contraband for analyses to the Forensic Science Laboratory. Precisely the prayer in this regard is based on the averment that though one part of the sample was sent for analyses and report of the Forensic Science Laboratory has been received, yet in view of the law laid down by a Division Bench of this Court in ***Ram Singh Versus State of Himachal Pradesh and the connected matters, 2012(2) Him L.R. (DB) 837***, it would be expedient and in the interest of justice that the second part of the sample and the bulk of the recovered contraband are also sent for examination to the Forensic Science Laboratory.

3. The learned counsel for the petitioners contends that the precedent of law, supra, relied upon by the learned trial court applies to the appellate stage and would not come into play, when the matter is still at the trial stage. However, the contention on the face of it appears to have been raised simply to be rejected. The

power of a court to grant permission to lead additional evidence under Section 311 Cr.P.C. includes both relating to a witness as also reports such as report of the Forensic Science Laboratory, which is *per se* admissible in evidence and if disputed, is required to be proved by the person submitting the report, in case a prayer to this effect is made by the accused and would thus fall within the purview of Section 311 Cr.P.C. The contention that the judgment referred to hereinabove applies only to a case which is at the appellate stage and not to one that is still at the initial stage of trial, is also equally fallacious, as the power under Section 311 Cr.P.C. can be exercised by any "any court", "at any stage of any inquiry, trial or other proceeding under this Code."

4. In view of the above, the petition is disposed of being without any merit.

5. In view of disposal of the main petition, Cr.MP No. 15 of 2013 shall also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE DEEPAK GUPTA, J. AND HON'BLE MR. JUSTICE V.K. AHUJA, J.

Himachal Pradesh Wakf Board, Elgin Villa, Lakkar Bazar, Shimla- 171001, through its Estates Officer, Shimla. .....Petitioner/Objector.

Vs.

Rajiv Dutta & Ors. .....Respondents/Decree Holders.

Hukami Devi Widow of Shri Ram Rattan Vaid .....Respondents/Judgment Debtor.

CMPMO No.187 of 2006 a/w
CMPMO Nos.188 and 189 of 2006.
Reserved On: 22.11.2011
Date of decision: 5.1.2012.

Wakf Act, 1995- Section 85- Objection petitions were filed by the Wakf Board in the petition for the execution of the orders passed by Rent Controller claiming that the property was a wakf property- objection petitions were dismissed by the Trial Court- appeals were filed, which were allowed and directions were issued to dispose of the objection after settling the issue- appeals were filed against this order but were dismissed- Wakf Board claimed before the Executing Court that jurisdiction lies with the Wakf Tribunal and matter should be sent to the Tribunal for adjudication- Wakf Tribunal held that matter falls within the purview of Rent Controller and not the Tribunal- aggrieved from the order, present petition has been filed- held that the question whether the property belongs to wakf or not can be decided only by the Tribunal in view of Section 85 of the Wakf Act and not by any other Courts- however, in view of Section 7 if the question was raised prior to the commencement of the Act, Tribunal will have no jurisdiction to decide such dispute- Rent Controller cannot decide the question of title but has to decide relationship between the parties- however, High Court had directed the Executing Court to determine the question of title- hence,

Executing Court has to decide whether objector is the owner of the property or not-hence, direction issued to the Executing Court to decide whether objectors are owners of the property or not and in case it is found that they are owners of the property, landlord would not be entitled to execute the decree. (Para-9 to 20)

For the Petitioner (s): Mr. B.S. Attri, Advocate in all the petitions.
For the respondents : None for the respondents in all the petitions.

The following judgment of the Court was delivered:

Deepak Gupta, J.

Keeping in view the importance of the issue involved in these cases at the time of admission of these petitions, the same were referred for decision to a Division Bench.

2. The following important question arises in these cases:-

"Whether the Objections filed by the petitioner H.P. Wakf Board should have been transferred for decision of the Tribunal constituted under the Wakf Act, 1995, or whether the Rent Controller has jurisdiction to hear and decide the objections?"

3. The brief facts relevant for decision are that one Smt. Kailash Dutta (since deceased) and now represented by her legal heirs S/Sh. Rajiv Dutta and Sanjeev Dutta filed three separate eviction petitions against her tenants in respect of portion of the building defined as property Nos. 149 and 150, Nomani Building, Lower Bazar, Shimla. These eviction petitions were filed in the year 1984 and in all these petitions eviction orders were passed against the tenants in the year 1989. It would be pertinent to mention that in all these petitions, the tenants had raised an objection that no relationship of landlord and tenant existed between them and Smt. Kailash Dutta, the alleged landlady. The stand of the landlay was that the original owner of the building late Sh. Kamaru Din by written Will had bequeathed his entire property in her favour. The learned Rent Controller held that the petitioner was a landlady and entitled to receive the rent. It would be pertinent to mention that the learned Rent Controller could not have decided the question of title. Even if the title of the petitioner was defective, she could still be treated to be a landlady. Thereafter, three execution petitions 29-10 of 99/95, 30/10 of 99/95 and 31/10 of 99/95 were filed by the landlady Smt. Kailash Dutta for execution of the eviction orders, which remained pending for a long time.

4. The Punjab Wakf Board, the predecessor-in- interest of H.P. Wakf Board filed objection petitions in these execution petitions. The case set up by the Wakf Board was that initially one Abdulla, a Sunni Muslim was the owner in possession of the property. He was succeeded by one Kamaru Din, who also died sometime in the year 1973-74. The case set up by the objector was that the property vested in the Wakf Board, Shimla which later became part of the Punjab Wakf Board, Ambala and now is the part of the H.P. Wakf Board. Sh. S.J. Dutta, the predecessor-in-interest of Smt. Kailash Dutta used to reside in a portion of the property known as 149 and 150 Lower Bazar, Shimla and was managing the property as an attorney/agent of Sh. Kamaru Din till his death. It was alleged that the Will, whereby Kamaru Din was alleged to have

bequeathed his estate in favour of Smt. Kailash Dutta was not a valid Will. The execution of any such Will was denied. It was claimed that Kailash Dutta and her successors had no right, title or interest in the property. The landlady and her successors in reply alleged that the objections were not maintainable and had been filed in collusion with the tenants and that the Wakf Board had no right to approach the Court under Order 21 Rule 97 CPC. On merits, it was alleged that Sh. Kamaru Din had executed a legal and valid Will in favour of Smt. Kailash Dutta. The execution petitions filed by the Punjab Wakf Board were dismissed by the Executing Court on the ground that the Board had no locus standi to file such objections.

5. Aggrieved by the said order, the Board filed Civil Appeal Nos.74-S/13, 75-S/13 and 76-S/13 of 2001 in the Court of learned District Judge, Shimla, who allowed the appeals and directed the Executing Court to consider and dispose of the objections after settling the issues. The successors of Smt. Kailash Dutta filed FAO Nos.22, 23, 24 of 2002 against the common judgment passed by the learned District Judge. These appeals were dismissed by a Division Bench of this Court, vide judgment, dated November 28, 2002.

6. Thereafter, the matter went back to the Executing Court and at that stage an application was filed on behalf of the Wakf Board that in view of the property having been included in the list of Wakf properties and in view of the fact that a Tribunal had been constituted under the Wakf Act, the Tribunal alone had jurisdiction to hear the matter and the Wakf Board prayed that the execution petition and the objections may be sent for trial to the Wakf Tribunal at Shimla for adjudication.

7. Vide order dated 10.8.2005, the Civil Judge held that he had no jurisdiction and referred the matter to the learned District Judge, Shimla, who was the designated Wakf Tribunal at Shimla for necessary directions. The learned District Judge, Shimla vide his order dated 25.2.2006 held that the execution proceedings arising under the H.P. Rent Control Act and this was not a matter falling within the Wakf Act and therefore, the Tribunal did not have jurisdiction to decide the execution petitions. Aggrieved by this common order, the petitioner filed the present petitions.

8. We have heard Sh. B.S. Attri, learned counsel appearing on behalf of the Wakf Board.

9. To appreciate the contentions raised by Sh. B.S. Attri, it would be pertinent to mention that the Wakf Act, 1995 (hereinafter referred to as the Act) was enacted and applies to all Wakfs in the country. By this Act, the Wakf Act, 1994 and Wakf Amendment Act, 1984 were repealed. A Wakf has been defined in Section 3 (r) of the Act, as follows:-

> **""Wakf" means the permanent dedication by a person professing Islam, of any movable or immovable property for any purpose recognized by the Muslim law as pious, religious or charitable and includes-**
>
> ***(i) a wakf by user but such wakf shall not cease to be a wakf by reason only of the user having ceased irrespective of the period of such cesser;***
>
> ***(ii) "grants", including mashrut-ul-khidmat for any purpose recognized by the Muslim law as pious, religious or charitable; and***

(iii) a wakf-alal-aulad to the extent to which the property is dedicated for any purpose recognized by Muslim law as pious, religious or charitable. And "wakf" means any person making such dedication."

10. Under Section 83 of the Act, the State Governments have been empowered to constitute as many Tribunals as they think fit for determination of any dispute, question or other matter relating to Wakf or Wakf property. Section 85 of the Act which bars the jurisdiction of the Civil Court, reads as follows:-

> **"85. Bar of jurisdiction of Civil Court-No suit or other legal proceeding shall lie in any Civil Court in respect of any dispute, question or other matter relating to any wakf, wakf property or other matter which is required by or under this Act to be determined by a Tribunal."**

11. It is thus clear that no suit or other legal proceedings shall lie in any Civil Court in respect of any dispute, question or other matter relating to any Wakf property, which under the Act is required to be determined by the Tribunal. Chapter-II of the Act deals with the survey of Wakfs and as per this Chapter the property of the Wakf have to be notified and if any question arises, whether the property notified as a Wakf property in the list of Wakfs, is actually a Wakf property or not, the matter has to be decided by the Tribunal, alone and no Court has jurisdiction in this behalf.

12. We are concerned only with Section 6(1) of the Act, which reads as follows:-

> **"6. Disputes regarding wakfs- (1) if any question arises whether a particular property specified as wakf property in the list of wakfs is wakf property or not or whether a wakf specified in such list is a Shia wakf or Sunni Wakf, the Board or the mutawalli of the wakf or any person interested therein may institute a suit in a Tribunal for the decision of the question and the decision of the Tribunal in respect of such matter shall be final."**

13. Section 6 (4) of the Act provides that the list of Wakfs, unless modified in pursuance to a decision of a Tribunal, shall be final and conclusive. Section 6 (5) further provides that after the commencement of the Act in the State, no suit or other legal proceedings shall be instituted or commenced in a Court in that State in relation to any question referred to in sub section (1). Section 7 (5) of the Act deals with the power of the Tribunal to determine dispute regarding Wakfs and reads as follows:-

> **"7. Power of Tribunal to determine disputes regarding wakfs- (5), The Tribunal shall not have jurisdiction to determine any matter which is the subject matter of any suit or proceeding instituted or commenced in a Civil Court under sub section (1) of Section 6, before the commencement of this Act or which is the subject matter of any appeal from the decree passed before such commencement in any such suit or proceeding or of any application for revision or review arising out of such proceeding or appeal, as the case may be."**

14. A bare reading of Section 7(5) clearly shows that the Tribunal does not have any jurisdiction to decide a dispute which is the subject matter of any suit or proceeding instituted or commenced in a Civil Court before the commencement of this Act, or subject matter of any appeal from the decree passed before such commencement in any such suit or proceeding or of any application for revision or review arising out of such suit or appeal, as the case may be. It is thus clear that if a dispute, whether a property was a Wakf property or not, had been raised in a Civil Court prior to the enforcement of the Act, then the Tribunal would have no jurisdiction to decide the matter. At this stage, it would be pertinent to notice that the Act came into force in the State of Himachal Pradesh much after the rent proceedings had commenced.

15. It is contended by Sh. B.S. Attri, learned counsel for the Board that in this case the dispute is, whether the property i.e. 149 and 150, Lower Bazar, Shimla is a Wakf property or not and the dispute in question cannot be decided by the Rent Controller in execution proceedings and must be referred to the Tribunal constituted under the Act. He also contends that assuming for the sake of arguments that this dispute has been raised before the Rent Controller prior to the date of commencement of the Act, then also the Rent Controller not being a Civil Court and not having jurisdiction to decide the question of title, could not have decided such issue and the same had to be referred to the Tribunal.

16. It would be pertinent to mention that in the State of Himachal Pradesh, two Wakf Tribunals were constituted in exercise of the powers conferred under Section 83 of the Act, vide Notification dated 1st December, 2001 and these Tribunals are at Shimla and Kangra at Dharamshala. The Shimla Tribunal has jurisdiction over the Districts Shimla, Solan, Sirmour, Mandi, Bilaspur and Kinnaur. On 9th March, 2002 a Notification was issued in terms of Section 27 of the Wakf Act and as per this Notification, the property i.e. three storied building with shops known as Nomani Building, 149 & 150, Lower Bazar, Shimla were declared to be Wakf properties under the management of the Punjab Wakf Board, Ambala in terms of the dedication dated 27.9.1971 by Sh. Kamaru Din.

17. The question that arises is whether the dispute in relation to the title of property No.149 and 150 is to be referred to the Tribunal or the Rent Controller can decide the same in execution proceedings. At this stage, it would be pertinent to mention that the Will executed by Sh. Kamaru Din was also subject matter of Civil Revision No.175 of 1994. In that case the tenant, at the stage of attornment, denied the title of Smt. Kailash Dutta on the ground that Kamaru Din has not executed any Will in her favour. The question which arose before this Court was, whether this question has to be decided by the Civil Court or by the Rent Controller. Hon'ble the Chief Justice has held as follows:-

> **"In such circumstances, the petitioner has to establish the relationship of landlord and tenant for the purposes of filing an application under Section 14 of the Act. The basic requirement of the Act is that there should be a relationship of landlord and tenant. The Rent Controller under the provisions of the Act is not expected or entitled to decide the question of title to immovable property when it is in dispute. In this case, the title to the property was**

denied at the earliest point of time when the petitioner wanted the respondent to make an attornment to him."

18. It is well settled law and as held by Hon'ble the Chief Justice that the learned Rent Controller cannot decide the question of title, but may at best decide, whether the relationship of landlord or tenant exists between the parties or not. Since the learned Rent Controller decided this issue in favour of Smt. Kailash Dutta and that decision has attained finality, she may be considered to be the landlord of the premises. However, in the present case the matter does not end here. As pointed out above, this Court in the earlier cases i.e. FAOs No.22 of 2002, 23 of 2002 and 24 of 2002, specifically held that the Executing Court was bound to hold a detailed enquiry to decide the question of title. After quoting various judgments, the Division Bench of this Court held as follows:-

> **"13. In *Silverline's* case (Supra) relied upon by the learned counsel for the appellants, Hon'ble the Supreme Court held as under:-**
>
> > **"14. It is clear that the executing Court can decide whether the resister or obstructor is a person bound by the decree and he refuses to vacate the property. That question also squarely falls within the adjudicatory process contemplated in Order 21 Rule 97 (2) of the Code. The adjudication mentioned therein need not necessarily involve a detailed enquiry or collection of evidence. The Court can make the adjudication on admitted facts or even on the averments made by the resister. Of course the Court can direct the parties to adduce evidence for such determination if the Court deems it necessary."**
>
> **14. It is evident from the above that a detailed inquiry and collection of evidence will not be necessary and the Court can adjudicate the dispute on admitted facts and averments by the resister. However, if necessary Court has to direct the parties to lead evidence to prove their rival claims. It is thus not the ratio of the case that a question or right, title or interest should be disposed of without holding inquiry. The detailed inquiry will not be required when the facts alleged by one party are not disputed by the other. However, in a case where contentious questions of facts and law are raised, it will be necessary to inquire into such questions by affording opportunity to the parties to prove their rival contentions.**
>
> **15. In a latter judgment in <u>Shreenath and another</u> vs. <u>Rajesh and others</u> (ATR 1998 SC 1827), the Hon'ble Supreme Court while dealing with a similar question held as under:-**
>
> > **"11. So, under Order 21 Rule 101 all disputes between the decree holder and any such person is to be adjudicated by the Executing Court. A party is not thrown out to relegate itself to the long drawn out**

arduous procedure of a fresh suit. This is to salvage the possible hardship both to the decree-holder and other person claiming title on their own right to get it adjudicated in the very execution proceedings. We find that Order 21 Rule 35 deals with cases of delivery of possession of an immovable property to the decree-holder by delivery of actual physical possession and by removing any person in possession who is bound by a decree, while under Order 21 Rule 36 only symbolic possession is given where tenant is in actual possession. Order 21 Rule 97, as aforesaid, conceives of cases where delivery of possession to decree-holder or purchaser is resisted by any person. Any person, as aforesaid, is wide enough to include even a person not bound by a decree or claiming right in the property on his own including that of a tenant including stranger."

13. So far sub clause (1) of Rule 97 the provision is same but after 1976 amendment all disputes relating to the property made under Rules 97 and 99 is to be adjudicated under Rule 101, while under unamended provision under sub-clause (2) of Rule 97, the Executing Court issue summons to any such person obstructing possession over the decretal property. After investigation under Rule 98 the Court puts back a decree-holder in possession where the Court finds obstruction was occasioned without any just cause, while under Rule 99 where obstruction was by a person claiming in good faith to be in possession of the property on his own right, the Court has to dismiss the decree-holder application. Thus even prior to 1976 right of any person claiming right on his own or as a tenant, not party to the suit such person's right has to be adjudicated under Rule 99 and he need not fall back to file a separate suit. By this, he is saved from a long litigation. So a tenant or any person claiming a right in the property, on his own, if resists delivery of possession to the decree-holder the dispute and his claim has to be decided after 1976 Amendment. Under Rule 97 read with Rule 101 and prior to the amendment under Rule 97 read with Rule 99. However, under the old law, in case order is passed against the person resisting possession under Rule 97 read with Rule 99 then by virtue of Rule 103, as it then was, he has to file a suit to establish his right. But now after the amendment one need not file suit even in such cases as all disputes are to be settled by the Executing Court itself finally under Rule 101."

16. It is evident from the above that the provisions of Rule 101 are mandatory and provides for inquiry into the question of

right, title and interest raised therein and ambit and scope of such inquiry will depend on the facts and circumstances of each case i.e. in a case where the question (s) raised can be decided on the basis of admitted and undisputed facts a comprehensive inquiry may not be necessary but in a case where contentious pleas of facts are raised, the Executing Court is bound to hold a detailed inquiry and permit the parties to lead evidence to prove their rival pleas based on the facts.

17. In the case in hand, question of title is involved. According to the appellants, they are owners of the property in question by virtue of a Will executed by a Mohammadan in favour of a Hindu woman which Will was not even produced before the Executing Court, whereas respondent No.1 claims to have become owner of such property by virtue of the provision of Muslim law and that the Will set up by the appellants is a forged document. In these circumstances, the Executing Court could not and should not have proceeded to dismiss the objection petitions without affording any opportunity to the parties to prove their rival averments and that too in the absence of production of proof of the Will set up by the appellants. The learned District Judge has thus rightly held that the Executing Court did not hold the requisite inquiry into the question of title raised by respondent No.1.

18. In view of the above conclusions, the impugned order remanding the cases to the Executing Court for inquiry in accordance with law being lawful, call for no interference."

19. This judgment has attained finality and, therefore, the Executing Court will have to hold an inquiry, as to whether the objector, H.P. Wakf Board is the owner of the property or not. This is an objection raised by the third party i.e. Wakf Board, which has questioned the title of the landlady. This objection, in view of the earlier judgment of this Court which has attained finality will have to be decided by the Executing Court.

20. In view of the above discussion, the petitions are answered by holding that in the facts and circumstances of the present case, the Executing Court will decide the question, whether the petitioner (s), i.e. objector before the Executing Court have title to the property or not. In case it is held that they are owners of the property, then obviously Smt. Kailash Dutt will not be entitled to execute the earlier order passed in the rent petitions.

21. Keeping in view the fact that the proceedings are pending for a long time, the Executing Court is directed to dispose of the objections at the earliest and in any event not later than 31st August, 2012. The petitions stand disposed of accordingly. No costs.

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BEFORE HON'BLE MR. JUSTICE DEV DARSHAN SUD, J.

Chand Ram alias Khem Chand son of Sh. Surat Ram ....Appellant

Vs.

State of Himachal Pradesh through Secretary Home, Government of Himachal Pradesh, Shimla HP ....Respondent

Cr. Appeal Nos. 398 of 2012 along with Cr. Appeal Nos. 399 of 2012, 400 of 2012 and 401 of 2012

Judgment Reserved on 20th December, 2012

Date of Decision 8th January, 2013

Indian Penal Code, 1860- Section 341, 367, 333, 506 read with Section 34- The Informant and PW-2 were on patrolling duty- a van was found parked on the road side- accused H and C were on the front seat, whereas, accused P and N were sitting in the back portion of the vehicle- the informant inquired as to why the van was parked on the road side- accused attacked the informant and PW-2- informant shouted for help on which people gathered at the spot and rescued the informant from the accused- fracture of the nasal bone was detected on x-ray- accused were tried and convicted by the Trial Court- held in appeal that there are no major contradictions in the statements of witnesses- evidence of the prosecution witnesses corroborates each other on material facts- minor contradictions do not disprove the case of the prosecution- FIR was lodged promptly- defence version was not probable- motive was not proved- appeals dismissed.

(Para-7 to 34)

Cases referred:

C. Maniappan and others v. State of Tamil Nadu, AIR 2010 SC 3718
Dudh Nath Pandey vs. State of U.P. AIR 1981 SC 911
Sanjiv Kumar v. State of Punjab (2010)3 SCC (Cri.) 330
State of Haryana vs. Ram Singh 2002 SCC (Cri) 350
State of U.P. vs. Babu Ram, AIR 2000 SC 1735
Aher Raja Khima vs. State of Saurashtra, AIR 1956 SC 217
C. Magesh and others vs. State of Karnataka (2010)5 SCC 645
Ruli Ram and another vs. State of Haryana (2002)7 SCC 691
Sucha Singh and another vs. State of Punjab, (2003)7 SCC 643
Dalip Singh vs. State of Punjab, AIR 1953 SC 364
Guli Chand vs. State of Rajasthan (1974)3 SCC 698
Maslati vs. State of U.P. AIR 1965 SC 202
Krishna Mochi vs. State of Bihar, (2002)6 SCC 81
Vidyadharan vs. State of Kerala (2004)1 SCC 215
Arjun Mahato vs. State of Bihar (2008)15 SCC 604
Suresh vs. State of Haryana (2009)13 SCC 538
Sajjan Sharma vs. State of Bihar (2011)2 SCC 206

For the Appellant: Shri S.R. Chauhan, Advocate.

For theRespondent: Shri P.K. Sharma, Additional Advocate General with Mr. R. P. Singh, Assistant Advocate General.

The following judgment of the Court was delivered:

Dev Darshan Sud, J.

These four appeals are being disposed of by this judgment as they arise out of the same judgment and order of conviction against all the four accused. The learned trial Court has convicted them to undergo sentence for offences as committed by them as under:-

Name	Offence	Sentence of imprisonment	Fine	In default of payment of fine
Chand Ram,Neter Singh, Hamender Singh and Prem Singh	341 read with Section 34 IPC	One month	Rs. 500/-	Further imprisonment for 15 days
-do-	367 read with Section 34 IPC	Three years	Rs. 3000/-	Further imprisonment for six months
-do-	333 read with Section 34 IPC	Five years	Rs. 5000/-	Further imprisonment for one year
-do-	506 (II) read with Section 34 IPC	Two years	Rs. 2000/-	Further imprisonment for two years

2. All the sentences were directed to run concurrently and benefit of Section 428 of the Code of Criminal Procedure (hereinafter 'Cr.P.C.') was granted to all the accused.

3. The case of the prosecution in brief is that on 24.8.2008 at about 9.15 PM, complainant H.C. Hem Raj PW1 along with HHC Kanshi Ram PW2 was on patrolling duty. They noticed a pickup van with registration No. HP-64-0340 parked on the road side. The complainant went towards the vehicle to see as to why it was parked there. He noticed that accused Hamender and Chand Ram were on the front seat whereas Prem

Singh and Neter Singh were sitting in the back portion of the vehicle. The complainant questioned them as to why the vehicle was parked unauthorizedly on the road side. This did not go down well with the accused; they pounced upon him, beat him and pulled him inside the van. Thereafter they drove the van towards Kanda road where they beat him up mercilessly by kicking and punching him. The complainant shouted for help at which PW4 Sant Ram, PW3 Bal Krishan, Liaq Ram, Sher Singh and Ashok Kumar reached the spot and rescued him from the clutches of the accused. His shirt was torn by the accused who threatened to kill him. The complainant sustained injuries on his nose and mouth. His statement Ext.PW1/A under Section 154 of Cr.P.C. was recorded by the police party headed by PW17 Baldev Thakur, Additional SHO. The complainant was referred for medical examination to CHC Dharampur, where he was examined and his X-ray revealed fracture of his nasal bone. PW14 Dr. Amit Aggarwal proved MLC Ext.PW14/B, radiologically examined by PW5 Dr. Sandeep Jain. PW5/A was the X-ray film revealing the fracture of the nasal bone of the complainant, Ext.PW5/B, which is the final opinion of the doctor, records that the nasal bone of the complainant was fractured. FIR No. 107/08 (Ext.PW11/A) was registered at Police Station Dharampur. The vehicle was impounded and investigation followed thereafter.

4. PW16 Additional Superintendent of Police Mr.Ramesh Chand Pathania also investigated the case. PW5 Dr. Sandeep Jain and PW14 Dr. Amit Aggarwal proved the injuries of the complainant. The prosecution examined 17 witnesses in all. Two witnesses were examined in defence. On the evidence recorded, the learned trial Court convicted all the accused for offences as noted supra.

5. The appellants have challenged this judgment on a number of grounds which inter alia include that PW3 Bal Krishan had stated that when he inquired from the complainant as to how he sustained injuries, he stated that he had fallen down from a scooter. PW6 Chain Singh stated that he had heard PW1 Hem Raj screaming after he had fallen from the scooter. PW4 Sant Ram is the brother of the complainant and he was doing the business of selling illicit liquor in a Khokha and all the villagers including Neter Singh had made a complaint against him and later on his khokha(s) was demolished. PW17 Baldev Thakur had stated that the relations between the accused and the injured persons were strained because a complaint had been made by Neter Singh against Sant Ram PW4, brother-in-law of the complainant for encroaching on government land on which he was carrying on the business of selling the illicit liquor. (I find that this suggestion has been denied by him in cross examination.) It was also urged that witnesses are related to the injured being his close relatives and that the other witnesses produced are the police personnel who cannot be relied upon. The area where the incident took place was populated but no independent witness was associated.

6. According to the learned counsel appearing for the appellants, these major contradictions coupled with the fact that the witnesses are

partisan are sufficient to establish that the incident did not take place at all and that it was the outcome of enmity with the accused.

7. Adverting to the statements of witnesses, PW1 complainant Hem Raj states that he was posted as Head Constable at police station Dharampur. On 24.8.2008 he along with PW2 HHC Kanshi Ram were on patrolling duty at around 8.45 PM in Sukhi Johri at Dharampur bazaar. PW2 HHC Kanshi Ram was walking 15-20 steps ahead of him. One pickup van No. HP-64-0340 was parked at Sukhi Johri and he went near the vehicle where he found that driver of the vehicle/accused Hamender and one Chand Ram were sitting in the front while Prem Singh and Neter in the back portion of the pickup van. He asked them as to why they had parked the vehicle there, whereupon they pounced upon him, pushed him into the vehicle and drove towards Kanda road. After reaching there, they stopped the vehicle and started beating him up by kicking and punching him. When he raised alarm PW4 Sant Ram, Liaq Ram, PW3 Bal Krishan PW15 Sher Singh and one Ashok Kumar came there on a scooter of one Mukesh. They rescued him from the clutches of the accused. In the thrashing which he received, his uniform shirt and vest were torn. He was abused and threatened by the accused that he would be killed. He received injuries on his nose and mouth and blood started oozing from his nose. The police visited the spot and his statement under Section 154 of Cr.P.C. was recorded. He was rushed to CHC Dharampur where he was medically examined, was subjected to X-ray examination. He then states that Neter Singh and Prem Singh pushed him into the vehicle and Chand Ram caught hold him from his arm and pushed him into the vehicle and closed the window. Prem Singh and Neter Singh boarded the vehicle from the rear side. At Kanda, when pickup van was stopped, Prem Singh caught hold him from the back and pinned his arm while Neter Singh punched him on his nose, resulting in grievous injuries. His supplementary statement was recorded on 18th November, 2008 when he stated that when he was posted at Pangi, his father had constructed a house in village Kanda (udan) where at that time, Neter Singh had threatened his father that in case he unloads the construction material, he would be dealt with appropriately. There was an altercation between Neter Singh and Chand Ram and his parents when he told that they would not allow his parents to raise any construction. In cross examination, he states that his family is residing in Kanda since 2006 which is at the distance of about 5 K.m. from Dharampur. Sant Ram PW4 and Sher Singh PW15 are related to him as his brothers-in-law. He denies that scooter PB-35-G-0921 which is blue in colour belongs to him and that he was using this scooter for travelling from his house to the police station and back. He also denies that the scooter is parked in front of his house and on the fateful day, he was travelling on the scooter from Sukhi Johri to Kanda and since the lights of his scooter were not working, he was following the scooter of one Mukesh. He also denies that it is because of this, he lost his control and fell down from the scooter near the house of Chain Singh and that he was lifted by Mukesh and due to this reason, he received the injuries. He denies that he was drunk on that day and that he was beaten up by Ashok. Ashok's brother Dalip was posted in police station

Dharampur, in those days. He denies any personal grudge with Ashok. He denies any violent quarrel between his father and mother and Neter Singh and Chain Singh, but states that there was a verbal altercation between them. He also denies that he had financed Sant Ram to run a shop inside the Khokha or that it was built on the government land or Sant Ram was carrying on the business of selling the illicit liquor. He admits that Dhain Singh is also his relative.

8. PW2 HHC Kanshi Ram states that he was on patrolling duty on the fateful day. The complainant was 15-20 steps behind him and was checking pickup van No. HP-64-0340, which was parked on the side of the road. Some persons were sitting in the vehicle. He says that he noticed that some people pulled the complainant into the vehicle and drove it towards Kanda. He tried to chase it but accused fled from the spot. On this, he intimated the police station on telephone about the incident. PW17 S.I. Baldev Thakur, PW9 C. Kamal Kumar and HHC Rajesh Kumar rushed to Sukhi Johri and then towards Kanda where the complainant made a statement Ext.PW1/A under Section 154 Cr.P.C. in his presence. He corroborated the incident as to what happened to the complainant. In cross examination, he states that he telephoned the police station from his mobile No. 94180-60832 on phone No. 264032. He admits that there are residential houses at Sukhi Johri and the vehicle was parked just short off of the shops at Sukhi Johri. He denied that complainant Hem Raj was having a blue coloured scooter. It was lonely place and some people had gathered there but he could not state their names. He says that it wasdark.

9. PW3 Bal Krishan states that he is resident of Kanda. On 24.8.2008 he heard some noise at about 8 p.m. and when he came out of his house, he saw Hem Raj with blood oozing from his nose. He inquired as to how this had happened, he (the complainant) stated that he had fallen from the scooter and sustained these injuries. He was declared hostile and cross examined. He identified the scooter bearing registration No. PB- 35-G-0921 and stated that he had not seen Hem Raj wearing any uniform.

10. PW4 Sant Ram states that he is resident of village Kanda. On 24.8.2008 at around 9.30 PM he was in his house with his cousin Sher Singh and they were sitting in the kitchen when they heard some noise/shouting. Both of them came out and ran towards the road and saw that the accused were beating up complainant Hem Raj, who were kicking and punching him. Laiq Ram, Bal Krishan PW3 and Sher Singh PW15 intervened and rescued the complainant from the clutches of the accused. After some time, Mukesh DW1 and Ashok Kumar intervened and tried to save the complainant. Blood was oozing out from the nose of the complainant. His uniform i.e. his shirt and vest were torn by the accused. Before leaving the spot, the accused threatened him that they would kill him. He denies that he was selling illicit liquor along with some other articles from his Khokha and due to this reason, drunkards used to create a scene thereby shouting and yelling. He denied that any complaint was made against him. He admits that khokha adjoining the rain shelter was on the government land. He also denies that Neter Singh accused had made a

complaint against him, pursuant to which eviction proceedings were initiated against him and later on the khokha was demolished. He says that he removed the khokha himself and constructed another khokha adjoining the land of Dhian Singh. He also denies that he filed a complaint against Chand Ram and Neter Singh with regard to the theft from his khokha and stated that in his presence Ashok Kumar did not beat the complainant. Neter Singh had punched the complainant on his nose.

11. PW6 Chain Singh states that around one year back (from the date his statement was recorded), he was carrying on construction work of his house and he engaged Neter Singh as a contractor. At around 8.30 PM he saw one vehicle owned by accused Hamender generally used for transportation of vegetables near the rain shelter at Anji Kanda. After hearing the commotion when he reached the spot he saw only Sher Singh and Raju (uncle of Sher Singh) and one policeman. When he reached the spot, he saw that the persons, who were quarrelling at the spot, had already left. He had heard from Hem Raj complainant that he had sustained injuries due to falling of from the scooter. He was declared hostile and cross examined at length.

12. PW15 Sher Singh states that on the fateful day, he was present in the house of his uncle (Taya) at Kanda. At around 9/9.15 PM he heard a commotion. He along with Sant Ram PW4 went to the road and found the accused beating up Hem Raj. The accused were kicking and punching the complainant, who was in police uniform. He tried to save him from the accused and in the scuffle, the shirt of the complainant was torn and blood was oozing from his nostrils. Ashok and Mukesh came to the spot on the scooter and tried to save the complainant. The accused persons while leaving the spot threatened the complainant to do away with his life. In cross examination, he states that it was a dark night and it was not possible to clearly identify the accused, but they could be identified by their voices on the spot. He did not notice the blood oozing from the nasal of the complainant immediately, but later on observed that blood was oozing from the nose of the complainant and was spreading on his face.

13. PW17 Inspector Baldev Thakur, SHO was posted as SI/SHO, P.S. Dharampur in the year 2008. He states that on 24.8.2008 a telephonic information was received from PW2 HHC Kanshi Ram that the complainant was taken away in vehicle No. HP-15-0340, towards Kanda. On this, he along with H.C. Rajesh Kumar and C. Kamal went to Kanda where Hem Raj was bleeding from his nose and his statement Ext.PW1/A was recorded under Section 154 Cr.P.C. He thereafter investigated the case. The complainant was referred for medical examination etc. In cross examination, he states that when he reached Kanda, he saw the complainant in a torn shirt and vest. He did not take into possession the shirt and vest immediately, but they were taken into possession on the next day.

14. DW1 Mukesh states that he was having a saw mill in Sukhi Johri, Dharampur. On 24.8.2008 it was Janmashatami and at around 7.30 PM when he was going to his residence on his scooter, Hem Raj met him at

Sukhi Johri and asked him to drive in front of the complainant who was driving scooter No. PB-35G- 0921 and asked this witness to show him the light of his scooter as there were no lights on the scooter of the complainant, who was drunk at that time. When they reached near the pond at Kanda, Hem Raj fell from his scooter and suffered injuries as the distance between his scooter and that of the complainant had increased. He lifted him and found that blood was oozing from his nose. On this the complainant became infuriated and began shouting, abusing and saying that as to why light was not properly shown to him (complainant). Ashok Kumar was his pillion rider. When the complainant raised a hue and cry, Chain Singh, Neter Singh, Bal Krishan and Laiq Ram rushed to the spot and when Hem Raj did not stop abusing, Ashok Kumar administered 2/3 slaps to Hem Raj due to which more blood started oozing from his nose. The other accused except Neter Singh were settling their accounts of sale of vegetables which they had sold at Chandigarh at a place which was slightly further from the place of occurrence. They asked the complainant as to why he was abusing them. Thereafter all of them left for their residences. He denies the presence of PW4 Sant Ram and PW15 Sher Singh etc. He says that Hem Raj was inimical with the accused because his brother-in-law (wife's brother) Sant Ram had constructed a khokha on the government land about which they had complained to the Tehsildar and the khokha was removed. He also says that Sant Ram used to sell illicit liquor and all the villagers including the accused had objected to these activities. He says that the scooter of Hem Raj complainant bearing No. PB-35G-0921 was parked in the house of Hem Raj and mark D-1 and Mark D-2 are its photographs. In cross examination, he says that he came to the Court by bus. He does not know who is the owner of this scooter, but he had seen the complainant riding it. The complainant was drunk at the time of the incident. He states that he has no record regarding the complaints made by them to the Tehsildar or any other official with respect to illicit sale of liquor by Sant Ram.

15. DW2 Neter Singh says that he is contractor. He clicked photographs Ext.DW2/A and Ext.DW2/B in which the scooter was shown parked inside the house of the complainant. In cross examination, he says that he did not make any complaint either in writing or oral after the registration of the First Information Report. He does not know about the name of the owner of the scooter.

16. At this juncture, it would be fruitful to consider the evidence of PW5 Dr. Sandeep Jain who states that on 29.8.2008 when he was posted as Radiologist at Regional Hospital, Solan he conducted the radiological examination of PW1 complainant Hem Raj and he observed the fracture of nasal bone. He proved on record X-ray film Ext.PW5/A and his opinion Ext.PW5/B and states that these injuries can be possible by kicking and punching. He admits that if somebody falls down in that event also, such injuries can be possible, but then there must be corresponding injuries on the other parts of the body. He also says that there are over writings on the X-ray slip.

17. PW14 Dr. Amit Aggarwal states that he was posted as Medical Officer at CHC Dharampur. On 25.8.2008 at the request of the police made vide Ext.PW14/A he examined Hem Raj and found fresh bleeding present from both nostrils and tenderness on bridge of nose. He advised X-ray and rendered his opinion, on the report Ext.PW5/B, that the probable duration of the injuries is 0 to 6 hours with a blunt weapon. He proved Ext.PW14/B which is the MLC issued by him. This is the entirety of the evidence by leading other evidence of investigation on record which requires consideration.

18. Ext.PW14/B is the MLC of the complainant. According to it, he was brought on 25.8.2008 at mid night with alleged history of assault and he was having fresh bleeding from both nostrils, tenderness on bridge of nose and the final opinion would be given only after receiving the radiological report.

19. In *C. Maniappan and others v. State of Tamil Nadu, AIR 2010 SC 3718* holding:-

> *"71. It is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witness. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of the incident, minor discrepancies are bound to occur in the statements of witnesses. (vide Sohrab & Anr. v. The State of M.P., AIR 1972 SC 2020; State of U.P. v. M.K. Anthony, AIR 1985 SC 48; Bharwada Bhogini Bhai Hirji Bhai v. State of Gujarat, AIR 1983 SC 753; State of Rajasthan v. Om Prakash AIR 2007 SC 2257: (2007 AIR SCW 3937); Prithu @ Prithi Chand & Anr. v. State of Himachal Pradesh, (2009) 11 SCC 588: (AIR 2009)9 SCC 626 : (AIR 209 SC (Supp) 2687 : 2009 AIR SCW 6177); and State v. Saravanan & Anr., AIR 2009 SC 152) : (2008 AIR SCW 7060).Death sentence." (at p. 3737)* In *Paramjit Singh alais Pamma vs. State of Uttarakhand (2010)10 SCC 439* the Supreme Court holds:-
>
> *"Standard of proof*
>
> *10. A criminal trial is not a fairy tale wherein one is free to give flight to one's imagination and fantasy. Crime is an event in real life and is the product of an interplay between different human emotions. In arriving at a conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case, in the final analysis, would have to depend upon its own facts. The court must bear in mind that "human nature is too willing, when faced with brutal crimes, to spin stories out of strong*

> *suspicions". Though an offence may be gruesome and revolt the human conscience, an accused can be convicted only on legal evidence and not on surmises and conjectures. The law does not permit the court to punish the accused on the basis of a moral conviction or suspicion alone. "The burden of proof in a criminal trial never shifts and it is always the burden of the prosecution to prove its case beyond reasonable doubt on the basis of acceptable evidence." In fact, it is a settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof required, since a higher degree of assurance is required to convict the accused. The fact that the offence was committed in a very cruel and revolting manner may in itself be a reason for scrutinizing the evidence more closely, lest the shocking nature of the crime induces an instinctive reaction against dispassionate judicial scrutiny of the facts and law. (Vide Kashmira Singh v. State of M.P. AIR 1952 SC 159; State of Punjab vs. Jagir Singh, (1974)3 SCC 277, Shankarlal Gyarasilal Dixit v. State of Maharashtra (1981)2 SCC 35, Mousam Singha Roy vs. State of W.B. (2003)12 SCC 377 and Aloke Nath Dutta vs. State of W.B. (2007)12 SCC 230.*
>
> .....
>
> *20. In view of the above, it is evident that the evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution."*
>
> *(at pp.445,446, & 449)*

It is in the light of these decisions, the judgment of the learned trial Court is to be considered.

20. The sequence of the narration of facts of the prosecution witnesses is that (i) the complainant and HHC Kanshi Ram were on patrolling duty. PW2 HHC Kanshi Ram was walking ahead of the complainant PW1 H.C. Hem Raj, who found the accused sitting in the pickup van and when he inquired from them as to what they were doing there, they pounced upon him, dragged him in the vehicle and drove it to Kanda, where they kicked and punched him whereupon PW3 Bal Krishan, PW4 Sant Ram, PW6 Chain Singh, PW15 Sher Singh rushed to the spot on hearing his cries and rescued him; (ii) It is also the case of prosecution that DW1 Mukesh also reached the spot; (iii) PW2 HHC Kanshi Ram immediately informed the police station by his mobile phone whereupon the party consisting of PW17 Inspector Baldev Thakur rushed to the spot, recorded the statement of PW1 complainant Hem Raj and then took him to the police station. He was immediately examined by PW14 Dr. Amit Aggarwal, who found injuries on his nose and he referred him for radiological examination which was conducted by PW5 Dr. Sandeep Jain and found that the complainant had sustained nasal bone fracture.

21. In opposition to this, the case of the defence is that

(i) the complainant was riding scooter No. PB-35G-0921. He had asked DW1 Mukesh to guide him by the light of his scooter as the scooter of the complainant did not have the lights; (ii) he was drunk at that time and because of the distance between the two scooters, the complainant lost control and fell down; (iii) thereupon he became infuriated, started shouting, abusing and yelling. According to DW1 Mukesh, he (the complainant) was slapped by one Ashok Kumar his pillion rider which aggravated the injured; (iv) this case was outcome of the complaint having been made by the accused against PW4 Sant Ram, who was brother-in-law of the complainant and pursuant to this complaint, the khokha (temporary stall) of PW4 Sant Ram was removed from the government land; (v) Sant Ram was carrying on the business of selling the illicit liquor and all the drunkards used to congregate and create the problems for all andsundries.

22. On the evidence of hostile witnesses, the Supreme Court *C. Maniappan's case* (supra) holds:

"69. It is settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examine him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (vide Bhagwan Singh v. The State of Haryana, AIR 1976 SC 202; Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170; Syad Akbar v. State of Karnataka, AIR 1979 SC 1848; and Khujji @ Surendra Tiwari v. State of Madhya Pradesh, AIR 1991 SC1853).

70. In State of U.P. v. Ramesh Prasad Misra & Anr., AIR 1996 SC 2766, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra, (2002) 7 SCC 543: (AIR 2002 SC 3137 : 2002 AIR SCW 3619) ; Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516; Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P., AIR 2006 SC 951: (2006 AIR SCW 421); Sarvesh Naraian Shukla v. Daroga Singh & Ors., AIR 2008 SC 320: (207 AIR SCW 6843); and Subbu Singh v. State, (2009) 6 SCC 462: (2009 AIR SCW 3937).

Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.

In the instant case, some of the material witnesses i.e. B. Kamal (PW.86); and R. Maruthu (PW.51) turned hostile. Their evidence has

been taken into consideration by the courts below strictly in accordance with law.

Some omissions, improvements in the evidence of the PWs have been pointed out by the learned counsel for the appellants, but we find them to be very trivial in nature." (at p.3736)

23. Adverting to the proved facts on record I find that (a) there is no written complaint or evidence of any oral complaint having been made against PW4 Sant Ram by any of the accused; (b) there is no order of any authority or evidence about any pending proceedings with respect to (i) the illegal construction/encroachment by Sant Ram; (ii) any complaint or proof of any complaint/case pending against Sant Ram with respect to the sale of illicit liquor; (c) there is no proof that scooter No. PB-35G-0921 is owned by the complainant.

24. It is after excluding these facts that the other evidence on record has to be considered, though as urged falsity of the defence set up, would not per se establish the guilt of the accused.

25. Adverting to the case of the prosecution, I find that there is no major contradiction in evidence of the witnesses. To reach this conclusion, I find that evidence of the prosecution witnesses corroborates each other on material facts. Minor contradictions qua the incident or assault do not disprove the case of the prosecution. It is urged that since the prosecution witnesses are partisan and related to each other their evidence cannot be relied upon. This submission cannot be accepted in its generality. The rule to be applied is one of careful scrutiny and not of rejection outright. The sequence after the forcible abduction of PW1 complainant Hem Raj is that he was pushed into the pickup van, driven to Kanda and then kicked and thrashed there. Thereafter, PW2 HHC Kanshi Ram immediately telephoned the police station, PW17 Inspector Baldev Thakur immediately rushed to the spot to ascertain what was going on, he immediately took the complainant to the hospital where he was examined by PW14 Dr.Amit Aggarwal and then on the next day by PW5 Dr. Sandeep Jain, who conducted the radiological examination revealing grievous injuries in the nasal bones of the complainant. I also note that when he was taken for medical examination, there is nothing in MLC of the complainant Ext.PW14/B to indicate that he was drunk. There is no question to PW14 Dr. Amit Aggarwal that the complainant was in fact drunk. The First Information Report has been lodged with promptness and his medical examination has also been conducted immediately (though urged wrongly that it was conducted the day after), as the record shows that it was 12.30 AM in the mid night of the same day. This lends credence to the version of the complainant. On the question that the witnesses are partisan, it is but usual that the persons who know each other/related to the complainant are usually the first who rush to his aid. True that PW3 Bal Krishan has turned hostile when he states that on asking the complainant that how the blood was oozing out from his nose, he (the complainant) told him that he had fallen from his scooter and sustained the injuries. PW6 Chain Singh also stated that when he reached the spot, he did not see any quarrel. DW1 Mukesh is categoric when he says that the complainant was drunk and fell down from the scooter.

But evidence of DW1 Mukesh cannot be accepted for the reason that ownership of the scooter which the complainant was supposed to be riding has not been established, neither the factum of accident nor the fact that the complainant was in fact driving or riding any scooter.

26. On the question of probability of defence, I need not reiterate the principles that evidence of the defence witnesses requires equal treatment. In *Dudh Nath Pandey vs. State of U.P. AIR 1981 SC 911* the Supreme Court holds:

> *"19.…….Defence witnesses are entitled to equal treatment with those of the prosecution. And Courts ought to overcome their traditional instinctive disbelief in defence witnesses. Quite often, they tell lies but so do the prosecution witnesses……."* *(at p. 916)*

In *Sanjiv Kumar v. State of Punjab (2010)3 SCC (Cri.) 330* the Supreme Court holds:-

> *"23. It has been observed that decence 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."* *(at p. 337)*

27. To similar effect is the judgment of the Supreme Court in *State of Haryana vs. Ram Singh 2002 SCC (Cri) 350,* in which it is held:

> *"19. ……..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 issued of credibility and the trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution……" (at p. 362)*

The Supreme Court aptly summed up this principle in *State of U.P. vs. Babu Ram, AIR 2000 SC 1735.* This follows the fundamental postulate of criminal jurisprudence as laid down by the Supreme Court in *Aher Raja Khima vs. State of Saurashtra, AIR 1956 SC 217 holding:-*

> *"9. Now it may be possible to take two views of this statement but there are two important factors in every criminal trial that weight heavily in favour of an accused person: one is that the accused is entitled to the benefit of every reasonable doubt and the other, an off-shoot of the same principle, that when an accused person offers a reasonable explanation of his conduct, then, even though he cannot prove his assertions, they should*

ordinarily be accepted unless the circumstances indicate that they are false……"(at p. 221)

At this juncture, in *Aher Raja Khima's case* the Supreme Court also holds that merely because the witnesses are police personnel, it does not attach any taint to their evidence. Lastly in *C. Magesh and others vs. State of Karnataka (2010)5 SCC 645* the Supreme Court lays down the fundamental principles for appreciation of evidence and holds:-

> *"45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasize, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Suraj Singh vs. State of U.P. (208)16 SCC 686 has held: (SCC p. 704, para 14)*
>
> *"14. 21…..The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy;…….the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation…" 46. In a criminal trial, evidence of the eyewitness requires a careful assessment and must be evaluated for its credibility. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that "no man is guilty until proven so", hence utmost caution is required to be exercised in dealing with situations where there are multiple testimonies and equally large number of witnesses testifying before the court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses." (at p. 655)*

28. At this juncture, I advert to the defence taken by the accused that the injury was in fact caused to the complainant by falling from the scooter and was not inflicted on him which is the case of prosecution based on tainted evidence.

29. In *Ruli Ram and another vs. State of Haryana (2002)7 SCC 691* the Supreme Court holds:

> *"7. So far as the acceptability of evidence is concerned, the trial court and the High Court analysed the evidence in detail and have held it to be plausible and acceptable, and that it suffers from no infirmity. It has been noted that in a faction-ridden village, independent witnesses, as submitted by the learned counsel for the accused-appellant, are difficult to get. Enmity is a double-edged sword. While it can be a basis for false implication, it can also be a basis for the crime. The court has to weigh the evidence carefully and it after doing so, holds the evidence to be acceptable, the accused cannot take the plea that it should not be acted upon. When a plea of false implication is advanced by the accused, foundation for the same has to be established. We do not find any reason to differ from the courts below on the factual aspects." (at p. 698)*

30. In *Sucha Singh and another vs. State of Punjab, (2003)7 SCC 643* the Court holds:

> *"13. We shall first deal with the contention regarding interestedness of the witnesses for furthering the prosecution version. Relationship is not a factor to affect the credibility of a witness. It is more often than not than a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible." (at p. 650)*

Relying upon the decision in *Dalip Singh vs. State of Punjab, AIR 1953 SC 364, Guli Chand vs. State of Rajasthan (1974)3 SCC 698,* the Court then proceeds:

> *"16……We may also observe that the ground that the witness being a close relative and consequently, being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh Case in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses……." (at pp. 650-651)*

The Court thereafter holds that this principle has been reiterated in *Maslati vs. State of U.P. AIR 1965 SC 202* holding that plea as urged is one of *falsus in uno falsus in omnibus* which does not apply to criminal trial in India. It is merely a rule of caution. All that it requires is that in such cases testimony may be disregarded and not that it must be disregarded. It is not a mandatory rule of evidence for its rejection as a whole. The Court then holds that material discrepancies are those which are not normal and not expected of a normal person. In case of normal discrepancies they do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in *Krishna Mochi vs. State of Bihar, (2002)6 SCC 81.* The Court then proceeds:-

> *"20. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice according to law. [See: Gurbachan Singh v. Satpal Singh and Others [AIR 1990 SC 209]. Prosecution is not required to meet any and every hypothesis put forward by the accused. [See State of U.P. v. Ashok Kumar Srivastava [AIR 1992 SC 840]. A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. [See Inder Singh and Anr. v. State (Delhi Admn.) (AIR 1978 SC 1091)]. Vague hunches cannot take place of judicial evaluation.*

"A judge does not preside over a criminal trial, merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties." (Per Viscount Simon in Stirland v. Director of Public Prosecution (1944 AC (PC) 315) quoted in State of U.P. v. Anil Singh AIR 1988 SC 1998. (SCC p. 692, para 17).

Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth.

21. *In matters such as this, it is appropriate to recall the observations of this Court in Shivaji Sahebrao Bobade v. State of Maharashtra (1974)1 SCR 489 (SCR pp.492-493)]: (SCC p. 799, para 6)*

".....The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand special emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. ..... The evil of acquitting a guilty person light-heartedly as a learned author (Glanville Williams in 'Proof of Guilt') has sapiently observed, goes much beyond the simple fact that, just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted 'persons' and more severe punishment of those who are found guilty. Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless....." ".....a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent....."

22. *The position was again illuminatingly highlighted in State of U.P. v. Krishna Gopal (AIR 1988 SC 2154). Similar view was also expressed in Gangadhar Behera and Ors. v. State of Orissa (2002 (7) Supreme 276)." (at pp 653-654)*

31. In *Vidyadharan vs. State of Kerala (2004)1 SCC 215* the Court holds:

"8.....When a plea is taken of false implication, courts have a duty to make deeper scrutiny of the evidence and decide the acceptability or otherwise of the accusations....." (at p.220)

In *Arjun Mahato vs. State of Bihar (2008)15 SCC 604* the Court holds:

"13. Merely because the eye-witnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. We shall also deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

6. In Dalip Singh and Ors. v. The State of Punjab AIR 1953 SC 364 it has been laid down as under: (AIR P. 366 PARA 26)-

'26.A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

The above decision has since been followed in Guli Chand v. State of Rajasthan (1974 (3) SCC 698) in which Vadivelu Thevar v. State of Madras (AIR 1957 SC 614) was also relied upon.

13. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh case in which surprise was expressed over the impression which prevailed in the minds of the members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed: (AIR p. 366 pra 25)

"25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable

to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in Rameshwar V. State of Rajasthan AIR 1952 SC 54,AIR at p. 59. We find, however, that it unfortunately still persists, if not in the judgments of the courts, at any rate in the arguments of counsel.'

14. Again in Masalti v. State of U.P. AIR 1965 SC 202 this Court observed: (AIR pp.209-10, para 14)

'14……But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. …. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard-and-fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.'

15. To the same effect are the decisions in State of Punjab v. Jagir Singh, (1974)3 SCC 277, Lehna vs. State of Haryana (2002)3 SCC 76, and Gangadhar Behera v State of Orissa (2002)8 SCC 381."

The above position was also highlighted in Babulal Bhagwan Khandare v. State of Maharashtra (2005)10 SCC 404 and in Salim Sahab v. State of M.P. (2007)1 SCC 699, at SCC pp. 702-03, paras 12-15." (at pp607-608)

In *Suresh vs. State of Haryana (2009)13 SCC 538* the Court holds that the plea of false implication must have a foundation and further holds:

"14. In view of the cogent and credible evidence of the injured witnesses there is no scope for interference in these appeals. Though false implication was pleaded, the same is without any foundation. Clearly, all the persons who have suffered injuries would not shield the actual culprit and implicate an innocent person when false implication is pleaded. The foundation has to be laid on the same. In the instant case that has not been done." (at p. 542)

32. I must also notice the decision in *Sajjan Sharma vs. State of Bihar (2011)2 SCC 206* holding:

"22. In this country, when while correctly naming the accused in cases of serious offences, it is endemic that some other innocent persons or even such of the members of the family of the accused who might not be present at the time of commission of offence are also roped in and falsely implicated……." (at p. 211)

33. I need not multiply the precedent any further. It is the rule of caution which this Court has to follow/apply in considering the entirety of the evidence. No doubt as urged merely falsity of defence, if established on record, would not constitute a ground for conviction but at the same time there must be some plausible evidence if not conclusive evidence regarding false implication. The motive set out for false implication is the enmity with the

brother-in-law (Sant Ram) of the complainant who was dealing in selling illicit liquor and was an encroacher of the government land. The complaints have been made against him and because of this fact the complainant and the witnesses harboured a grudge against the accused. Accepting this to be true, there must some shred of proof/evidence, if again not conclusive, to prove on record any complaint oral or in writing against Sant Ram or any order passed by the competent authority evicting him from the land or initiating any action for selling the illicit liquor. I find none proved on the record.

34. Now adverting to the second aspect as to whether the injury had been caused to the complainant by falling from the scooter. Again what I find is that only the number of scooter has been mentioned and no attempt has been made whatsoever to establish on record that this scooter was owned by the complainant or had been loaned to him by any acquaintance or family member for use and travelling or that he was actually riding it. These facts were not difficult to prove. In these circumstances, it becomes difficult to accept the defence which though having been urged is not established by an iota of evidence on record. The promptness with which the FIR was lodged (which factor is again urged against the prosecution since the complainant was a police official), the medical examination conducted immediately and the injuries lend credence and acceptability to the evidence of the prosecution. On the question that the complainant was drunk and because of this he fell from the scooter, all that I need say is that the doctor PW14 Dr. Amit Aggarwqal has stated nothing. In this eventuality, I find no merit in these appeals, which are accordingly dismissed.

35. Before proceeding further, I deem it fit and proper that report of the Probation Officer be called for.

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BEFORE HON'BLE MR. JUSTICE DEEPAK GUPTA, J. AND HON'BLE MR. JUSTICE KULDIP SINGH, J.

Kuldeep Kumar son of Pritam Chand ...Appellant.
Versus.
State of Himachal Pradesh. ...Respondent.

Cr. Appeal No.:136 of 2006 a/w Cr. Appeal Nos. 143, 374 of 2006 and 312 of 2008
Reserved on: 24.12.2012.
Date of Decision: 9.1.2013.

Indian Penal Code, 1860- Section 302, 382, 201 read with Section 34- U ran a Public Call Office – she also used to run a taxi- A was employed by her as a driver- accused K used to assist U in her shop- M and A were residents of area where the shop of U was located- deceased R and his brother were whole sale dealers and used to supply articles at various places- R used to go every Thursday to collect money from the shopkeepers- he left Damtal in his Maruti car, which was being driven by V- car was found in a burnt

condition in which dead bodies of R and V were lying- investigations were conducted and it was found that U and K had conspired to kill R- all the accused went to the place of crime in the van of U- accused U brought R to the same place and accused K attacked R and stabbed him with dagger/Khukhari – all the four accused attacked R with knives and daggers- V was also brought to the spot and was beaten to death - bodies were put into the car and the car was burnt- accused A turned an approver - remaining accused were tried and convicted by the Trial Court- held in appeal that Medical Officer found that injuries were ante mortem in nature- an empty can was found in the car in which traces of kerosene oil were found by the Forensic Laboratory – petrol tank of the car is intact which rules out the possibility that the car had caught fire accidently- the approver was illiterate and it is not explained as to who had written the application to the Court in which he had expressed his desire to become an approver - his statement was self exculpatory - his statement is not in accordance with the prosecution version and does not inspire confidence- theory of last seen was also not proved- testimonies of PW-8 and PW-10 were not satisfactory- recovery at the instance of the accused U was not proved –recovered money was not connected to the deceased- investigation was not fair- prosecution case was not proved beyond reasonable doubt- appeal allowed and accused acquitted after giving the benefit of doubt. (Para-10 to 59)

Cases referred:

Sarwan Singh vs. State of Punjab, AIR 1957 SC 637

Rampal Pithwa Rahidas and others vs. State of Maharashtra, 1994 Supp (2) Supreme Court Cases 73

Dagdu and others vs. State of Maharashtra, (1997) 3 SCC 68

Sampath Kumar vs. Inspector of Police, AIR 2012 SC 1249

For the Appellants:	Mr.M.S.Chandel, Sr. Advocate with Mr. N.S.Chandel & Mr. Dinesh Thakur, Advocates in Cr. Appeal No. 136 of 2006. Mr. Jagdish Vats, Advocate in Cr. Appeal No. 143 of 2006. Mr. Anup Chitkara & Ms. Divya Sood, Advocates in Cr. Appeal No. 374 of 2006 & Cr. Appeal No. 312 of 2008.
For the Respondent-State:	Mr. Ramesh Thakur, Assistant Advocate General.

The following judgment of the Court was delivered:

Per Deepak Gupta, J.

These four appeals are being disposed of by a common judgement since they arise out of the same incident and judgement whereby all the four accused were convicted of having committed offences punishable under Sections 302, 382, 201 read with Section 34 IPC and sentenced as follows:-

> "Accordingly, all the four accused are sentenced to life imprisonment and to pay fine of Rs.25,000/- each for offence under Section 302 IPC and in default of payment of fine they shall further undergo simple imprisonment for one year each. The accused are further sentenced to R.I. for five years each and to pay fine of Rs.10,000/- each for offence

under Section 382 IPC and in default of payment of fine they shall further undergo simple imprisonment for one year. At the same time all the accused are sentenced to R.I. for three years each and to pay fine of Rs.10,000/- each for offence under Section 201 IPC and in default of payment of fine they shall further undergo simple imprisonment for six months each. All the sentences shall run concurrently. All the fine amount imposed on its realization shall be paid to the LRs of deceased Rakesh Gautam and Vijay Kumar in equal amount."

2. The four appellants along with fifth accused Arun Kumar alias Vicky, who turned approver and was granted pardon, were charged with having committed the murder of one Sh. Rakesh Gautam and his driver Vijay Kumar and also of having committed theft of the money belonging to Rakesh Gautam in furtherance of their common intention.

3. Briefly stated the facts of the case which are really not in dispute are that Usha Guleria ran a public call office (PCO) at Rasooh Chowk near Ranital. She also used to run a taxi and the approver Arun Kumar was employed by her as a driver. Accused Kuldip Kumar used to assist Usha Guleria in her shop. Manoj Kumar and Ashok Kumar were residents of Rasooh Chowk.

4. Rakesh Gautam (deceased) and his brother PW-6 were whole sale dealers running business under the name and style of M/s Sidharth traders. They used to supply Karyana articles at various places in Kangra District and Rakesh Gautam used to go every Thursday to collect money from the shopkeepers. He on 9.10.2003 had left Damtal about 7 a.m in the morning in his Maruti car No. HP-38A-3917. The car was being driven by Vijay Kumar.

5. On 10th October, 2003 at about 9.15 a.m a journalist Jitender Sharma, who was correspondent of Divya Himachal, made a telephonic call to PW-34 Inspector Sanjiv Chauhan, SHO Police Station Kangra to the effect that a burnt Maruti car alongwith two dead bodies was lying near Bharari Khad. On receipt of this information PW-34 alongwith S.I Surestha and other police officials proceeded to the spot after recording daily diary report Ext.PW-29/A. When the police officials reached the spot, PW-34 noticed that the burnt car was lying below the Dhank (steep cliff) around 80 yards below the road. Two dead bodies were found lying between the road and the car. The first body which was that of Vijay Kumar (driver) was found at a distance of 50 yards from the road. The second body was of Rakesh Gautam and was lying 59 yards below the road. Other burnt items were found scattered all over the hill side. Some burnt currency notes were also found near the dead body of Vijay Kumar. One plastic Can (marked Ginni) was found near the car and from it kerosene oil could be smelt.

6. Since Rakesh Gautam had not reached home his brother Naresh Gautam PW-6 had made inquiries about the whereabouts of his brother. When his brother did not return the next morning also, he alongwith some persons went in search of Rakesh Gautam in Kangra area. They came to know that some car had met with an accident in Sarotri area. They reached the spot and here the witness identified the bodies of his brother Rakesh Gautam and his driver Vijay Kumar. Naresh Gautam suspected that his brother had been murdered.

7. The prosecution case as initially set up in the challan was that accused Usha Guleria had illicit relations with deceased Rakesh Gautam. She thereafter developed illicit relations with co-accused Kuldip who used to work in the STD booth with her. Both of them conspired to kill Rakesh Gautam with the intention to grab the money which he used to collect from the various traders and was carrying with him back to Damtal. The prosecution story also was that Usha Guleria owed a huge amount of money to Rakesh Gautam. Therefore, the motive ascribed to get rid of Rakesh was to avoid paying her debt, steal the money which Rakesh Gautam was carrying and carry on her illicit relations with Kuldip Kumar.

8. The prosecution also alleged that in furtherance of their common intention Kuldip Kumar, Manoj Kumar and Ashok Kumar alongwith approver Arun Kumar went in the van owned by Usha Guleria to the place of the crime near village Farna. Thereafter Usha Guleria managed to take deceased Rakesh Gautam in his car to the same place. When the two reached village Farna the other accused i.e. Kuldip Kumar, Manoj Kumar and Ashok Kumar and approver Arun Kumar were hiding there. As soon as Usha Guleria and the deceased Rakesh Gautam alighted from his car and started walking towards the jungle Kuldip Kumar attacked deceased Rakesh Gautam and pushed him to the ground and thereafter stabbed him with a dagger/Khukri. All the four accused attacked Rakesh Gautam and finished him off with knives and daggers. After Rakesh Gautam died his body was put in his Maruti car No. HP-38A-3917. Approver Arun Kumar was made to stand near the car. Thereafter, the other four accused Manoj Kumar, Kuldip Kumar, Ashok Kumar and Usha Guleria returned to Rasooh Chowk in the van. They returned after about 20 minutes to village Farna. According to the prosecution, Vijay Kumar, driver of Rakesh Gautam, was sitting in the residential quarter of Usha Guleria and the four accused went to get him from there. They told Vijay Kumar that his car had got spoilt and he had been called by Rakesh Gautam. Then Vijay Kumar accompanied the four accused in the van. After the van had moved for some distance Manoj Kumar and Kuldip Kumar, who were sitting in the dickey of the van started beating the driver Vijay Kumar and by the time they reached Farna Vijay Kumar was half dead. After the van reached Farna then approver Arun Kumar drove the car of Rakesh Gautam and went towards Baroh. Ashok Kumar drove the van whereas Arun Kumar drove the car. When they reached near Kallar (Thandapani) Vijay Kumar, who was seriously injured, started thrashing around in agony. The van was stopped and Kuldip Kumar got down from the van and said that the driver Vijay Kumar was still alive. Upon this Arun Kumar got down from the car which he was driving and gave a blow on the head of the driver and the driver also died. Thereafter, the body of Vijay Kumar was also put in the car belonging to Rakesh Gautam. At this point, the five accused alongwith the two cars were seen by witness Paramjit. Thereafter, both the cars were driven on the road going from Baroh to Suni and when they reached near a big curve the vehicles were stopped. Petrol was taken out from the van and was put on the dead bodies of Rakesh Gautam and Vijay Kumar and then they were burnt. The money which Rakesh Gautam had collected was taken out by Usha Guleria and as per the plan the five accused pushed the car belonging to Rakesh Gautam down the cliff near Kharota jungle at Sarotri. They then returned to Rasooh Chowk. The seat covers of the van were burnt in the Khud and the weapons were washed with soap. According to the prosecution at Kharota when the accused was taking the petrol out of the van they were seen by witnesses Ashwani Kumar and Anup Kumar. At this stage, it would be pertinent to mention that these facts were stated in

the challan which was filed in Court on 2.1.2004 and thereafter Arun Kumar turned approver and the complexion of the case changed considerably. After investigation, the accused were charged with having committed the offences aforesaid. They pleaded not guilty and claimed trial. After trial they have been convicted. Hence, these appeals by the accused.

Medical Evidence:

9. On behalf of the appellants it is firstly urged that the prosecution has failed to prove that the death was homicidal in nature. It would be pertinent to refer to the statement of the doctor at this stage.

10. PW-1 Dr. Aditya Kumar Sharma, carried out the post-mortem on the bodies of Rakesh Gautam as well as driver Vijay Kumar. He could smell some petroleum product from the bodies and burnt clothes. He found the following 11 injuries on the body of Rakesh Gautam:-

1. Red abraded contusion of size 8x5 cms present on the midforehead.

2. Red abraded contusion of size 3x3 cms present on the right side of the face.

3. Red contusion of size 4x3 cms present over left sided parietotemporal region of scalp.

4. Red contusion of size 5x4 cms present over right sided frontotemproal region of scalp.

5. Whole of upper and lower lip contused.

6. Lacerated wound of size 1x1x.5 cms present in the inner aspect of upper lip.

7. Red contusion of size 8x4 cms present over midsternal region of chest.

8. Red contusion of size 4x4 cms present over frontomedial aspect of right knee.

9. Red contusion of size 4x4 cms present over frontal aspect of left knee.

10 Lower 1/5th of left leg and whole left foot found missing with bones.
11. Fractured ends of left tibia and left fibula bone exposed.

Red contusion of size 3x3 cms present in mid occipital region of scalp.

Injury No. 1 to 11 were ante mortem in nature and caused by blunt trauma. No foreign body present in injury No.1 to 11."

11. All these injuries were ante mortem in nature and caused by blunt weapon. He also found that most of the body of Rakesh Gautam was charred. He was of the view that the burns were ante mortem in nature. According to his opinion, Rakesh Gautam, died due to combined effect of cardiac temponade and ante mortem burns. According to him except injury No.10 all other injuries could be caused by fist and kick blows. He also opined that injuries No. 1 to 11 were possible if a live man was closeted in a vehicle, set on fire, and the vehicle was rolled down a hill. In cross-examination he accepted to be correct the suggestion that the burn injuries found on the person of Rakesh Gautam were possible if he was in a vehicle which caught fire due to an accident. According to this witness the probable time between injury and death was few hours.

12. This witness also carried out the post mortem on the body of Vijay Kumar and found the following injuries on his person:-

1. Red abraded contusion of size 8x6 cms present over midforehead.

2. Incised looking lacerated wound of size 3x1x1 cm present over right side of forehead, clotted blood oozing from the wound.

3. Red contusion of size 4x4 cms present over right temporal region of scalp.

4. Red abrasion of size 2x2 cms present over right cheek.

5. Upper and lower lip contused.

6. Lacerated wound of size 3x1x1 cms present over mid-occipital region of scalp.

7. Lacerated wound of size 3x1x1 cms present over right occipital region of scalp. Clotted blood present in injury No. 6 & 7.

8. Red abrasion of size 3x1 cms present over the nose.

9. Incised looking lacerated wound of size 22x6 cms present over anterior aspect of neck passing deep through skin, subcutaneous tissue, infrahyoid muscles, furtherextending through thyrohyoid membrane and ligament, above thelevel of throid cartilidge extending further deep through mid-thyropharyngeal part of inferior constrictor muscles of pharynx communicating through the lumen of pharynx, cut end of pharynx were separated. Underlying blood vessels and nerves were cut.

10. Red contusion of size 5x5 cms present over left anterior aspect of thorax at the level of 1st and second intercostals space.

11. Incised looking lacerated wound of size 2x1 cm X muscle deep present 3 cms lateral to injury No.10.

12. Red abrasion of size 4x3 cms present under the chin.

13. Red contusion of size 20x8 cm present over the right anterolateral aspect of thorax.

14. Red contusion of size 6x5 cms present over sternal region (upper) of the chest.

15. Red contusion of size 8x4 cms present over right elbow.

16. Red contusion of size 4x4 cms present over anteremedial aspect of right lower leg with fracture of underlying right tibia and fibula bones.

17. Incised looking lacerated wound of size 3x2 cms communicating with the abdominal cavity present in the anterior aspect of the abdomen in mid-line 4 cm below the umbilicus.

18. Incised looking lacerated wound of size 3x2 cms communicating with abdominal cavity present 5 cms lateral to injury No.17.

19. Incised looking lacerated wound of size 3x2 cms communicating with abdominal cavity present 4 cm above the injury No.18. The margins of injury No.17,18 & 19 are contused, loops of small intestines were seen protruding out through the injury No. 17, 18, 19 from the abdominal cavity. No foreign body present in injury No. 1 to 19.

Injury No. 1, 3, 4, 5, 6, 7, 8, 10, 12, 13, 14, 15, 16 were caused by blunt trauma and were antemortem in nature. Injury No. 2, 9, 11, 17, 18, 19 were caused by relatively sharp object and were ante mortem in nature."

13. Soot particles were also present in the mucosa of larynx and trachea, which was also found inflamed. The body of Vijay Kumar was also found burnt and there were patches of superficial to deep ante mortem burns present over the face, scalp, right and left ear, etc. There were patches of post mortem burns over the anterior aspect of abdomen, right and left upper extremities, etc. According to doctor the cause of death in respect of Vijay Kumar was hemorrhagic shock and ante mortem burns and the probable time between injuries and death was few hours. The doctor opined that injuries No. 2,9,11,17,18 and 19 found on the body of deceased Vijay Kumar were possible with weapon like Khukri i.e. Ext.P-1. The witness, however, stated that knife Ext.P-2 could not have been used to cause any of the injuries.

14. The submission made on behalf of the appellants is that the medical evidence does not prove that the death was homicidal. It is urged that both the deceased could have rolled down in the car which caught fire and in the process they got burnt. It is also urged that they could have suffered the injuries when the car rolled down into the Khud. Soot particles were found in the mucosa of larynx and trachea and in the oral cavity. The doctor also found ante mortem burns. Similarly, soot particles were also found in the mucosa of larynx and trachea and in the oral cavity of Vijay Kumar. As far as Vijay Kumar is concerned, according to the doctor he not only died due to ante mortem burns but also died due to hemorrhagic shock. The presence of soot in the trachea and in the oral cavity clearly indicates that the deceased were alive when they caught fire. However, what is not explained by the counsel for the accused is the presence of an empty Can being the words *Ginni* in the car in which traces of kerosene oil were found by the forensic laboratory. It is urged that the deceased could have been carrying kerosene oil as fuel for distribution in the village. This explanation is too far fetched to be believed and cannot be accepted.

15. The doctor has in no uncertain terms stated that the injuries are ante mortem in nature. It is obvious that the deceased were alive when they were burnt. It may have happened that the persons who committed the crime thought that two persons were dead and burnt them but the fact remains that according to the medical evidence the time elapsed between injury and death was few hours. One of the causes of death in the case of Rakesh Gautam is cardiac temponade, which means that the heart is full of blood. This happens when a person is burnt alive and not when a dead body is set on fire. It is, therefore, more than apparent that when these two persons were set on fire they were alive though it cannot be said with certainty whether the other injuries are prior to the burning or thereafter. The stand of the accused is that both the mechanical and burn injuries, could have been received by the deceased when the vehicle fell down from a height of 200 to 250 feet. This cannot be accepted. As noted above, almost the entire body of Rakesh Gautam was charred except for his head, face, neck, etc. Similarly, the body of Vijay Kumar was also extensively burnt. We have also seen the photographs Ext.P-7 to P-13, Ext.P16 to Ext.P-18, which show the extensive burns on the body of the deceased persons. The car on the other hand is not burnt so badly as is apparent from the photographs Ext.P- 20 to Ext.P-23. Another important factor is that the body of Vijay Kumar was found only at a distance of 50 yards from the road and the body of Rakesh Gautam was found at a distance of 59

yards from the road. The car was found at a distance of 80 yards from the road. This clearly indicates that when the car rolled down the two persons were thrown out of the car. If the car had accidentally rolled down, assuming the car had caught fire and the occupants had been thrown out within seconds they could not have received such extensive burns. Another aspect is that the petrol tank of the car is intact. There is no explanation as to how the car caught fire. As already stated above we are not inclined to believe the explanation of the accused that Rakesh Gautam was carrying some kerosene in the car which caught fire. Therefore, we are of the considered opinion that the deceased were beaten up and then set on fire when they were still alive and thereafter their bodies were put in the car and the car pushed down the khud to make it appear like an accident. We, therefore, reject the first plea raised on behalf of the accused.

Statement of Approver:

16. The second argument on behalf of the accused is that the statement of the approver does not inspire confidence. It is full of loopholes and is not corroborated by the other evidence and in fact is in direct conflict with the medical evidence. The entire case revolves around the statement of the approver and therefore, before appreciating his evidence it would be appropriate to refer to the law as to how the statement of an approver should be appreciated.

17. Section 133 of the Indian Evidence Act reads as follows:-

> ***Accomplice –*** *An accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.*

18. A bare reading of the Section clearly shows that an accomplice is a competent witness. However, at the same time we cannot loose sight of Section 114, which reads as follows:-

> ***Court may presume existence of certain facts. –*** *The Court may presume the existence of any fact which it thinks likely to have happened, regard being had a common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.*
>
> In the examples given under Section 114, the 2nd illustrations reads as follows:-
>
> *(a) xxx.. xxx… xxx…*
>
> *(b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars*;

19. Therefore, though the statement of the accomplice who turned approver is admissible in evidence, the Court while appreciating the evidence must be satisfied that the statement of the accomplice is corroborated in material particulars.

20. The Apex Court in **Sarwan Singh vs. State of Punjab,** ***AIR 1957 SC 637*** held as follows:-

> "8…… Every person who is competent witness is not a reliable witness and the test of reliability has to be satisfied by an

approver all the more before the question of corroboration of his evidence is considered by criminal courts."

The Apex Court made very pertinent observation as to how the statement of an approver is to be recorded. It would be pertinent to refer to the following observations of the Apex Court.

> *"10..... There can be no doubt that, when an accused person is produced before the Magistrate by the investigating officer, it is of utmost importance that the mind of the accused person should be completely freed from any possible influence of the police and the effective way of securing such freedom from fear to the accused person is to send him to jail custody and give him adequate time to consider whether he should make a confession at all. It would naturally be difficult to lay down any hard and fast rule as to the time which should be allowed to an accused person in any given case. However, speaking generally, it would, we think, be reasonable to insist upon giving an accused person at least 24 hours to decide whether or not he should make a confession. Where there may be reason to suspect that the accused has been persuaded or coerced to make a confession, even longer period may have to be given to him before his statement is recorded."*

21. In **Rampal Pithwa Rahidas and others vs. State of Maharashtra, *1994 Supp (2) Supreme Court Cases 73,*** the Apex Court held as follows:-

> *"34. Once, we have found that the approver is a planted witness and his testimony is not worthy of credence and is uninspiring and unacceptable justifying its rejection outright, it will be futile and wholly unnecessary to look for corroboration of his testimony. It is only when the approver's evidence is considered otherwise acceptable that the court applies its mind to the rule that his testimony needs corroboration in material particulars connecting or tending to connect each one of the accused with the crime charged."*

22. In **Dagdu and others vs. State of Maharashtra, *(1997) 3 SCC 68*** the Apex Court held as follows:-

> *"21. There is no antithesis between Section 133 and illustration (b) to Section 114 of the Evidence Act, because the illustration only says that the Court 'may' presume a certain state of affairs. It does not seek to raise a conclusive and irrebuttable presumption. Reading the two together the position which emerges is that though an accomplice is a competent witness and though a conviction may lawfully rest upon his uncorroborated testimony, yet the Court is entitled to presume and may indeed be justified in presuming in the generality of cases that no reliance can be placed on the evidence of an accomplice unless that evidence is corroborated in material particulars, by which is meant that there has to be some independent evidence tending to incriminate the particular accused in the commission of the crime. It is hazardous, as a matter of prudence, to proceed upon the evidence of a self-confessed criminal, who, in so far as an approver is concerned has to testify in terms of the pardon tendered to him. The risk involved in convicting an accused on the testimony of an*

accomplice, unless it is corroborated in material particulars, is so real and potent that what during the early development of law was felt to be matter of prudence has been elevated by judicial experience into a requirement or rule of law. All the same, it is necessary to understand that what has hardened into a rule of law is not that the conviction is illegal if it proceeds upon the uncorroborated testimony of an accomplice but that the rule of corroboration must be present to the mind of the Judge and that corroboration may be dispensed with only if the peculiar circumstances of a case make it safe to dispense with it."

23. Keeping in view the aforesaid principles in mind we have to appreciate the evidence of the approver. Before appreciating his evidence it would be pertinent to mention that the material on record shows that the approver Arun Kumar is totally illiterate. He has admitted so in his evidence himself. The application filed by the approver before the Court whereby he prayed that he wants to tell the truth and his statement may be recorded is Ext.PW- 2/B. The letter is scribed in the *Devnagri* script and the approver signed it by writing the words ARUN in capital letters like an illiterate person. The letter is, however, couched in language which is totally legal. It contains words in Hindi, which any ordinary person who does not deal with legal matters would not be aware of. Nothing has come on record to prove who wrote this application which was signed by the approver Arun Kumar. This application is dated 24.2.2004 and appears to have been handed over to Superintendent, District Jail, Dharamshala, who forwarded it in original to the learned Sessions Judge, Kangra alongwith the details of the case and it was mentioned that the case was fixed for 1.3.2004. On 25.2.2004 there is a noting by the Criminal Ahlmad that the application be put up for orders before the learned Court. The matter was put up before the learned Sessions Judge after commitment on 1.3.2004 when the application was probably not brought to his notice.

24. Be that as it may, from the evidence of PW-35 i.e. Shri T.N.Vaidya, the learned Sessions Judge, who recorded the statement of the approver, it is apparent that the application was taken up on 15.3.2004 and the learned Sessions Judge did not feel it necessary to ask from Arun Kumar, who had written the application in question. He, however, satisfied himself that the approver was making the statement voluntarily and then recorded the statement regarding his willingness on 15.3.2004 itself in the forenoon. The statement is Ext.PW-35/A. The order-sheet does not disclose that the approver was asked who wrote the application on his behalf. Then the matter was adjourned to after lunch when again the approver was told that he was not bound to make any statement but thereafter the accused was pardoned and his statement recorded which is Ext.PW-2/A and Ext.PW-35/C (hereinafter referred to as Ext.PW-35/C). It would have been better if the learned Sessions Judge adjourned the matter for a day or two and should have also verified who recorded the letter for recording his statement. We are saying this because by this time the accused had been behind bars for almost 5 months and as laid down by the Apex Court in Sarwan Singh's case (supra) it would be reasonable to give an accused at least 24 hours to decide whether or not he should make such a statement.

25. We, however, for the purpose of this case are not discarding the evidence of the approver on this ground alone and we proceed to discuss his statement since the entire case revolves around his statement. The same has to be discussed in detail.

26. According to the approver Arun Kumar, he was working as a driver with accused Usha Guleria and used to drive her van No. HP-01-0787. He knew all the accused persons. According to him on 9.9.2003 in the evening he was at Jawalamukhi-Road bus stand and received a call from Usha Guleria asking him to come to her STD booth. When he went there, Usha Guleria asked him to call accused Kuldip. The approver then went to the house of Kuldip where he found that Kuldip was drinking liquor. He told Kuldip that he had been sent by Usha Guleria for some work. Thereupon Kuldip told this witness that they had to go to Farna village to collect money. Kuldip asked the approver to wait in the van. When the approver went to the van which was parked near the shop of an electrician accused Manoj Kumar and Ashok Kumar were standing near the van. According to the approver, he asked both of them to accompany him to Farna. Thereafter, Kuldip cam and they all proceeded in the van towards Farna. When they were about 20-25 feet short of the village the van was stopped since there was no motorable road thereafter. Kuldip Kumar alighted from the van and told the approver and the other two accused to stay there. In the meantime a car came from the side of Ranital which stopped about 20 feet behind the van. From this car Rakesh Gautam (deceased) and Usha Guleria alighted. They started walking towards jungle. Accused Usha Guleria was walking ahead and Rakesh Gautam was following her. Suddenly, accused Kuldip Kumar appeared and pushed Rakesh Gautam who fell down. Thereafter, Kuldip started hitting Rakesh Gautam with a Khukri. Rakesh Gautam started crying out loudly “Bhabhi Mujhe Bachao”. On seeing this, approver Arun Kumar and the other two accused went to the spot. At that time accused Kuldip was giving kick blows to Rakesh Gautam. Approver asked Kuldip why he was hitting Rakesh Gautam. On this Rakesh Gautam kept the Khukari on the throat of Arun and told the approver that he should do what he was told. Thereafter, Kuldip removed the wrist watch and purse of Rakesh Gautam. He took out the keys of the car and handed over the same to the approver. He then asked the approver to bring the car to the place where Rakesh Gautam was lying. The approver brought the car there. Thereafter, accused Usha Guleria and Kuldip lifted Rakesh Gautam and put him in the car. Thereafter, the keys of the van were taken from the approver and handed over to Ashok who took charge of the van. Thereafter all the four persons sat in the van. They told the approver to stay at the spot until they brought the driver of Rakesh Gautam. Then all the four accused went towards Ranital side. They threatened the approver that if he went away he would be blamed for the offence. The approver stayed at the spot for about 20 minutes alongwith the car and Rakesh Gautam. Thereafter, the van came back. Ashok Kumar was driving the van and Usha Guleria was occupying the front passenger seat. Accused Manoj Kumar and driver of Rakesh Gautam were occupying the rear seat. Accused Kuldip was sitting in the dicky of the van and was holding the hair of the driver of Rakesh Gautam whose neck was already cut. Thereafter, Kuldip asked the approver to follow the car in the van. The approver drove the car with Rakesh Gautam lying in it and followed the van. When the two vehicles reached Thandapani the van was stopped. Therefore, the approver stopped the car. Usha Guleria and Kuldip Kumar came out of the van and the driver of Rakesh Gautam who was having some injury in the abdomen was shifted to the car by accused Usha Guleria and Kuldip Kumar. Again they asked him to follow the van. When they had just crossed Sarotri they saw a Khud there. The accused persons stopped the van and the approver stopped the car. Usha Guleria and Kuldip got down from the van and asked the approver to get out of the car. When the approver got out of the car Kuldip put a stone against the front tyre of the car and the car was stopped by the accused persons

towards the cliff. The approver sat in the van and in the meanwhile someone put some oil in the car. Thereafter, accused Kuldip brought the gear of the car to neutral position and removed the stone from the front tyre of the car. The car was set on fire and then rolled down the cliff. Thereafter, the four accused and the approver returned to Ranital in the van. Usha Guleria asked the approver to remove the seat covers, which were spoiled with blood. Thereafter, the approver alongwith Ashok and Manoj removed the seat covers. Usha Guleria and Kuldip went to their residences. After some time they came back. Then accused Kuldip and Usha Guleria threatened the approver and the other two accused that they should not disclose about the incident to anyone otherwise the consequences would be bad. After saying this Usha Guleria again went to her residence. When Kuldip returned from his residence his clothes were soiled with blood so he also brought a new set of clothes. Then Kuldip Kumar, Manoj Kumar and approver Arun Kumar went to the bank of the Khud. Accused Ashok Kumar went to his house. The seat covers and blood soiled clothes were taken to the Khud and were set on fire by Kuldip Kumar. According to the approver his pants was also soiled with blood near the bottom. Kuldip asked him to remove the pants and the same was also set on fire. Thereafter, accused Kuldip took a bath in the Khud and then they returned to Ranital. Then Kuldip went to the residence of Usha Guleria and Manoj Kumar went away to his own house. Approver Arun Kumar slept in the van. Next morning the approver went to the STD booth of Usha Guleria at 7/7.15 am. She gave him Rs.200/- and asked him to get the van washed since it was blood stained. The witness took the van to Bankhandi and got it washed at a service station. Thereafter, he returned to Ranital. At about 6.30 p.m. Usha Guleria again telephoned and asked him to come to her STD booth. When the approver reached the booth, Usha Guleria asked him to sit there and she went to her residence. She came back carrying a polythene bag. She then asked him to keep the polythene bag on the rear seat of the van while she went inside the STD booth. Thereafter she came out and sat in the van and asked the approver to take her to her sister's house at Dehra, where she went into the house carrying the polythene bag while the approver stayed in the van. After 20 minutes Usha Guleria returned from the house and sat in the van. This witness also identified the Khukri Ext.P-1 and stated that it was the same Khukri which was placed on his throat by accused Kuldip.

27. The approver was cross examined at length. A suggestion was put to him that he turned approver at the behest of the police. He could not give any explanation as to who wrote the application which was signed by him and filed on his behalf. In cross-examination this witness has made certain statements which do not help the prosecution at all. Relevant portion of his statement is as follows:-

> *"When I was called by Usha Guleria for the first time, I was not aware of anything except what she told me that money was to be collected from village Farna. She used to depute me for such like jobs. Ashok Kumar and Manoj Kumar were also not aware of anything. Till Rakesh Gautam was brought there, myself, Ashok Kumar and Manoj Kumar were not aware of anything. When I asked accused Kuldeep Kumar as to why he was hitting Rakesh Gautam, Kuldeep Kumar placed the Khukhri on my throat. Kuldeep threatened me, as well as to Ashok Kumar and Manoj Kumar that in case we objected, we would also meet the same fate. We were frightened due to this reason and could not help. It is correct to suggest that till that stage we were innocent. Accused Kuldeep gave*

repeated blows with Khukhri Ext.P-1 on the abdomen of Rakesh Gautam. I cannot say if the Khukhri was quite sharp. I cannot give the dimension of the Khukhri. It is correct that Rakesh Gautam had died due to Khukhri stabs."

28. This witness also stated that he was terrified when the Khukri was placed on his throat and Ashok Kumar and Manoj Kumar were also in the same position and they were totally terrified. He also went on to state that driver Vijay Kumar was dead by the time when he was put in the Maruti car. It is also important to note that in his statement which is recorded as approver Ext.PW-35/C there is no mention of the kick blows being given by Kuldip Kumar to deceased Rakesh Gautam. He also stated that he had only seen Rakesh Gautam once earlier and according to him Usha Guleria and Kuldip had gone to the house of Usha Guleria to bring the driver from there. When asked to explain what he did after his pants were burnt in the Khud he stated that accused Kuldip Kumar had brought spare pants to the Khud which he wore after his pants were burnt. He also clearly stated that he did not know whether Rakesh Gautam was on visiting terms with Usha Guleria. He also admits the suggestion that Usha Guleria had not told him that he was required to go to Farna village to collect money.

29. Since it is the statement of the approver which is the sheet anchor of the case of the prosecution this statement has to be analysed very carefully. The statement of this approver is totally self exculpatory. He does not attribute any offence to himself. Though initially the case of the police was that it was this witness who had hit driver Vijay Kumar on the head but the approver has not put any blame on himself for any act. Not only this, according to the approver he was threatened by Kuldip Kumar and also by Usha Guleria. His version is that Kuldip Kumar threatened him with a Khukri and therefore, he got scared. According to him even Ashok Kumar and Manoj Kumar were totally innocent and were not aware of any prior plan. This witness does not ascribe any specific act or offence to Ashok and Manoj. If we were to believe him then till Rakesh Gautam was beaten-up, neither the approver nor Ashok Kumar and Manoj Kumar were aware of anything. This would mean that only Usha Guleria and Kuldip Kumar had planned the entire offence.

30. This story does not fit in with the statement of this witness himself. In his examination-in-chief he has stated that after Usha Guleria sent him to meet Kuldip Kumar, Kuldip told him that they had to go to Farna village to collect money. He then went to the van and it was he i.e. approver Arun Kumar who asked Manoj Kumar and Ashok Kumar to accompany him to Farna village. If Kuldip and Usha Guleria had planned to murder or cause injuries to Rakesh Gautam and Ashok Kumar and Manoj were not part of the conspiracy then why would Kuldip have permitted these two persons to join them. No criminal would associate witnesses with his crime.

31. Another reason to doubt the statement of this witness is that according to him at Farna village the motorable road ended just 20-25 feet from the village. The statement of the witness is that Kuldip after pushing down Rakesh Gautam started hitting him with a Khukri. This is totally inconsistent with the medical evidence in which none of the injuries found on the person of Rakesh Gautam has been caused with any Khukri or any other sharp edged weapon. The doctor has clearly stated that all the injuries on the body of Rakesh Gautam were caused with the blunt weapon and

he in cross-examination has clearly stated that these injuries could not be caused by the Khukri.

32. Whereas the case of the prosecution was that Rakesh Gautam had illicit relations with Usha Guleria, according to the approver when Rakesh Gautam was being hit with a Khukri by Kuldip he cried "Bhabhi Mujhe Bachao". This would indicate that he treated Usha Guleria as his Bhabhi and this would also indicate that there were no illicit relations between them. In fact, none of the witnesses who have appeared for the prosecution have whispered a word that there were any illicit relations between Usha Guleria and Rakesh Gautam.

33. The conduct of the approver is not above suspicion.

According to him after he was threatened he remained at the spot for 20 minutes with the car of Rakesh Gautam and body of Rakesh Gautam had been put in the car because according to this witness Rakesh Gautam was dead. If the approver was not a part of the conspiracy then why did he not walk 20-30 feet to the village and raise a hue and cry. He could have easily collected the villagers of village Farna. This clearly indicates that he is not telling the truth. The police has also not made any effort to associate any person from Farna village in the investigation. It cannot be believed that at about 9 p.m all the villagers would be asleep and would have not noticed that two vehicles had come to the village and thereafter some commotion took place.

34. The statement of the approver does not also inspire confidence because in his initial statement Ext.PW-35/C he had stated that the neck of the driver was cut but in his statement in Court he made an improvement by saying that the neck was cut to some extent. Initially he had stated that the driver and Rakesh Gautam were dead by this time. It appears that this improvement had been made with a view to get over the medical evidence according to which the burns were ante mortem and further the time between injury and death was a few hours.

35. Though this witness very specifically states that Kuldip accused removed the wrist watch and purse of Rakesh Gautam and also took the keys of Maruti car which were handed over to the approver but he is totally silent with regard to the money which was allegedly collected by Rakesh Gautam. He has not stated a word that any person picked up any other item.

36. Another surprising aspect of the statement of the approver is that when near the point where the car was pushed down he stopped the car and sat in the van. He virtually stops noticing anything thereafter. He noticed that Kuldip put a stone in front of the car and the car was stopped towards a cliff. He then says that someone put oil in the car but that person is not named by him. He then states that Kuldip put the car in the neutral position, removed the stone and then the car was set on fire and rolled down the cliff. He is also silent as to who set the car on fire. This also shows that he is trying to hide something and is not telling the entire truth.

37. According to this witness after they all returned to Ranital they took the van to the Khud where the clothes of Kuldip and seat covers of the van which were soiled with blood were burnt. He also states that his own pants which was soiled with blood near the feet was also burnt. Neither in his statement Ext.PW-35/C nor in his examination-in-chief he stated that he had kept spare pants and it was only in cross-

examination that he stated that Kuldip had got spare pants for him. This also cannot be accepted to be a truth.

38. The statement of the approver also cannot be accepted to be correct because he gives no explanation as to from where kerosene oil was arranged. There is not a word stated by the approver or any other witness that from where the kerosene oil was arranged. If it had been arranged earlier then it should have been lying in the van but the statement of the approver is totally silent in this regard.

39. In view of the fact that the statement of this witness is not corroborated but in fact the medical evidence contradicts his statement with regard to the death of Rakesh Gautam, it is difficult to believe his statement. His conduct of not going to village Farna and keeping silent after such a gruesome incident is totally unbelievable. If, as this witness would have the Court believe, he was innocent and only helped the accused in destroying the evidence under fear of death, we see no reason why he had not immediately after the incident reported the matter to somebody. Assuming, that he was scared of Kuldip and Usha Guleria, once all the persons were arrested on 13.10.2003 there is no explanation why he kept silent till the end of February, 2004 and in fact made the statement only on 15th March, 2004. In case he had nothing to do with the incident he would have told this fact to the police at the first stage itself. Furthermore, as discussed above accused Manoj Kumar and Ashok Kumar even as per the statement of the approver were not accomplices at the beginning. They were joined by the approver and not by the other two accused. Therefore, also we cannot rely upon this statement which is totally self-exculpatory and puts the entire blame on Kuldip and Usha Guleria.

Last seen:

40. The prosecution also relies upon the theory of last seen in connecting the accused especially Usha Guleria and Kuldip. The witnesses examined in this behalf are PW-9 Praveen Kumar and PW-12 Roshan Lal. PW-9 runs a Dhabha at Rasooh Chowk where accused Usha Guleria had an STD booth. According to this witness he knew Rakesh Gautam, who used to come to Rasooh Chowk to collect money. One Milap Chand, who runs a Karyana shop adjacent to his Dhabha, some times used to leave cash with this witness for payment to Rakesh Gautam because Milap Chand used to close his shop by 7/7.30 p.m and Rakesh Gautam on certain occasions came later. According to this witness on 9.10.2003 at about 8 or 8.30 p.m Rakesh Gautam came in his vehicle and went to the shop of PW-12 Roshan Lal and parked his vehicle there. Thereafter, Rakesh Gautam went to the booth of Usha Guleria. After 5-7 minutes Rakesh Gautam came to the Dhabha of this witness and asked whether Milap Chand had left any amount for him. The witness told Rakesh Gautam that no money had been left. Thereafter, Rakesh Gautam went back to the PCO of Usha Guleria. After some time the PCO was closed and the car was still parked in front of the PCO. At this stage this witness was declared hostile and cross-examined by the public prosecutor. The witness denied that he had made any statement to the police that after some time the car of Rakesh Gautam was taken on the Lunj road and then accused Usha Guleria boarded the car alongwith Rakesh Gautam and was seen going on Baroh road. He, however, accepted the suggestion that car was seen going on Baroh road. In cross-examination the witness clearly admitted that from his Dhabha the road which bifurcates and goes towards Baroh is at a distance of 500-600 meters and is not visible. Therefore, if a person stands at his Dhabha it cannot be said whether the vehicle was

going towards Baroh or towards Ranital. This witness admits that all the accused persons were arrested on 13/14.10.2003 and the police had been coming to Rasooh Chowk to make inquiries. However, from 13/14.10.2003 till 21.10.2003 neither the police inquired anything from him nor he volunteered to make any statement to the police.

41. The statement of PW-12 totally contradicts the statement of PW-9. According to PW-12 on 9.10.2003 one Lalaji came from Pathankot in a van. A driver was driving the van and the Lalaji went to the PCO of Usha Guleria who served them tea. After some time the driver came out followed by Lalaji and Usha Guleria. Usha Guleria closed the PCO. She then crossed the road and went to her residence which is across the road. He does not even say that Usha Guleria went with Lalaji. He also admits that the police visited Rasooh Chowk many times upto 21.10.2003 but did not make any statement to the police nor the police made any inquiry from him. Thus the story of last seen is not proved at all.

Corroboration of the statement of the approver:

42. The prosecution submits that the statement of the approver is corroborated by the statement of PW-8 Ashwani Kumar and PW-10 Paramjit. PW-8 Ashwani Kumar runs a Dhabha at Dramman, which is far away from the area in question. According to this witness he alongwith one Anup had gone to Baroh in his vehicle No. HP-01-9005. When they were returning from Baroh at the big curve near Sarotri they saw two vehicles parked. One was a Maruti car and the other was a Maruti van. This was about 11/12 o'clock mid night. According to him accused Usha Guleria, Kuldip Kumar and two-three other boys were present and he had identified two of them as the accused persons present in the Court. He also states that he knew Usha Guleria and therefore, asked them whether they were in need of some help. Usha Guleria declined any help and therefore, this witness went away. In cross-examination, he states that the police inquired from him why he had gone to village Baroh and he had told that he had gone to meet Mr. Bhatt at Baroh but this fact does not find mention in his statement recorded under Section 161 Cr.P.C. Ext.DB. The witness admits that he came to know about the incident on 10.10.2003 itself and he has a telephone facility at his house but he did not inform the police or any other person about his having seen the Maruti car and van. He admits that he had read about the accident in the newspaper on the next day but still did not make any effort to make a report to the police. He tried to explain his conduct by saying that he was out of station but this fact is also not recorded in Ext.DB. According to him he knew only Kuldip and Usha Guleria and no identification parade was carried out with regard to other accused. The person who was accompanying him i.e. Anup was not examined. This witness admitted that Usha Guleria was neither his class fellow nor his relative. He had no business dealings with her. He also admitted that prior to the incident he never had any talk with Usha Guleria. He admits that distance between Ranital and Dramman is 50 kilometers. It is thus apparent that he did not know Usha Guleria also. If he had never talked to her earlier how could he have known her especially when his village is at a distance of 50 kilometers from Rasooh Chowk.

43. As far as PW-10 Paramjit is concerned this witness states that he sells milk in poly-packs at various places in Kangra district. He has a Maruti car having a Punjab number. He also states that he knew Usha Guleria. On 9.10.2003 at about 10.30 p.m when he was returning from Baroh to Kangra via Daulatpur near the big

curve he saw two vehicles i.e. HP-38A-3917 and HP-01-787 respectively parked there. These vehicles were facing towards Baroh. When he crossed the place Usha Guleria, Manoj and Kuldip were standing on the road side near the van. Since he knew them he stopped the vehicle. He saw two persons lying on the back seat of the car and when he inquired who these persons were, she told him that they were her relatives who were sick and were being taken to Baroh hospital for check up. Then this witness went to Kangra. According to this witness he had gone to his village in district Amritsar due to illness of his wife and therefore, did not come to know about the incident nor he read about the same in the newspaper and therefore, did not make any statement to the police. The witness was confronted with his statement recorded under Section 161 Cr.P.C. Ext. DC wherein there is no mention of these facts that he had gone to village Patti and therefore, could not inform the police. This witness admits that he resides at Tanda-Kholi near medical college Tanda and his wife also normally resides with him there.

44. According to the inquest report Ext.PW-1/B, which also contains a map, the accident occurred between Daulatpur and Sarotri. Similar is the position in inquest report Ext.PW-1/G. In the site map Ext.PW-13/A prepared by the Investing Officer it has been reflected that the accident took place between Suni and Sarotri. From the map it is apparent that Suni is towards Daulatpur side. Therefore, the vehicles if they were coming from Sarotri side would have been directed towards Daulatpur and Suni and not towards Baroh, which is in the opposite direction. This is also apparent from the statement of the approver that after the car was rolled down they returned back to Ranital. Initially, the case set up by the prosecution was that Paramjit saw Usha Guleria and the other accused near Thandapani. However, in evidence Paramjit stated that he saw them near the curve where the car was rolled down. Moreover, these witnesses have not given any explanation as to what they were doing at that time in the area in question. Their story cannot also be believed because for a week they kept silent and did not inform anybody that they had seen the accused near the scene of incident. To us, it appears that they are planted witnesses.

Recovery of the currency notes at the instance of Usha Guleria

45. As mentioned above, according to the approver on the day after the murder Usha Guleria called him. She then asked him to place a polythene bag on the rear seat of the van. Later she took the van to her sister's house in Dehra. She went into the house with the polythene bag and returned after 20 minutes without the bag. The story of the prosecution is that after Usha Guleria was arrested she made a disclosure statement that she had stolen the money which the deceased Rakesh Gautam had collected and had kept the same in the house of her sister. In support of this allegation, the prosecution has examined two witnesses. PW-3 Ved Prakash states that on 17.10.2003 he had gone to the police station Kangra in connection with his personal work and accused Usha Guleria was already there and in his presence she made a statement Ext.PW-3/A that on 9.10.2003 during the night she had taken the money from the car belonging to Rakesh Gautam and put the same in the plastic bag of yellow colour which she had concealed in the house of her sister Nirmala Devi in the bed under the mattress. According to this witness when he reached the police station PW-6 Naresh Gautam, brother of Rakesh Gautam, was already there. He could not give the reason why he was present in the police station but states that he was there by chance. He has given a very evasive answer that he had some labour problem due to which he

had gone to the police station but no report in writing was lodged by him. The presence of this witness at the police station is not free from doubt. He has virtually not given any reason why he was present in the police station. He also states that the police did not try to associate any lady witness.

46. The version of PW-6 Naresh Gautam is different. According to him he alongwith one Nitin Mahajan went to the police station Kangra on 17.10.2003. All the accused persons and the approver were present in the police station. According to him PW-3 Ved Prakash was also present in the police station. This is contrary to the statement of PW-3, who has stated that when he reached the police station PW-6 was already in the police station. Whereas according to PW-3, Usha Guleria was present when he reached, according to PW-6, Usha Guleria was brought to the room where they were sitting and then she made the statement Ext.PW-3/A.

47. Regarding recovery of the money the relevant statement is of PW-4 Piar Singh. He is Pradhan of Gram Panchayat Khaballi. According to him he was called by Dehra police on 17.10.2003 from his residence to the house of Nirmala Devi, sister of Usha Guleria. He reached there at about 9/10 p.m. A number of police officials were present alongwith a photographer. Usha Guleria was in the custody of the police. PW-6 and Nitin Mahajan were also present. Usha Guleria pointed out the bed in the room where the money had been concealed. Photographs of the same were clicked. Then a yellow coloured polythene bag was found concealed under the mattress. On opening this polythene bag a sum of Rs.69,115/- was recovered, which was taken into possession. In cross- examination the witness stated that he does not know when the police reached the house of Nirmala Devi alongwith Usha Guleria. He also states that he did not know Naresh Gautam and Nitin Mahajan earlier. He also admits that he did not know Usha Guleria earlier. As far as PW-6 is concerned he states that from the police station Kangra he accompanied the police to village Barwala and when he reached there PW-4 was already present but this is again contrary to the statement of PW-4. According to him when he arrived at the house of sister of Usha Guleria the police officials from Kangra and Dehra were present alongwith Naresh Gautam and Nitin Mahajan. Naresh Gautam also states that when they reached the house of Nirmala Devi after PW-4 Piar Chand arrived accused Usha Guleria led them to the house of her sister where they first went to the Verandah of the house. Then Usha Guleria was asked by the police where she had kept the money. She then went inside the room and indicated where the cash was kept. Usha Guleria lifted the bed sheet and mattress under which money was found inside a plastic bag which on counting was Rs.69,115/-. The statement of this witness is contrary to that of PW-4 who has stated that when he reached the spot the police officials told him that they had to recover the amount which was lying under the mattress. According to Piar Chand when he reached they were already in the room where the money was hidden. Therefore, there is material discrepancy in these two statements also.

48. For the sake of argument, if we are to accept that the recovery of the money has been proved then also the prosecution has miserably failed to prove that this money is connected to the crime in question. Approver Arun Kumar has not said a word as to who took the money out of the car of Rakesh Gautam. Furthermore, another very important aspect is that as per the police itself near the wreckage of the car partly burnt currency notes were found. The police did not deem it fit to investigate and find out what was the value of the currency notes which were burnt. If the intention of the

accused was to steal the money lying in the car which was being carried by Rakesh Gautam, why would they have left some currency notes in the car itself. In any event, the police should have made an effort to find out the value of the currency notes. Even PW-34 the Investigating Officer has clearly stated that burnt currency notes were found near the dead body of Vijay Kumar. There is no explanation why these notes were not counted.

49. At this stage it would be pertinent to mention that according to the prosecution Ext.P-2 knife was also used as a weapon of offence. Rakesh Gautam received no injury from knife or Khukri. PW-1 Dr. Aditya Kumar Sharma has clearly stated that the injuries on both the deceased could not have been caused by weapon Ext.P-2. It is thus apparent that the investigation was also not fair.

50. At this stage, we would like to note that as far as Manoj Kumar and Ashok Kumar accused are concerned there was no evidence worth the name against them. Nothing has been ascribed to Manoj Kumar at all. He was a silent spectator to the entire incident. Therefore, it cannot be believed that he was a part of the conspiracy. Even from the statement of the approver it is apparent that neither the approver nor accused Ashok Kumar or Manoj Kumar were part of the initial conspiracy. Why would Kuldip and Usha Guleria behave so stupidly as to involve other people in the crime when nothing is attributed to the other accused? If the story of the accused is to be believed then all that approver and these two accused did was to help the main accused in the crime. It is thus more than obvious that the story of the approver cannot be believed. It is also contradicted by the medical evidence and there is no corroboration of the same by the other material on record.

51. The prosecution has only been able to prove that the deceased were burnt when they were still alive. It also stands proved that the time which elapsed between injury and death was couple of hours. It appears to us that the death was homicidal in nature. There is virtually no evidence against the accused. As already stated by us above, the statement of PW-8 Ashwani Kumar and PW-10 Paramjit does not inspire confidence. The recovery of the notes is also doubtful but even if it is believed, the currency notes are not connected with the crime and there is no explanation as to why the partly burnt notes which were found at the site were not counted. The learned trial Court convicted the accused mainly on the basis of the statement of the approver. Even before the learned trial Court there was virtually no evidence against Ashok Kumar and Manoj Kumar who have been convicted only on the basis of surmises and conjectures.

52. The investigation in the case has also not been fair. As pointed out above, the police has planted a knife Ext.P- 2, which has no connection with the crime. There is a witness to the recovery of knife who has made a parrot like statement. Therefore, the probability of the other recoveries being false cannot be ruled out.

53. We may also make reference to the statement of Dr.Atul Fulzele, IPS, who was at that time posted as Assistant Superintendent of Police, Kangra at Dharamshala. He moved an application Ext.PW-1/M alongwith questionnaire Ext.PW-33/A to PW-1 Dr. A.K.Sharma to clarify certain issues. The questions are so detailed that they could not have been prepared without seeing the weapon of offence. Question No.3 in Ext.PW- 1/M makes special reference to a knife. How did this witness know that a knife was used if he was not aware of the weapon of offence? The most

depressing part of this case is the manner in which the police has carried out the investigation of the case. Initially, the police could have not suspected murder. They were informed by a journalist that an accident had taken place. It was only later in the day that PW-6 Naresh Gautam, brother of the deceased, came to the spot and told the police that he suspected that his brother had been murdered. Even if only a case of accident was being investigated by the police party some site map should have been prepared at the spot and in the case of an accident one looks for skid marks, etc. No such plan has been produced on record. Once the police was informed that murder was suspected and the car had been pushed down the road then they should have carried out better investigation to pin point the place where the car had been kept standing before being pushed down the road. Other than a plan showing the various places where the bodies of the two victims, wreckage of the car and various other items were found, no other investigation worth the name was done at the spot. The investigating officer did not even deem it fit to find out whether, if at all, the van was washed at Bankhandi and no witnesses were associated in this regard.

54. We are in the 21st century but PW-34, who was the investigating officer, has investigated the case in a totally unscientific manner. No effort was made to lift any finger prints, hair or any other items from the Maruti car, which could link the accused including the approver (who had not turned approver at that stage) with the car in question. When Usha Guleria and Kuldip Kumar put the body of Rakesh Gautam in the car and later when they shifted the body of driver Vijay Kumar from the van to the car they would have left tell tale signs in the form of finger prints, hair, sweat, pieces from the clothes, etc. If the investigation had been done scientifically then such tall tale signs marks could have been linked with the perpetrators of the crime. Similarly, no forensic examination of the van has been done.

55. As noted above no effort was made to find out the value of the partly burnt currency notes found at the spot. The car was got mechanically examined whereas in fact it should have been forensically examined before being sent for mechanical examination. According to PW-34, the van was recovered from Rasooh Chowk on 16.10.2003. This van was also not got forensically examined. No effort was made to lift any finger prints, hair, etc. from the van, which could have easily proved whether the driver Vijay was carried in the van or not. The van was recovered on 16.10.2003 but the lab assistant PW-31 from the State Forensic Lab only went on 2.11.2003 to inspect the van. He only found slight brown stains on the door of driver seat and on the rear right door, which on test was found to be positive for blood. If as claimed by the prosecution, driver Vijay Kumar was killed inside the van or at least he was bleeding in the van not only the seat covers of the van but even the seats & cushions of the van would have become blood stained. However, no blood was found on the seats. Blood was only found on the small seat between the two front seats. As per the forensic report no traces of kerosene oil were found on the clothes of the deceased person.

56. This is a case which should have been investigated scientifically. The scientific evidence is totally lacking. The only thing which is proved is that human blood is found in the Maruti van owned by Usha Guleria, which was being driven by approver Arun Kumar as driver. However, the prosecution has failed to link by grouping, etc. this blood to the blood of any of the deceased. Similarly, the blood found at the spot near Farna has not been linked to the deceased.

57. In view of the above discussion, we are of the view that though the finger of suspicion may point against the accused but the prosecution has failed to prove beyond reasonable doubt that the offence was committed by the accused. We are constrained to observe that the learned trial Court did not properly appreciate the statement of the approver or the other evidence. Recently, the Supreme Court of India in **Sampath Kumar vs. Inspector of Police, AIR 2012 SC 1249,** held as follows:-

> *1. "6. The legal position regarding the standard of proof and the test which the circumstantial evidence must satisfy is well settled by a long line of decisions of this Court. It is unnecessary to burden this judgement by making reference to all such decisions. We are content with reference to some of those decisions. In* ***Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116,*** *this Court laid down the following five tests to be satisfied in a case based on circumstantial evidence:-*
>
> 1. *The circumstances from which the conclusion of guilt is to be drawn should be fully established.*
> 2. *The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable or any other hypothesis except that the accused is guilty.*
> 3. *The circumstances should be of a conclusive nature and tendency.*
> 4. *They should exclude every possible hypothesis except the one to be proved, and*
> 5. *There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.*
>
> *15. ..... One could even say that the presence of motive in the facts and circumstances of the case creates a strong suspicion against the appellant but suspicion, howsoever strong, also cannot be a substitute for proof of the guilt of the accused beyond a reasonable doubt."*

59. Applying the aforesaid principles laid down in Sampath Kumar's case, we are of the considered view that at best the prosecution has proved that a sum of Rs.69,115/- was recovered from Usha Guleria. As held by us above, this money has not been proved to be linked to Rakesh Gautam nor is it proved that this amount was removed by Usha Guleria or any of the other accused from the car of Rakesh Gautam. As far as the statement of the approver is concerned for the reasons given hereinabove we are clearly of the view that the same does not inspire confidence and cannot be relied upon to convict the accused. No other circumstance has been proved.

60. In view of the above discussion, we are clearly of the view that the benefit of doubt should be given to the accused. Therefore, we allow the appeals, set-aside the judgement of conviction and sentence passed by the learned trial Court. The accused be released forthwith unless they are required in any other case.

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BEFORE HON'BLE MR.JUSTICE DEV DARSHAN SUD,J.

Oriental Insurance Company Ltd. Mythe Estate Kaithu, Shimla-3 through its Senior Divisional Manager. .....Appellant

Versus

Mool Chand Bisht & Ors. .....Respondents- Claimants.

FAO No.482 of 2008 alongwith FAO Nos.468, 469, 470, 471,472, 481 and 483 of 2008.
Judgment Reserved on: 10.12.2012
Date of decision: 09.01.2013

Motor Vehicles Act, 1988- Section 166- A vehicle met with accident due to the negligence of the driver - claimants filed claim petitions, which were allowed- aggrieved from the award, separate appeals have been preferred- held that deceased was a house wife- she was aged 41 years- hence, would be entitled for the compensation of Rs. 3000 x 12 x 13= Rs. 4,68,000/-- additional sum of Rs.50,000/- is awarded and the claimants held entitled a sum of Rs. 6 lacs with interest @ 8% per annum- in another case, deceased aged was 38 years- multiplier of 15 would be applicable and the compensation of Rs. 5,40,000/- would be payable- a sum of Rs.50,000/- is added as an additional charge- Rs.10,000/- awarded as funeral expenses- thus, amount of Rs. 6 lacs awarded with interest @ 8% per annum. (Para-3 to 23)

Cases referred:

Lata Wadhwa and Others vs. State of Bihar and Others, (2001)8 SCC 197,

Arum Kumar Agrawal and Anothers vs. National Insurance Company Limited and Others, (2010)9 SCC 218

National Insurance Company Limited vs. Kusuma and Another, (2011)13 SCC 306

Amrit Bhanu Shali and others vs. National Insurance Company Ltd. and Others, 2012 ACJ 2002

Sarla Verma vs. Delhi Transport Corporation, 2009 ACJ 1298 (SC)

New India Assurance Co.Ltd. vs. Satender & Ors., AIR 2007 SC 324,

National Insurance Company Limited vs. Kusuma and Another, (2011)13 SCC 306

For the Insurance Company: Mr.Lalit Kumar Sharma, Advocate.
For the Claimant(s): Mr.J.L. Bhardwaj, Advocate.
For the owner(s) of the vehicle: Mr.B.S. Chauhan,Advocate.

The following judgment of the Court was delivered:

Dev Darshan Sud, J.

All these appeals are being disposed of by this judgment as they arise out of the same accident. Before adverting to the individual grounds of challenge in each one of the appeal, the facts may be noticed.

2. On 21.1.2006, Mahindra Max Jeep No.HP-01K was being driven by its owner Shri Rakesh Goyal. It was pleaded that he was driving at a fast speed, lost control of the vehicle near Bhangi Dwar on Chowai- Dalash road and as a result it fell into a gorge about 800 feet as a result Smt.Daya Banti alongwith other occupants sustained fatal injuries. In each case, the learned Tribunal has awarded compensation holding that the accident had occurred owing to the rash and negligent acts of the driver. The award has been challenged by the Insurance Company only in three cases and the claimants have filed appeals claiming enhancement of the compensation in each case.

(I) FAO No. 482 of 2008, titled: *Oriental Insurance Co.Ltd. vs. Mool Chand Bisht & Ors.*

3. The appellant-Insurance Company challenges the compensation to the claimants in this appeal which has been awarded for the death of Smt.Daya Banti who was a house wife and it was pleaded that she was also assisting the family in agricultural work.

4. The learned Tribunal awarded a sum of Rs.5,55,000/- in all taking the dependency to be Rs.3000/- per month and adopting a multiplier of 15. She was aged about 41 years on the date of the accident as determined by the learned Tribunal.

5. The appellant-Insurance Company submits that amount was excessive. On the second issue settled by the learned Tribunal, regarding the quantum, it is submitted that the husband of the deceased was serving in the Punjab National Bank and was getting Rs.21,000/ 25,000 per month as salary and was the owner of 17-18 bighas of land which was a fertile apple orchard from which he used to earn Rs.3-4 lacs annually. In these circumstances, it cannot be urged that he was dependant upon the deceased. As an adjunct to this argument, it is submitted that 1/3rd should and ought to have been deducted from the datum figure as the personal expenses of the deceased house wife. It is also stated that the other claimants, namely, son and daughters of the deceased cannot be said to be dependant upon a house wife, their mother, and cannot be granted any compensation.

(II) FAO No.471 of 2008, titled: Mool Chand Bisht & Ors vs. Smt.Samriti Goyal & Ors.

6. This appeal has been preferred by the appellants-claimants for enhancement of compensation. It is claimed that just compensation has not been awarded as the averments in the appeal are that the deceased was helping in agricultural pursuits for producing bountiful apple crop, no amount has been awarded for funeral expenses, loss of consortium and loss of estate. The claimants plead that a sum of Rs.15 lacs should and ought to be awarded as just compensation.

7. In ***Lata Wadhwa and Others vs. State of Bihar and Others, (2001)8 SCC 197,*** the dependency in the case of death of a house wife has been calculated at Rs.3000/- per month. This case was subsequently reaffirmed in ***Arum Kumar Agrawal and Anothers vs. National Insurance Company Limited and Others, (2010)9 SCC 218,*** holding:-

> **"26. In India the Courts have recognised that the contribution made by the wife to the house is invaluable and cannot be computed in terms of money. The gratuitous services rendered by wife with true**

love and affection to the children and her husband and managing the household affairs cannot be equated with the services rendered by others. A wife/mother does not work by the clock. She is in the constant attendance of the family throughout the day and night unless she is employed and is required to attend the employer's work for particular hours. She takes care of all the requirements of husband and children including cooking of food, washing of clothes, etc. She teaches small children and provides invaluable guidance to them for their future life. A housekeeper or maidservant can do the household work, such as cooking food, washing clothes and utensils, keeping the house clean etc., but she can never be a substitute for a wife/mother who renders selfless service to her husband and children.

27. It is not possible to quantify any amount in lieu of the services rendered by the wife/mother to the family i.e. husband and children. However, for the purpose of award of compensation to the dependents, some pecuniary estimate has to be made of the services of housewife/mother. In that context, the term `services' is required to be given a broad meaning and must be construed by taking into account the loss of personal care and attention given by the deceased to her children as a mother and to her husband as a wife. They are entitled to adequate compensation in lieu of the loss of gratuitous services rendered by the deceased. The amount payable to the dependants cannot be diminished on the ground **that some close relation like a grandmother may volunteer to render some of the services to the family which the deceased was giving earlier.**

28. In Lata Wadhwa v. State of Bihar (2001)8 SCC 197, this Court considered the various issues raised in the writ petitions filed by the petitioners including the one relating to payment of compensation to the victims of fire accident which occurred on 3.3.1989 resulting in the death of 60 persons and injuries to 113. By an interim order dated 15.12.1993, this Court requested former Chief Justice of India, Shri Justice Y.V. Chandrachud to look into various issues including the amount of compensation payable to the victims. Although, the petitioners filed objection to the report submitted by Shri Justice Y.V. Chandrachud, the Court **overruled the same and accepted the report. On the issue of payment of compensation to the housewife, the Court observed** ***SCC pp.209-10, para*** **10)**

> "10. So far as the deceased housewives are concerned, in the absence of any data and as the housewives were not earning any income, attempt has been made to determine the compensation on the basis of services rendered by them to the house. On the basis of the age group of the housewives, appropriate multiplier has been applied, but the estimation of the value of services rendered to the house by the housewives, which has been arrived at Rs.12,000 per annum in cases of some and Rs.10,000 for

> others, appears to us to be grossly low. It is true that the claimants, who ought to have given data for determination of compensation, did not assist in any manner by providing the data for estimating the value of services rendered by such housewives. But even in the absence of such data and taking into consideration the multifarious services rendered by the housewives for managing the entire family, even on a modest estimation, should be Rs.3000 per month and Rs.36,000 per annum. This would apply to all those housewives between the age group of 34 to 59 and as such who were active in life. The compensation awarded, therefore, should be recalculated, taking the value of services rendered per annum to be Rs.36,000 and thereafter, applying the multiplier, as has been applied already, and so far as the conventional amount is concerned, the same should be Rs.50,000 instead of Rs.25,000 given under the Report. So far as the elderly ladies are concerned, in the age group of 62 to 72, the value of services rendered has been taken at Rs.10,000 per annum and the multiplier applied is eight. Though, the multiplier applied is correct, but the values of services rendered at Rs.10,000 per annum, cannot be held to be just and, we, therefore, enhance the same to Rs.20,000 per annum. In their case, therefore, the total amount of compensation should be redetermined, taking the value of services rendered at Rs.20,000 per annum and then after applying the multiplier, as already applied and thereafter, adding Rs.50,000 towards the conventional figure." (emphasis supplied)
>
> ***29. The judgment of Lata Wadhwa's case was referred to with approval in M.S. Grewal and another v. Deep* Chand Sood and others (2001) 8 SCC *151 for confirming the award of* compensation of Rs.5 lacs in a case involving death of school children by drowning due to negligence of teachers of the school. In Municipal Corporation of Greater Bombay v. Laxman Iyer and another (2003) 8 SCC 731, a two-Judge Bench while deciding the issue of award of compensation under Sections 110-A and 110-B of the Motor Vehicles Act, 1939, referred to the judgments in *Lata Wadhwa's case and M.S. Grewal's* case." *(pp.237-239***

The Court thereafter considers the other precedent and then holds:-

> **"36. Though, Section 163A does not, in terms apply to the cases in which claim for compensation is filed under Section 166 of the Act, in the absence of any other definite criteria for determination of compensation payable to the dependents of a non-earning housewife/mother, it would be reasonable to rely upon the criteria specified in clause (6) of the Second Schedule and then apply appropriate multiplier keeping in view the judgments of this Court in Kerala SRTC v. Susamma Thomas, (1994)2 SCC 176, U.P. S.R.T.C. v. Trilok Chandra, (1996)4SCC 362, Sarla Verma v. DTC, (2009)6 SCC 121 and also take guidance from the judgment in Lata**

> **Wadhwa's case. The approach adopted by different Benches of Delhi High Court to compute the compensation by relying upon the minimum wages payable to a skilled worker does not commend our approval because it is most unrealistic to compare the gratuitous services of the housewife/mother with work of a skilled worker." (p.241)**

The Court thereafter allowed the appeal awarding compensation of Rs.six lacs and costs of Rs.50,000/-. Hon'ble A.K. Ganguly J, concurring with the judgment, holds:-

> **"50. Women are generally engaged in home making, bringing up children and also in production of goods and services which are not sold in the market but are consumed at the household level. Thus, the work of women mostly goes unrecognized and they are never valued. Therefore, in the categorization by the Census what is ignored is the well known fact that women make significant contribution at various levels including agricultural production by sowing, harvesting, transplanting and also tending cattles and by cooking and delivering the food to those persons who are on the field during the agriculture season.**
>
> **52. The same gender bias has been reflected in the judgment of the High Court whereby the High Court has accepted the tribunal's reasoning of assessing the income of the victim at Rs.1,250/- per month. Even if we go by the formula under clause 6 of the Second Schedule, income of the victim comes to Rs.5,000/- per month." (p.243)**

8. Subsequently in ***National Insurance Company Limited vs. Kusuma and Another, (2011)13 SCC 306***, the Supreme Court again reaffirmed the principle laid down in ***Lata Wadhwa's*** case holding:-

> **"12. It is quite true, as observed in New India Assurance Co.Ltd. v. Satender,(2006)13 SCC 60, that the question of assessment of compensation in a case where the deceased is an infant involves a good deal of guess work but in our view it cannot be a wild guesswork. As aforesaid, some material has to be adduced by the claimants to prove that they entertained a reasonable expectation of pecuniary advantage from the deceased. There are quite a few precedents providing guidelines for determination of compensation in such cases but because of the nature of the order we propose to pass on facts in hand, we deem it unnecessary to burden the judgment by making a reference to all these cases, except to note that in Lata Wadhwa v. State of Bihar, (2001)8 SCC 197 as also in M.S. Grewal v. Deep Chand Sood, (2001)8 SCC 151 wherein a large number of young school-going children had lost their lives, respectively in fire and by drowning, multiplier method was adopted and applied for assigning value of future dependency to determine the quantum of compensation.(p.310)**

9. It is these principles which would govern the grant of compensation in the present case. On the question of multiplier, since the deceased was aged 41 years in Amrit Bhanu Shali and others vs. National Insurance Company Ltd. and Others, 2012 ACJ 2002, the Supreme Court holds:-

> **"15(15)(ii) Re: Question-Selection of multiplier:**
>
> **(21) We, therefore, hold that the multiplier to be used should be as mentioned in column 4 of the Table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is, M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years." (p.2007)**

10. The multiplier to be adopted, on the basis of Sarla Verma vs. Delhi Transport Corporation, 2009 ACJ 1298 (SC), would in this case be 13. The submission made on behalf of the appellant Insurance Company that no amount can be awarded to the claimants for the loss of their mother cannot be accepted since the argument is that the husband is earning, death of his wife would not constitute any loss. Surely this logic cannot be adopted. The argument does not carry any legal foundation as it urges that any member of the family can be subject matter of a tort involving fatal injuries and in which compensation is to be paid. FAO No.482 of 2008 is accordingly dismissed.

11. Adverting to appeal ***(FAO No.471 of 2008)*** filed by the claimants, on the basis of law discussed *supra,* the compensation calculated would be Rs.3000x 12x13 = 4,68,000/-. Learned counsel for the claimants submits that the Supreme Court in ***Arum Kumar Agrawal's*** case holds that income should and ought to be Rs.5000/- per month and in this eventuality the compensation requires to be increased. In case a datum figure of Rs.5000/- is adopted, the total compensation would work out to Rs.7,80,000/-. However, taking into consideration the totality of the facts of the case, I deem it proper not to increase the award but to award an additional sum of Rs.50,000/- as held in ***Lata Wadhwa and Arum Kumar Agrawal's*** case. I direct that the claimants would be entitled to a sum of Rs.six lacs in all. It will carry interest at the rate of 8% per annum from the date of filing of the petition till its realisation. Award is accordingly modified. The compensation will be awarded in the ratio as adopted by the learned Tribunal.

(III) *FAO No.470 of 2008, titled: Kumari Minakshi vs. Smt.Samriti Goyal & Ors.*

(IV) FAO No.483 of 2008, titled: Oriental Insurance Company Limited and Others. vs. Kumari Minakshi and Others.

12. In this case, the claimant is the minor daughter of Smt.Tara Devi who was aged about 38 years on the date when she died in the accident. A sum of Rs.4,83,000/- has been awarded by the learned Tribunal for the loss of her mother. The learned Tribunal adopts Rs.3000/- per month as loss and a multiplier of

13. Conventional charges of Rs.15,000/- was also awarded to her. Adverting to the precedent *supra*, the multiplier to be applied in her case would be 15, according

to ***Sarla Verma's*** case, in which eventuality, the compensation would work out to Rs.5,40,000/-. To this, another sum of Rs.50,000/- would be added as held in ***Lata Wadhwa and Arum Kumar Agrawal's*** cases *supra* and in addition another sum of Rs.10,000/- towards funeral expenses which would be the accepted norm, thus, in all a sum of Rs.six lacs alongwith interest at the rate of 8% per annum deserves to be awarded to the claimant. The submissions made on behalf of the Insurance Company that a personal deduction of 1/3rd requires to be made and an amount of Rs.15,000/- have to be deducted because no conventional charges can be awarded, cannot be accepted. I have not adjudicated the fact as to whether the income of a house wife requires to be increased to Rs.5000/- per month. Appeal of the Insurance Company is dismissed and that of the claimant is allowed. Award is modified accordingly. It will carry interest at the rate of 8% per annum from the date of filing of the petition till its realisation.

(V) FAO No. 469 of 2008, titled: KUmari Minakshi vs. Smt. Samriti Goyal & Ors.

14. In this appeal Minakshi challenges the award made in her favour for the death of her brother. The learned Tribunal has awarded a sum of Rs.1,54,000/- alongwith interest at the rate of 7% per annum. The deceased, on the date of his death, was about 16 years of age. It was claimed that he was a student, father of the claimant had already died and the deceased was rendering services/work in the house. He was a brilliant student and was getting scholarship. The learned Tribunal holds that his contribution to the family would be Rs.1000/- per month which would have been available to his minor sister. Applying a multiplier of 12 the compensation was worked out at Rs.1,44,000/- to which Rs.10,000/- were added. Learned counsel appearing for the appellant submits that the compensation is not just. In ***New India Assurance Co.Ltd. vs. Satender & Ors., AIR 2007 SC 324,*** the Supreme Court holds:-

> **"12. In cases of young children of tender age, in view of uncertainties abound, neither their income at the time of death nor the prospects of the future increase in their income nor chances of advancement of their career are capable of proper determination on estimated basis. The reason is that at such an early age, the uncertainties in regard to their academic pursuits, achievements in career and thereafter advancement in life are so many that nothing can be assumed with reasonable certainty. Therefore, neither the income of the deceased child is capable of assessment on estimated basis nor the financial loss suffered by the parents is capable of mathematical computation.**
>
> ***13. Applying the principles indicated in Jasbir Kaur's case (supra) to the facts of the present case we think award of a sum of Rs.1,80,000/- would meet the ends of justice. The same shall carry interest at the rate of 7.5% from the date of filing of petition till payment is made. Payment shall be made within a period of three months from today. Amounts, if any, already paid shall be adjusted from the aforesaid amount of Rs.1,80,000/- (p.326)***
>
> **14. In *Kaushlya Devi Vs. Karan Arora & Others, AIR 2007 SC 1912,* the Supreme Court holds:-**

"11. In cases of young children of tender age, in view of uncertainties abound, neither their income at the time of death nor the prospects of the future increase in their income nor chances of advancement of their career are capable of proper determination on estimated basis. The reason is that at such an early age, the uncertainties in regard to their academic pursuits, achievements in career and thereafter advancement in life are so many that nothing can be assumed with reasonable certainty. Therefore, neither the income of the deceased child is capable of assessment on estimated basis nor the financial loss suffered by the parents is capable of mathematical computation.

12. These aspects were highlighted in New India Assurance Co. Ltd. v. Satender and Ors. (AIR 2007 SC 324)." (p.1914)

15. Subsequently, in ***National Insurance Company Limited vs. Kusuma and Another, (2011)13 SCC 306*** the Court was considering the unborn child holding:-

"9. Thus, the word "just" connotes something which is equitable, fair and reasonable, conforming to rectitude and justice and not arbitrary. It may be true that Section 168 of the Act confers a wide discretion on the Tribunal to determine the amount of compensation but this discretion is also coupled with a duty to see that this exercise is carried out rationally and judiciously by accepted legal standards and not whimsically and arbitrarily, a concept unknown to public law. The amount of compensation awarded is not expected to be a windfall or bonanza for the victim or his dependent, as the case may be, but at the same time it should not be niggardly or a pittance. Thus, determination of "just" amount of compensation is beset with difficulties, more so when the deceased happens to be an infant/ child because the future of a child is full of glorious uncertainties. In the case of death of an infant many imponderables, like life expectancy of the deceased, his prospects to earn, save, spend and distribute have to be taken into account. It is quite possible that there may be no actual pecuniary benefit which may be derived by his parents during the life time of the child. But at the same time that cannot be a ground to reject the claim of the parents, albeit they establish that they had reasonable expectation of pecuniary benefit if the child had lived. The question whether there exists a reasonable expectation of pecuniary benefit is always a mixed question of fact and law but a mere speculative possibility of benefit is not sufficient.

10. In New India Assurance Co.Ltd. vs. Satender, (2006)13 SCC 60 relied upon by the High Court, while dealing with a claim for compensation under the Act in relation to the death of a nine year old child in a truck accident, this Court had observed as follows: (SCC p.63, para 9)

"9. There are some aspects of human life which are capable of monetary measurement, but the totality of human life is like the beauty of sunrise or the splendor of the stars, beyond the reach of monetary tape-measure. The determination of

damages for loss of human life is an extremely difficult task and it becomes all the more baffling when the deceased is a child and/or a non- earning person. The future of a child is uncertain. Where the deceased was a child, he was earning nothing but had a prospect to earn. The question of assessment of compensation, therefore, becomes stiffer. The figure of compensation in such cases involves a good deal of guesswork. In cases, where parents are claimants, relevant factor would be age of parents."

11. It was further observed that: (Satender case, SCC p.64, para 12)

"12. In cases of young children of tender age, in view of uncertainties abound, neither their income at the time of death nor the prospects of the future increase in their income nor chances of advancement of their career are capable of proper determination on estimated basis. The reason is that at such an early age, the uncertainties in regard to their academic pursuits, achievements in career and thereafter advancement in life are so many that nothing can be assumed with reasonable certainty. Therefore, neither the income of the deceased child is capable of assessment on estimated basis nor the financial loss suffered by the parents is capable of mathematical computation."

12. It is quite true, as observed in Satender, that the question of assessment of compensation in a case where the deceased is an infant **involves a good deal of guesswork but in our view it cannot be a wild guesswork. As aforesaid, some material has to be adduced by the claimants to prove that they entertained a reasonable expectation of pecuniary advantage from the deceased. There are quite a few precedents providing guidelines for determination of compensation in such cases but because of nature of the order we propose to pass on facts in hand, we deem it unnecessary to burden the judgment by making a reference to all these cases, except to note that in Lata Wadhwa v. State of Bihar, (2001)8 SCC 197 as also in M.S. Grewal v. Deep Chand Sood (2001)8 SCC 151, wherein a large number of young school going children had lost their lives, respectively in fire and by drowning, multiplier method was adopted and applied for assigning value of future dependency to determine the quantum of compensation.**

13. Having examined the instant case on the touchstone of the aforestated broad principles, we are of the opinion that neither the Tribunal nor the High Court applied any principle for determination of the amount of compensation on account of the birth of a still born child. It is clear from a bare reading of the orders of the Tribunal and the High Court that no reasons have been indicated by the Tribunal while awarding a lump sum amount of Rs.50,000/- towards the loss of unborn child and

Rs.10,000/- towards pain and suffering to the mother and by the High Court enhancing the said amounts to a consolidated amount of Rs.1,80,000/-. Besides, in the impugned judgment, we do not find any discussion on the question of non-pecuniary compensation awarded by the Tribunal to the claimant- mother on account of pain and suffering as a result of death of the child.

***14. In the normal course, we would have remanded the matter back to the Tribunal for fresh consideration. However, bearing in mind the quantum of compensation awarded by the courts below and the fact that the accident took place in the year 1995, we are of the opinion that at this juncture it would be too harsh to direct the claimants to undergo the entire gamut of a fresh exercise under Section 168 of the Act. Therefore, in the facts and circumstances of the case, we refrain from interfering with the impugned judgment and dismiss the appeal accordingly, with no order as to costs."* (pp.309-311)**

16. What I find from the assessment made by the learned Tribunal is that it is on the conservative side and in this eventuality the sum awarded requires to be increased. More so considering the fact that she has been rendered destitute, her mother and father have died, her father pre-deceased her mother. Her brother and mother died in the accident. Therefore, it would be in the fitness of things that a sum of Rs.two lacs in all is awarded to the appellant. It will carry interest at the rate of 8% per annum from the date of filing of the petition till its realisation. Award is modified accordingly.

(VI) *FAO No.472 of 2008, titled: Sanjay Kumar and Others vs. Smt.Samriti Goyal & Ors.*

(VII) FAO No.481 of 2008, titled: Oriental Insurance Co.Ltd. vs. Sanjay Kumar & Ors.

17. Both these appeals challenge the quantum of compensation awarded to the claimants for the death of their father Kehar Singh who was aged 46 years at the time of death. The claimants pleaded that he was an agriculturist and horticulturist cultivating land and selling vegetables etc. for their living who was earning about Rs.18000/- to Rs.20000/- per month. He was the sole bread earner of the family. The trial Court, on the evidence on record, holds that the deceased had inherited 1/3rd of 15 bighas of land holdings of his father Shri Ses Ram. The learned Tribunal assessed the income of the deceased at Rs.3000/- per month out of which, 1/3rd was deducted for personal expenses. Ultimately the annual dependency was calculated at Rs.24,000/-, multiplier of 12 was adopted and a sum of Rs.2,88,000/- has been worked out as just compensation. In addition, Rs.15,000/- as conventional charges were added and a sum of Rs.3,03,000/- was granted alongwith interest at the rate of 7½% per annum.

18. The Insurance Company in its appeal has challenged the award urging that the income of the deceased was not more than Rs.20,000/- which has been established on the record from the cross-examination of PW-1 Sunil Kumar and the multiplier used was excessive. Considering the age of the claimants, it could not be said that they are dependant upon him. This submission requires to be rejected. It cannot be

said that the death of the father, who was engaged in agricultural pursuits in a family residing and pressing together, would not cause any loss to the dependency.

19. Adverting to the evidence on record, I do not find that it has been admitted by PW-1 that income was not more than Rs.20,000/- is not found in the record. In fact this witness denies the suggestion that the income of the father and mother of the claimants was not more than Rs.2,000 to 2,500/-. In these circumstances, the appeal filed by the Insurance Company is dismissed.

20. Adverting to the appeal ***(FAO No.472 of 2008)*** filed by the claimants, according to ***Sarla Verma's*** case *supra*, considering the age of the deceased a multiplier of 13 has to be applied. I also find that the learned Tribunal has been frugal in granting compensation, more especially, when it is proved on record that the deceased was infact an agriculturist and no evidence has been brought on the record to the contrary.

21. In these circumstances, taking into consideration the subsequent decisions of the Supreme Court in ***Lata Wadhwa and Arum Kumar Agrawal's*** cases *supra***,** the income requires to be increased, in which eventuality it would be reasonable to assume that he would be earning Rs.4,500/- per month, if 1/3rd is deducted from his personal expenses it will leave a sum of Rs.3,000/- towards the contribution of the family. The annual dependency would be worked out to Rs.36,000/-. Applying multiplier of 13 the compensation awardable would be Rs.4,68,000/-. Award is accordingly modified. This amount shall carry interest at the rate of 8% per annum from the date of filing of the petition till its realisation. The amount will be disbursed in the same ratio as has been granted by the learned Tribunal.

(VII) FAO NO. 468 of 2008, titled: Sanjay Kumar & Ors. Vs. Smt. Samriti Goyal & Others;

22. The claimants are again Sanjay Kumar and Others. In this petition, they claim compensation for the death of their mother Smt.Roop Dassi, who at the relevant time was aged 43 years. The learned Tribunal has adopted a multiplier of 15. The loss to the claimants has been quantified at Rs.18,000/- per annum. She was a house wife and in this eventuality, I find that the Tribunal has been remiss in granting this amount as in ***Lata Wadhwa's*** case *supra* the Supreme Court holds that the amount should and ought to be Rs.3000/- per month which does not call for any deduction towards personal expenses as it is the value considered for the contribution of services to the family. In this eventuality the loss suffered by the appellants would be Rs.36,000/- per annum and when multiplier of 14 is adopted, Rs.4,90,000/- is awarded. I also find that as per ***Lata Wadhwa's*** and ***Arum Kumar Agrawal's*** cases *supra,* a sum of Rs.50,000/- is to be added. Thus, in all the compensation works out to Rs.5,40,000/- which would carry interest at the rate of 8% per annum from the date of filing of the petition till its realisation. The award is accordingly modified.

23. I must note the contention of the parties, the claimants herein, who submit that they lost both their mother and father and in this eventuality, the claim should and ought to be higher. In particular learned counsel places reliance on the subsequent decision of the Supreme Court in ***Arum Kumar Agrawal's*** case *supra***,** where ***Hon'ble A.K. Ganguly J.*** holds that income should and ought to have been assessed at Rs.5000/- per month. I am not pronouncing on this aspect of the case. It is

unfortunate that both the parents of the claimants have died in the accident and they are now left to live alone.

****

BEFORE HON'BLE MR. JUSTICE KULDIP SINGH, J.

Rakesh son of Shri Tule Ram ...Petitioner.

Versus

Smt. Poonam wife of Shri Rakesh ..Respondent

Cr.MMO No. 142 of 2012
Reserved on : 15.11.2012
Date of decision: 9.1.2013.

Code of Criminal Procedure, 1973- Section 125- Wife filed a petition for maintenance, which was allowed and maintenance of Rs.1,000/- per month was granted to her- a revision was filed, which was dismissed- held that it was proved that previous marriage of wife was dissolved by dissolution deed – relationship was proved by record and witnesses- husband had neglected to maintain the wife- petition of the wife was rightly allowed- petition dismissed. (Para-6 to 19)

Cases referred:

Yamunabai Anantrao Adhav vs. Anantrao Shivram Adhav and another AIR 1988 SC 644

Phirari Singh vs. State of U.P. and others 1990 Cri.L.J.884

R.P. Kapur vs. State of Punjab, AIR 1960 SC 866

Chanmuniya vs. Virendra Kumar Singh Kushwaha and another (2011) 1 SCC 141

For the Petitioner : Mr. Sanjeev Kuthiala, Advocate.

For the Respondent : Mr. S.M.Goel, Advocate.

The following judgment of the Court was delivered:

Kuldip Singh, Judge

This petition under Article 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure has been filed against the order dated 17.8.2011 passed by learned Additional Sessions Judge, Fast Track Court, Kullu, in Criminal Revision No. 10 of 2011 affirming order dated 29.3.2011 passed by learned Chief Judicial Magistrate, Kullu in Cr. M.A. No. 420-iv/2008.

2. The facts, in brief, are that the respondent had filed an application under Section 125 Cr.P.C. for grant of maintenance Rs. 5,000/- per month against the petitioner on the ground that she is legally wedded wife of petitioner and their marriage was solemnized on 7.2.2008. The petitioner earlier was married with one Sharda and from that wedlock the petitioner has two sons. Sharda died in January, 2008. The

petitioner solemnized marriage with the respondent in February, 2008. The respondent had conceived from the petitioner.

3. The parents of the petitioner levelled false allegations of theft against the respondent on 1.8.2008 and ousted the respondent from the matrimonial home. The respondent has no source of income whereas the petitioner has sufficient means. He was in possession of sufficient property and was in fruit and vegetable business. The income of the petitioner was about Rs.15,000/- per month. Therefore, the respondent claimed Rs.5,000/- maintenance per month from the petitioner.

4. The petitioner contested the petition by filing reply and has denied his marriage with the respondent. The families of petitioner and respondent were inimical with each other and there was long litigation between both the parties. The respondent is wife of Hari Chand resident of village Barshogi (Kahujani) and their marriage was solemnized on 14.10.1996. The respondent filed rejoinder and re- asserted her case. The respondent alleged that the petitioner gave beatings to her as a result of which the respondent aborted and she was admitted in Zonal Hospital, Mandi on 25.10.2008. The learned Chief Judicial Magistrate on 29.3.2011 allowed Rs. 1,000/- maintenance to respondent against the petitioner from the date of filing of the petition 28.8.2008. The learned Additional Sessions Judge on 17.8.2011 affirmed the order dated 29.3.2011, hence the present petition.

5. Heard learned counsel for the parties and record perused. It has been submitted by learned counsel for the petitioner that respondent is not the wife of the petitioner. The learned Courts below have mis-construed and mis-interpreted the oral and documentary evidence on record and have erred in returning the findings that the respondent is the wife of the petitioner and awarding maintenance to the respondent. The maintenance of Rs. 1,000/- per month is otherwise on the higher side. The learned counsel for the respondent has supported the impugned order and has submitted that there is no error of jurisdiction. The two Courts below have concurrently recorded findings of facts and awarded maintenance to the respondent which is not on the higher side.

6. The case of the respondent is that she married with petitioner on 7.2.2008 after the death of earlier wife of the petitioner and after the divorce of respondent with her previous husband. On the contrary, the petitioner has denied his marriage with respondent or they lived together as husband and wife. The case of the petitioner is that respondent is the wife of Hari Chand. The relations between the families of the petitioner and respondent are not good due to litigation and, therefore, the respondent has filed the petition falsely claiming herself to be the wife of the petitioner.

7. PW-1 Smt. Poonam has stated that in the home she is known by name Rami Devi and her school name is Poonam. She was earlier married with Hari Chand but the marriage was dissolved by divorce deed which was prepared in duplicate. One which was signed by Hari Chand was handed over to her and the other one which was signed by her was handed over to Hari Chand. The previous wife of petitioner was ailing and petitioner used to visit her. Their houses were located at a distance of five minutes walk. After the death of previous wife of the petitioner, she and petitioner solemnized marriage and she started living with him as his wife. She had conceived from the petitioner.

8. PW-1 further stated that the parents of the petitioner agreed for their marriage but lateron they started levelling false allegations of theft against her. They alleged that she had stolen Rs. 3,500/-. The petitioner ousted her from the matrimonial home on the allegations of theft, but at that time she was pregnant. She had been visiting to Jari hospital for vaccination during pregnancy and a card for this purpose was also prepared, the photocopy of which is mark 'B'. She aborted due to lack of proper treatment. The Panchayat Pradhan had issued marriage certificate mark 'C' to her. She is Harijan and they do not perform the marriage in the presence of Purohit. Their marriage is solemnized with the consent of the parties.

9. PW-1 continued that the petitioner deals in furniture and earns about Rs. 20,000/-. The petitioner has not given any maintenance to her since she had been turned out from the house. In cross- examination, she has stated that Kaushalya is her sister and Kewal Krishan is uncle of petitioner. She doesn't know litigation between the families of the petitioner and her paternal family. In 1995 Kaushalya Devi had filed a case against Kewal Krishan. There is no tradition of mourning for one year after the death in their family. The mourning days are limited to five days after the death.

10. PW-2 Roshan Lal has stated that Rakesh is also known as Pangi. He knows Poonam. He is a stamp vendor. The stamp papers were issued by him on the asking of Hari Chand and Poonam. The divorce deed Ex.PW-2/B was scribed in the presence of Lal Chand and Nathu Ram and they put their signatures on the divorce deed. Ex.PW- 2/B bears the signatures of Hari Chand and witnesses Lal Chand and Nathu Ram. Nathu Ram put his thumb impression, thereafter he signed the divorce deed**.** The divorce deed was prepared in duplicate, one was given to Poonam and the other one was given to Hari Chand.

11. PW-3 Shakuntla has stated that she is posted as F.H.W. at CHC, Jari. Poonam wife of Rakesh, resident of Jari was vaccinated on 27.7.2008, the entry is at serial No. 26 of 27.7.2008 in the Register. A card to this effect Ex.PW-3/A was issued by Bimla, FHW. She identified the signatures of Bimla on the card. PW-5 Urmila, Assistant Secretary, Gram Panchayat, Bhuin, has proved the copy of family register Ex.PW-5/A. PW-6 Salochana Sharma, President, Gram Panchayat, Bradha has proved certificate Ex.PW-6/A. This certificate was issued by her after seeing the pregnancy card of the woman.

12. RW-1 Rakesh Kumar has stated that he was married to Sharda Devi, who died in January, 2008. As per their custom, no auspicious work is done for one year after the death in the family. Kewal Krishan, uncle of the petitioner had been contesting election against Devi Ram, father of the respondent. Paru Ram is the grand-father of the respondent. Kewal Krishan and Paru Ram had been in litigation for the past. Kaushalya Devi is the elder sister of the respondent, Bhag Chand is the brother of the petitioner. Bhag Chand and Kaushalya Devi had three cases between them, one of them was of maintenance. His grand father and respondent are not on talking terms. He had no relationship with the respondent, the husband of the respondent is Hari Ram. The case is false and has been instituted to tarnish the political image of his father and uncle.

13. In cross-examination he has stated that at the time of his marriage with Sharda no pandit was called. His wife was mentally disturbed 5-6 months prior to her death. The house of the respondent is at a distance of 10-15 minutes walk from his

house. He had no knowledge that the respondent had conceived. He does not know that respondent had aborted. Salochana Sharma knew him and respondent as well as their families. He had no enmity with Salochana Sharma. He does not know that respondent had obtained divorce from Hari Chand on 5.1.1998. He does not know respondent has any means of maintenance. He is hale and hearty. RW-2 Khoob Ram has stated that Sharda Devi wife of petitioner had died in January, 2008. Tuli father of Rakesh is his nephew and Rakesh is grand son in relation.

14. Ex.R-1 is the certified copy of judgment dated 10.10.2007 passed in Criminal Revision No. 64 of 2001 Kaushalya Devi vs. Bhag Chand. Ex.PW-6/A is the certificate issued by President, Bradha showing Poonma Devi wife of Rakesh. Ex.PW-5/A is the copy of family register of Veri Devi showing Puni Devi, daughter of Devi Ram and Veri Devi wife of Devi Ram. Ex.PW-5/A is also another copy of family register of Sundru Ram showing Hari Chand son of Sundru and Rami Devi wife of Hari Chand etc. but against the entry of Rami Devi it has been stated that she has taken divorce. Ex.PW-3/A is the vaccination card of Poonam wife of Rakesh showing the tentative date of conception 25.5.2008 and delivery 4.3.2009. This also indicates that Poonam visited the centre for vaccination on 28.7.2008, 27.8.2008 and 27.9.2008. Ex.PW-2/B is the divorce deed between Hari Chand and Rami Devi dated 5.1.1998 signed by Hari Chand and witnessed by Lal Chand and Nathu Ram and scribed by Roshan Lal.

15. The learned counsel for the petitioner has relied **Smt. Yamunabai Anantrao Adhav vs. Anantrao Shivram Adhav and another AIR 1988 SC 644** on the point that under Section 125 Cr.P.C. 'wife' means legally wedded wife. He has submitted that respondent was already married with Hari Chand, therefore, she could not marry with petitioner in absence of proof of dissolution of her marriage with Hari Chand. In **Phirari Singh vs. State of U.P. and others 1990 Cri.L.J.884,** it has been held that if factum of marriage not established, application under Section 125 Cr.P.C. is not maintainable. The learned counsel for the petitioner has relied **R.P.Kapur vs. State of Punjab, AIR 1960 SC 866** on the power of the High Court to quash proceedings.

16. The learned counsel for the respondent has relied **Chanmuniya vs. Virendra Kumar Singh Kushwaha and another (2011) 1 SCC 141** where the Supreme Court has held that a broad and expansive interpretation should be given to the term 'wife' to include even those cases where a man and woman have been living together as husband and wife for a reasonably long period of time and strict proof of marriage should not be a precondition for maintenance under Section 125 Cr.P.C., so as to fulfill true spirit and essence of the beneficial provision of maintenance under Section 125 Cr.P.C.

17. The respondent has proved that her previous marriage with Hari Chand was dissolved by dissolution deed Ex.PW-2/B dated 5.1.1998. The marriage dissolution deed has been proved by PW-2 Roshan Lal scribe. The respondent has stated that after the death of previous wife of petitioner she married with petitioner and conceived from him. The respondent has stated that she had been visiting the health centre for vaccination but she aborted the foetus for want of proper treatment. PW-3 Smt. Shakuntla has proved vaccination card Ex.PW-3/A of the respondent in which tentative date of conception and delivery has been given. It also shows that the respondent had visited the centre on 28.7.2008, 27.8.2008 and 27.9.2008. PW-6 Salochana Sharma has proved certificate Ex.PW-6/A showing respondent to be the wife of petitioner.

18. RW-1 Rakesh has admitted that Salochana knew him as well as respondent and he has no enmity with Salochana. Salochana as President of Gram Panchayat is expected to be acquainted with both the petitioner and respondent and, therefore, the authenticity of certificate Ex.PW-6/A cannot be doubted more particularly when the petitioner has stated that he has no enmity with Salochana. The respondent has proved her marriage with petitioner. It has also been proved that petitioner has sufficient income. On the other hand, the respondent has no means to maintain herself. The petitioner has neglected the respondent. The contention of learned counsel for the petitioner that the petition has been filed due to enmity between the two families, has no force. The judgment Ex.R-1 dated 10.10.2007 in Cr.R. No. 64 of 2001 in between Kaushalya Devi vs. Bhag Singh is of no help to petitioner.

19. The two Courts below have rightly appreciated the material on record. The jurisdiction under Article 227 of the Constitution of India and Section 482 Cr.P.C. is very limited, it is not a case of no evidence. There is no perversity in the impugned judgment. On behalf of the petitioner no case of error of jurisdiction has been made out. The quantum of maintenance as well as period from which the maintenance has been allowed by the two Courts below are also not wrong. There is no merit in the petition.

20. In view of above, the petition fails and is accordingly dismissed, so also the pending application.

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BEFORE HON'BLE MR. JUSTICE DEEPAK GUPTA, J. AND HON'BLE MR. JUSTICE V.K. AHUJA, J.

Mahesh Udyog, Managed by M/s Shankar Trading Company Ltd. & Ors.
...Petitioners.

Vs.

Agriculture Produce Market Committee, Una, District Una, Himachal Pradesh, through its Secretary & Ors. ...Respondents.

CWP No. 1669 of 2007-G
Reserved on: 21.11.2012
Decided on: 11.01.2013

Constitution of India, 1950- Article 226- Petitioner was registered as a licencee under the H.P. Agriculture Produce Market Act,1969- it manufactures Katha out of Khair wood- market Committee issued a demand notice for a sum of Rs.83,17,360/- for transfer of Katha from one branch to another- demand notice was issued for a sum of Rs. 1,66,34,720/- which includes penalty- an appeal was filed, which was allowed and assessment was quashed- however, it was held that company had failed to fulfill the conditions laid down in Section 21 of the Act and Rule 80 (7) - market fee of Rs.70,000/- and penalty of Rs. 75,000/- were imposed – a revision was filed by the Committee, which was allowed and the case was remanded to the chairman- a writ petition was filed but the Act was repealed – Himachal Pradesh Agriculture and Horticulture Produce Marketing (Development and Regulation) Act, 2005 was passed – a fresh demand notice was issued which was challenged – writ petition was disposed of

with a direction to approach the Competent Authority – Competent Authority found that order was not proper- a writ petition was filed, which was again disposed of with a direction to Secretary to pass an order- Secretary passed an assessment order directing the Company to deposit an amount of Rs. 5,20,10,292/- - aggrieved from the order, the present writ petition has been filed- held that the assessment had been made by the Secretary – hence, the Secretary was a Competent Authority – Assessing Authority has to decide on the basis of evidence whether each transaction is a stock transfers or not – he shall have to give reasons for every transfer and only thereafter can he make assessment- both parties will have to give an opportunity to lead evidence- Katha is different from the Khair wood- Writ petition partly allowed- order of Assessing Officer set aside and matter remanded to Assessing Authority to determine whether the transactions are stock transfers or sales to third parties. (Para-10 to 42)

Cases referred:

Krishi Utpadan Mandi Samiti, Ghaziabad and another versus Metal Craft and others, (2008) 7 Supreme Court Cases 780

Heinz India Private Limited and another versus State of Uttar Pradesh and others, (2012) 5 Supreme Court Cases 443

Himachal Pradesh marketing Board and others versus Shankar Trading Co. Pvt. Ltd. and others, (1997) 2 Supreme Court Cases 496

For the petitioners:	Mr. R.L. Sood, Senior Advocate, with Ms. Shilpa Sood and Mr. Arjun K. Lall, Advocates.
For the respondents:	Mr. E.C. Aggarwala, Advocate, with Mr. Navlesh Verma and Ms. Radhika Gautam, Advocates, for respondent No. 1. Ms. Shubh Mahajan, Deputy Advocate General, for respondent No. 2.

The following judgment of the Court was delivered:

Deepak Gupta, J.

Petitioner No. 1 is a unit of M/s Shankar Trading Company, a body corporate registered under the Indian Companies Act, 1956. The company is involved in manufacturing and sale of *katha* which is a notified agriculture produce under the H.P. Agriculture Produce Market Act, 1969 (hereinafter referred to as the Act).

2. It is not disputed that the petitioner being a unit of Shankar Trading Company was required to be registered as a licensee under the said Act and this matter stands settled by the judgment of the Apex Court in Himachal Pradesh Marketing Board versus Shankar Trading Company, 1997 (2) SCC 496.

3. The following issues arise in this case:

1. Whether the stock transfers from the unit of company at Oel in District Una to it's Head office at Delhi or other branches amounts to sale within the meaning of the Act?

2. Whether Rule 80 (7) of the Rules is ultra vires of the Act and even if it is intra vires, whether it should be read down?

3. Whether Katha and khairwood are the same thing and therefore khairwood shall also be treated to be a notified agricultural produce?

4. Whether the Act envisages the imposition of penalty and there could be a rule imposing penalty without any such provision in the Act?

4. The undisputed facts are that the petitioner-company manufactures *katha* out of *khairwood* within the jurisdiction of the Market Committee, Una at it's works at Oel. The Market Committee prepared a note on 23.12.1996 holding that the transfers from the one branch to another of the company, which the company claimed were stock transfers, were actually sales and accordingly issued a demand notice on 28.12.1996 asking the petitioner-company to pay market fee of Rs. 83,17,360/-. This demand notice was superseded by another demand notice dated 16.01.1997 and penalty equal to the market fee was also claimed and the demand was doubled to Rs. 1,66,34,720/-. The petitioner challenged the demand notice by filing an appeal before the H.P. Marketing Board under Rule 41 of the H.P. Agriculture Produce Market Rules, 1971. The respondent-Market Committee contended that the appeal lay only to the Chairman and not to the entire Board. The appeal was transferred to the Chairman of the Board. The Chairman of the Board allowed the appeal of the company on 17.05.2000 and held that the stocks of *katha* transferred by the company to the head office of the company did not amount to sale within the meaning of the Act. The assessment made by respondent No. 1 vide note dated 23.12.1996 was quashed. However the Chairman held that the company had failed to fulfill the conditions laid down in Section 21 of the Act and Rule 80 of the Rules and further failed to explain the transfer of a large number of cases from Maheshnagar to its head office. Market fee of Rs. 75,000/- and penalty of the same amount, i.e. total of Rs. 1,50,000/- was imposed.

5. Thereafter, on 27.08.2003, i.e. more than three years after the order had been passed, a revision petition under Section 39 was filed by the Committee before the Commissioner-cum-Secretary (Agriculture) to the Government of Himachal Pradesh. The revision was allowed and the matter remanded to the Chairman of the H.P. Marketing Board. This order was challenged by the company by filing CWP No. 1008 of 2004.

6. When this writ petition was pending, the H.P. Agriculture Produce Market Act, 1969 was repealed and replaced by the Himachal Pradesh Agriculture & Horticulture Produce Marketing (Development and Regulation) Act, 2005 (hereinafter referred to as the Act of 2005). Thereafter, a fresh demand notice was issued to the company in terms of the new Act on 07.03.2006. The petitioner-company then filed CWP No. 298 of 2006 before this Court challenging the issuance of the said demand notice wherein a demand of Rs. 2,94,66,714/- was raised for the period w.e.f. 01.11.1996 to 31.01.2006. In addition to this, penalty equal to the same amount was levied and therefore the demand raised was for Rs. 5,89,33,428/-.

7. This petition was disposed of with the consent of the parties in the following terms:

> *"Based on the aforesaid submissions of the learned counsel for the parties, this petition is disposed of as settled by issuing the hereinbelow mentioned directions:*
>
> *(i) The competent authority, under the applicable law, be it the aforesaid repealed 1969 Act, or the aforesaid 2005 Act, as the case may be and the aforesaid 1971 Rules, shall pass a proper assessment order.*
>
> *(ii) The petitioners, through their authorized representative(s) shall appear before the Secretary of respondent No. 1 in his office at 11*
>
> *A.M. on 24.07.2006. The petitioners on that day shall produce before the Secretary the entire relevant record, all the relevant documents and papers as well as the written submissions which it may have to offer in its defence. No further opportunity shall be given to the petitioners for the aforesaid.*
>
> *(iii) On a date to be fixed by the Secretary which shall not be later than one week from 24.7.2006, the hearing in the mater shall take place. The hearing, if not concluded in one day, shall be continued on day to day thereafter.*
>
> *(iv) The competent authority shall thereafter pass the assessment order, which shall be a speaking order, and communicate the same to the petitioners."*

8. The petitioner thereafter filed its response to the demand notice. The matter was taken by the Agriculture Produce Market Committee, Una. It was found that order dated 06.01.2007 passed by the Committee was not proper. This order was challenged by the petitioner- company in this Court. The matter was disposed of by this Court vide judgment dated 07.03.2007 issuing the following directions:

> "*(i) The competent authority, under the applicable law, be it the repealed H.P. Agricultural Produce Market committee Act of 1969, or the H.P. Agricultural Produce Market committee Act of 2005, as the case may be and the aforesaid 1971 Rules, shall pass a proper assessment order;*
>
> *(ii) The petitioners, through their authorized representative(s) shall appear before the Secretary of respondent No. 1 in his office at 11 a.m. on 3rd April, 2007. In terms of the earlier order, the parties have already filed the pleadings. However, in case they desire to file any other documents or pleadings, they may do so within one week from 3rd April, 2007;*
>
> *(iii) On a date to be fixed by the Secretary which shall not be later than two weeks from 3rd April, 2007, the hearing in the mater shall take place. The hearing, if not concluded in one day, shall be continued on day to day thereafter;*

(iv) The competent authority shall thereafter pass the assessment order, which shall be a speaking order, and communicate the same to the petitioners. This order shall be passed positively on or before 15th May, 2007."

9. Thereafter, the assessment order was passed by the Secretary, Agriculture Produce Market Committee, Una on 14.05.2007. A perusal of the order shows that the company produced all the records demanded from it. The Assessing Officer held that the transfer of the stock from the market area for the purpose of sale cannot be without the payment of market fee and, therefore, held the stock transfers to be sale within the meaning of Section 21 of the Act and Rule 80 (7) of the Rules framed thereunder. He also held that company was also liable to pay market fee on the sale and purchase of *khairwood* since, according to him, *khairwood* and katha are one and the same thing. He assessed the liability of the company to pay market fee at Rs. 2,60,05,146. After holding the company so liable vide his order dated 14.05.2007, he issued notice to the company on 14.05.2007 itself returnable for the next day, i.e. 15.05.2007, under Rule 82 (9) of the H.P. Agriculture Produce Market Rules, 1971 to show cause why penalty be not imposed and on the next date itself passed an order imposing penalty of the same amount, i.e. Rs. 2,60,05,146/-. Vide order dated 21.05.2007, the company was directed to deposit a sum of Rs. 5,20,10,292/-. These orders are the subject matter of challenge in the present petition on various grounds.

10. The first ground which was half heartedly raised was that the order in question has not been passed by the competent authority and is not a speaking order. We are of the considered view that the orders in question are speaking orders and cannot be struck down on this ground. We are also clearly of the view that the competent authority to settle the assessment is the Secretary of the Market Committee.

11. It is contended that the power to impose and pass assessment orders under the Act of 1969 was the job of the Market Committee alone and since the impugned assessment orders have been passed by the Secretary of the Committee, they are illegal.

12. There is no manner of doubt that under the Act of 1969, assessments had to be made by the Market Committee. However, under the Act of 2005, assessment has to be made by the Secretary of the Market Committee. The repealing Section 86 of the Himachal Pradesh Agriculture & Horticulture Produce Marketing (Development and Regulation) Act, 2005, reads as follows:

*"**86**. The Himachal Pradesh Agricultural Produce Markets Act, 1969 is hereby repealed:*

Provided that such repeal shall not affect-

(a) the previous operation of the Act so repealed or anything duly done or suffered thereunder, or

(b) the right, privilege, obligation or liability acquired, accrued or incurred under the repealed Act, or

(c) any penalty, forfeiture or punishment incurred in respect of any offence committed against the repealed Act, or

(d) any investigation, legal proceeding or remedy in respect of any such right, privilege obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Act has not been enforced:

Provided further that subject to the preceding proviso any thing done or any action taken (including any appointment, or delegation made, notification, notice, order, instruction or direction issued, rules, regulations, bye-laws, form, scheme framed, certificate obtained, permit or license granted, registration affected, fee levied), under the repealed Act shall, in so far as it is in force immediately before the coming into force of this Act and is not inconsistent with the provisions of this Act be deemed to have been done or taken under the corresponding provisions of this Act and shall continue to be in force accordingly, unless and until superseded by anything done or any action taken under this Act."

13. A perusal of the aforesaid Section clearly shows that this Section lays down that repeal shall not affect any investigation or legal proceedings in respect of such obligation. Under the Act of 2005, the Secretary of the Market Committee is the competent authority to levy market fee. The old Market Committee does not exist and, therefore, we are of the view that the order passed by the Secretary of the Market Committee cannot be set aside on this ground.

14. Furthermore, we are going into the merits of the case and after so many years of litigation, it would not be pertinent to set aside an assessment order only on the basis of the question of forum. It would also be pertinent to mention that the petitioner-company did not raise this objection before the Secretary of the Market Committee in its reply submitted by it.

15. The second important issue raised is whether market fees can be levied upon stock transfers. Before appreciating the rival contentions of the parties, it would be relevant to quote Section 21 of the Act of 1969 which reads as follows:

*"**21**. The market committee shall levy, on ad-valorem basis, fees on agricultural produce bought or sold by licensees in the notified market area at the rate not exceeding one rupee for every one hundred rupees as may be fixed by the Board:*

Provided that-

(a) no fee shall be leviable in respect of any transaction in which delivery of the agricultural produce bought or sold is not actually made; a fee shall be leviable only on the parties to a transaction in which delivery is actually made."

16. Learned counsel for the petitioners submits that the Market Committee can levy fees only on specified agriculture produce which is bought or sold by the licensee in the notified market area and rely upon the proviso which

clearly provides that no fee shall be leviable in case of a transaction in which delivery of the agricultural produce bought or sold is not actually made.

17. The Apex Court in **Krishi Utpadan Mandi Samiti, Ghaziabad and another versus Metal Craft and others, (2008) 7 Supreme Court Cases 780,** was dealing with a case arising out of the U.P. Krishi Utpadan Mandi Adhiniyam, 1964. There also the market fee was payable on transactions of sale of specified agricultural produce in the market area. The Apex Court held as follows:

> *"18. Under Section 17 (iii) (b) the measure of levy of the fee is on the price of the goods sold. It obviously means that there must be a complete transaction of sale or a concluded sale. If there is only an agreement and the agreement fails, the remedy for the aggrieved party is to file suit for damages. Obviously, no fee can be charged on damages. The action for levy of fee can arise only on a concluded sale and as the sale has not taken place within the market area of Ghaziabad, no mandi fee can be levied.*
>
> *19. The stand of the appellant is that the market fee is levied on "transaction of sale" and not on "sale" only and, therefore, what is to be seen is where the transaction took place and not the situs of the sale. If this argument is accepted then even an agreement to sale without the presence or existence of the agricultural produce will come within the ambit of the charging provision. It would also mean that if the agreement takes place outside the boundaries of the State of Uttar Pradesh, the provisions would still become applicable."*

18. Faced with this situation, Mr. E.C. Aggarwala, learned counsel for the petitioners, frankly and candidly admitted that if there is only a transfer of stock of specified agriculture produce from one branch of the company to branch office, the same cannot be treated as a sale. He, however, urged that the goods which were transferred from Una to Delhi were not stock transfers but clear cases of sale by Mahesh Udyog in favour of the third parties which were camouflaged to appear as the stock transfers only with a view to avoid the payment of market fees. Therefore, according to Mr. Aggarwala, there was no stock transfer by the petitioner and the transactions which took place were actually sales of specified agricultural produce to third parties.

19. The Apex Court in **Heinz India Private Limited and another versus State of Uttar Pradesh and others, (2012) 5 Supreme Court Cases 443,** has laid down certain guidelines in this regard. The Apex Court after discussing the entire law and dealing with the presumption like the one raised in the present Act, held as follows:

> *37. It is fairly evident that the presumption is rebuttable in nature; for it holds good only till the contrary is not proved by the dealer. The question is what is the standard of proof required to rebut the statutory presumption and whether the Market Committee, the Director or the High Court applied the correct legal standard for holding that the presumption was not effectively rebutted.*
>
> *38. Relying upon the decision of this Court in Sodhi Transport*

Co & Ors. v. State of U.P. & Ors. (1986) 2 SCC 486, Mr. Sudhir Chandra contended that the standard of proof applicable was that applied in civil actions which are decided on the preponderance of probability and not the higher standard of "proof beyond reasonable doubt" applied in criminal cases. The appellants had according to the learned counsel discharged the burden of rebutting the presumption by adducing evidence which tended to show that the ghee manufactured by them had not been sold within the market area to attract the levy of market fee on the price thereof. He urged that the produce had been removed out of the market area on transfer of stock basis without any element of sale in such transfers. Reliance was in support placed by Mr. Chandra upon an agreement which Heinz had executed with its Clearing and Forwarding (C&F) Agent in the State of Rajasthan apart from other material adduced before the Market Committee, in a bid to prove that the stocks in question had not been sold within the market area.

20. After discussing the contention of the parties, the Apex Court went on to hold as follows:

56. Mr. Chandra, however, laid considerable emphasis on the words "tending to show that the real fact is not as presumed", to argue that the test applied by this Court in rebuttable presumptions had been the test of 'preponderance of probability'. We do not think so. It is well-settled that a decision is an authority for the point it decides. It is equally well-settled that the text of the decision cannot be read as if it were a statute. That apart the expression used by this Court is "evidence fairly and reasonably tending to show", which signifies that it is not just any evidence, howsoever shaky and nebulous that would satisfy the test of preponderance of probability to rebut the statutory presumption but evidence that can by proper and judicial application of mind be said to be fairly and reasonably showing that the real fact is not as presumed. In other words the evidence required to rebut a statutory presumption ought to be clear and convincing, no matter the degree of proof may not be as high as proving the fact to the contrary beyond a reasonable doubt.

57. The heightened standard of proof required to rebut a presumption raised under the statute at hand is in our view applicable for two distinct reasons. The first and foremost is that the presumption is raised in relation to a fiscal statute. While the amount payable is not a tax it is nevertheless a statutory levy which is attracted the moment the transaction of sale takes place within the market area. Goods, admittedly produced within the market area and not consumed within such area are

presumed to be leaving pursuant to a transaction of sale unless the contrary is proved. That the goods are produced within the market area is not in dispute in the instant case. That they left the market area is also admitted. In the ordinary course, therefore, the presumption would be that the goods left pursuant to a sale unless the appellants are in a position to prove the contrary.

58. The second reason for applying a higher standard of proof than mere preponderance of probability is that the nature of transaction pursuant to which the goods are removed from the market area is within the exclusive knowledge of the appellants or the persons to whom such goods are being dispatched. In other words, the circumstances in which the transactions, which the statute presumes to be sales, but which the appellants claim are simple transfer of stocks are within the exclusive knowledge of the appellants. The entire evidence relevant to the transactions, being available only with the appellants and the true nature of the transactions being within their special knowledge, there is no reason why the rebuttal evidence should not satisfy the higher standard of proof and clearly and convincingly establish that the fact presumed is not the actual fact. Our answer to Question No.2 accordingly is that the evidence intended to rebut the statutory presumption under Section 17 of the Adhiniyam ought to be clear and convincing evidence showing that what is presumed under the provision is not the real fact.

21. The Assessing Authority did not have the benefit of the law as laid down by the Apex Court. The Assessing Authority straightaway came to the conclusion that stock transfers amount to sale on account of the presumption raised under the Rule. The presumption is rebuttable as held by us above and therefore, we are of the considered view that the matter must be remanded back to the Assessing Authority to be decided afresh. After the Assessing Authority considers the entire evidence and the law on the point, the Assessing Authority shall have to deal with each and every transaction and come to a conclusion whether it is a stock transfer or not. He shall have to give reasons for every transfer and only thereafter can he make assessment. Both the parties will have to be given an opportunity to lead evidence to prove their respective cases in accordance with law laid down in **Krishi Utpadan Mandi Samiti, Ghaziabad and another versus Metal Craft and others, (2008) 7 Supreme Court Cases 780,** and **Heinz India Private Limited and another versus State of Uttar Pradesh and others, (2012) 5 Supreme Court Cases 443.**

22. The next issue strenuously argued by Mr. R.L. Sood, learned Senior Counsel appearing for the petitioners, was with regard to the validity of the Rules, especially Rule 80 (7) of the Rules of 1971.

23. Rules 80 (7) and 80 (8) of the 1971 Rules read as follows:

"80. Levy and collection of fees on the sale and purchase of agricultural produce -

.....

(7) ***For the purpose of this rule, agricultural produce shall be deemed to have been bought or sold in a notified market area:***

(i) if the agreement of sale or purchase thereof is entered into the said area; or

(ii) if in pursuance of the agreement of sale or purchase, the agricultural produce is weighed in the said area; and

(iii) if in pursuance of the agreement of sale or purchase, the agricultural produce is delivered in the said area to the purchaser or to some other person on behalf of the purchaser.

(8) ***If in the case of any transaction, any two or more of the acts mentioned in sub-rule (7) have been performed within the boundaries of two or more notified market areas, the market fee shall be payable to the Committee within whose jurisdiction the agricultural produce has been weighed in pursuance of the agreement of sale or, if no such weighment has taken place, to the Committee within whose jurisdiction the agricultural produce is delivered."***

24. One of the grounds for challenging these rules was that the same had not been placed before the Legislative Assembly as required under the Act, but when the matter was being heard, it was fairly admitted by Mr. R.L. Sood, learned Senior Counsel, that the rules were placed before the Legislative Assembly. An Assembly Bulletin was produced before this Court and placed on record which clearly shows that the rules had been produced before the Legislative Assembly and approved by it on 14.08.1974.

25. It would also be pertinent to mention that in the writ petition there is no challenge to Rule 80 (7) of the 1971 Rules. Faced with this situation, Mr. R.L. Sood, learned Senior Counsel, submitted that Rule 80 (7) must be read down to include actual sale transactions alone and merely because the goods were taken outside the market area would not be sufficient to hold that a sale transaction has taken place. The Act only lays down that market fee is leviable on sale. The Rule goes on to State that the agricultural produce shall be deemed to have been bought or sold in the notified market area if it is weighed in the area, or if in pursuance of the agreement of the sale and purchase, the agricultural produce is delivered within the market committee area.

26. There is no manner of doubt that these Rules travel beyond the scope of the Act. Section 21 of the Act only permits the Market Committee to levy market fee on sale or purchase of the specified agricultural produce in the notified market area. It is also essential that there should be actual delivery of goods. Rule 80 (7), however, raises a presumption that the agricultural produce shall be deemed to have been bought or sold in the market area if the agreement of sale or purchase is

entered into within the market area or if in pursuance of an agreement of sale the agricultural produce is weighed in the area or if in pursuance of the agreement to sale, the agricultural produce is delivered in the area. This presumption only is that even in case of an agreement of sale, if there is delivery or weighment of goods or if the agreement is entered into within the market area, the same shall be deemed to be a sale, even though the property in goods may not have been illegally transferred.

27. To this extent, the Rules do travel beyond the scope of the Act. At the same time, we cannot lose sight of the fact that Section 33 of the Act of 1969 empowers the State Government to make rules consistent with the Act to carry out the purposes of the Act. The Rules framed under this Section have to be placed before the Legislative Assembly. The Rule in question, though it does travel beyond the scope of Section 21, is one which is made out for carrying out the purposes of the Act. The Rule also envisages that an agreement of sale must be there. Sometimes the sale may not actually conclude in the market area and therefore, to meet such a situation, the Rule was framed. This Rule was placed before the Assembly and approved by it. The body which framed the Act and the body which approved the Rules are one and the same. Therefore, we are of the opinion that the Rule has become a part of the Statue and is, therefore, a legal and valid Rule. The challenge to the said Rule is without any merit and is accordingly rejected.

28. Once we have held the Rule to be valid, it does not mean that merely because the goods are weighed or an agreement is made within the jurisdiction of the Market Committee, every transaction must be a sale. If the goods are weighed and transferred as stock transfers from the works of the company to its branches or head office without any other reason, they would still not amount to a sale. The Rule only raises a presumption. The Assessing Act always rebut the presumption and show that though the goods were weighed or transferred out of the market area, the same is only a stock transfer and not a sale.

29. Mr. R.L. Sood, learned Senior Counsel appearing for the petitioners, submits that it is only *katha* which is included in the Schedule to the Act as Item No. 13. The English name is shown as *Catechu* and the Hindi name is *katha*. According to him, *khairwood* and *katha* are totally different items and the Assessing Officer has wrongly held the petitioner-company liable to pay market fee on the *khairwood* purchase or sale by it in the market area.

30. Mr. E.C. Aggarwala, learned counsel for the respondents, strenuously urged that *khairwood* and *katha* are one and the same thing and market fees can be levied on the sale and purchase of *khairwood* by the petitioner-company. Admittedly, the petitioner buys *khairwood* at various places in Himachal Pradesh and if the contention of Mr. Aggarwala is to be accepted then it would be liable to pay market fees on the sale of *khairwood*.

31. Both the parties have placed reliance on the judgment of the Apex Court in **Himachal Pradesh marketing Board and others versus** Shankar Trading Co. Pvt. Ltd. and others, (1997) 2 Supreme Court Cases **496.** The Apex Court held as follows:

> *"21. "Katha" has been included as an agricultural produce by the amendment of the Schedule to the Marketing Act on 2-3-1987. If a*

farmer growing "khairwood" in his farm undertakes the manufacturing processes as indicated by the writ petitioners and obtains the end product "katha" and then stores the same for selling within the specified market under the Marketing Act and ultimately sells the katha, there would have been no necessity for such farmer to obtain licence for such storing and selling katha."

It is only katha which is the specified produce. The question is does it include *khairwood*?

32. The Apex Court went on to hold as follows:

22. Under the scheme of the Marketing Act, it is only the actual producer of an "agricultural produce", obtained by various activities of agriculture, horticulture etc. as indicated in Section 2(a) of the Marketing Act, who is exempted from the requirement of obtaining a licence for processing or storing his "agricultural produce" in a place within the specified market. Such producer is also not liable to pay levy under Section 21 of the Marketing Act if he sells the "agricultural produce" since grown or reared by him after processing. Although "katha" has been specified as an "agricultural produce" after the amendment of the Schedule to the Marketing Act, the writ petitioners are not producing the said agricultural produce namely katha by processing the agricultural produce grown by them in their farm. They, in fact, are purchasing khairwood, an agricultural produce grown by others, and then subject such khairwood to various physical and chemical processes for obtaining an end product "katha"

23. Some "agricultural produce" which is obtained in its natural form requires processing for being used as an item for consumption. Such processing may, in some case, be quite simple e.g. pulses from the grains. Income case, a delicate processing is required entailing some physical and chemical processing e.g. hide from the raw skin of an animal.

24. Under the scheme of the Marketing Act, which is primarily intended to benefit the actual growers of "agricultural produce", the producer or grower of "agricultural produce", even when required to undertake some processing whether simple or otherwise, of the natural "agricultural produce" to make its consumption worthy, does not cease to be a producer of the "agricultural produce" because the natural produce even after being subjected to processing, remains "agricultural produce" within the meaning of Section 2(a) of the Marketing Act. That apart, the definition of "producer" under Section 2(h) has taken care of such processing activity. So far as "katha" is concerned, it is a scheduled agricultural produce. It will, therefore, be immaterial if for obtaining katha from natural agricultural produce as grown in the farm namely khairwood, some detailed and delicate manufacturing processes are to be undertaken. In our view, in view of inclusion of "katha" as a specified agricultural produce, there is no scope to contend, that

katha is not such an agricultural produce which may be obtained from the khairwood after some processing as commonly understood, but katha can be obtained by subjecting the natural produce khairwood to a series of delicate physical and chemical processing and the end product "katha" has not only a distinct identity but has also physical characteristic and chemical composition, different from khairwood so that a farmer producing katha from khairwood grown by him does not get the benefit which a farmer or grower would have otherwise got under the Marketing Act. The fine distinction between simple processing to make natural agricultural produce fit for consumption and delicate manufacturing process required for obtaining katha, a completely separate end product as sought to be made by the writ petitioners cannot be accepted because of inclusion of katha in the Schedule.

25. The writ petitioners even though are producing katha, a specified agricultural produce by processing khairwood, a natural product grown in the farm, in our view, cannot claim exemption from the requirement of obtaining a licence under Section 4(3 and payment of levy under Section 21 because they themselves have not grown the khairwood but have purchased the "agricultural produce" khairwood grown by others and then processed the same to obtain katha even though katha itself is a specified agricultural produce."

33. Mr. Aggarwala relies upon the observations made in last lines of para 24 wherein the Apex Court held that the fine distinction sought to be made between simple processing and delicate manufacturing process urged by the company could not come to it's aid and it would have to obtain a license.

34. Mr. Aggarwala has relied upon a lot of material downloaded from the net and otherwise to show that *Catechu or katha* and *khairwood* are the same thing. In our view, this submission is totally ill founded. *Katha or Catechu* is extracted from the wood of the khair tree. The Botanical name of the khair tree is *Acacia,* which is a forest based species and one of the species is *Acacia Catechu.* It is common knowledge that *katha* is not *khairwood* by itself. *Katha* is manufactured from heart wood of the khair or *Acacia* wood which is cut into fine chips and around 8-9 kilograms of chips are kept in wire net cage to avoid direct contact with heated surface of the extractor. These cages with about three times amount of water, I.e. about 27 litres, are placed in extractors and the chips are boiled in water for about three hours. Thereafter, the extract from each extractor is mixed after filtration and then kept in the shade and finally *katha* crystallizes. After the material has completely crystallized, the mass is passed through manual filter press and washed in cold water to improve its quality. Then the substance is placed on wooden frames and provided with canvas cloth to separate traces of *cutch.* Thereafter, the *katha* is ready to be cut.

35. A number of precedents have been cited but we are not going to discuss each of them since we are clearly of the view that *katha* and *khairwood* are not one and same thing. Katha is an entirely different end product which is

produced when the heart wood of the *khair* tree is processed as detailed hereinabove.

36. We need not multiply the authorities because the Apex Court in **Civil Appeal No. 2396 of 2002,** titled **Chhotanagpur Rope Works versus State of Bihar and another, decided on 20.07.*2010,*** *has settled the law. It held as follows:*

> *"The short question that arises in these cases is whether "jute rope" or "jute core rope" is "agricultural produce" within the meaning of the definition of "agricultural produce" under Section 2 (1) (a) of the Bihar Agricultural Produce Markets Act, 1960 (Act XVI of 1960) (hereinafter referred to as 'the Act'). By reversing the findings of the learned single Judge, the Division Bench of the High Court has held that "jute rope" or "jute core rope" is "agricultural produce".*
>
> > *We are of the opinion that the judgment of the Division Bench of the High Court cannot be sustained. Initially, Section 2 (1) (a) of the Act defined "agricultural produce" in the following terms:-*
> >
> > *"Section 2(1)(a): "agricultural produce" includes all produce, whether processed or non-processed of agriculture, horticulture, animal husbandry and forest specified in the Schedule."*
>
> *Subsequently, in the year 1982, that definition of "agricultural produce" was substituted by the following definition:*
>
> > *"Agricultural produce" means produce whether processed or non-processed, manufactured or not, of Agriculture, Horticulture, Plantation, Animal Husbandry, Forest, Sericulture, Pisci-culture (includes live stock or poultry) as specified in the Schedule."*
>
> *We are of the view that both under the initial definition and in the amended definition also, it is necessary for a commodity to be in the Schedule to the Act if it is to be included within the definition of "agricultural produce".*
>
> We may note that item VII (Fibres) of the Schedule to the Act, among other items, mentions "Jute", "Gunny Bags" and "Sutli". Gunny bag is an item which is the result of manufacture and it does not, by itself, grow on the agriculture field. Thus, even those agriculture produce which are the result of manufacture which were sought to be brought within the definition of "agricultural produce" by legal fiction were placed in the Schedule to the Act. It follows that manufactured or processed items which are not in the Schedule to the Act are not to be treated as "agricultural produce" for the purposes of the Act.
>
> *Mr. S.B. Sanyal, the learned Senior Advocate appearing for respondent No. 2 herein, submits that in the new definition of "agriculture produce" the words "as specified in the Schedule" govern only the words "live stock or poultry". With respect, we do*

not agree with this contention. We are of the opinion that they cover the entire items mentioned in the definition of "agriculture produce".

Mr. Sanyal further submits that "Sutli" is a "rope". We are not inclined to agree. "Rope" is a thick article, whereas "Sutli" is very thin. Thus, we reject that contention urged by Mr. Sanyal."

37. The Apex Court in the case before it held that there is a difference between *Sutli* which is thin and *rope* which is thick. Both were manufactured out of *Jute,* but since *Sutli* was not included in the Schedule, the Apex Court held that market fee could not be levied upon it.

38. Applying the same principle, though in a converse manner, we are clearly of the view that *katha* and *khairwood* cannot be equated and held to be the same thing since *khairwood* can never be called *katha*. Khair is only a piece of wood and after it goes through a complex procedure of manufacture, is *katha* extracted from it.

39. We may, at this stage, point out that it has been strenuously urged before us that no penalty could be levied and there is no power to levy penalty under the Rules. In view of the fact that we are remanding the case, we do not feel that it would be appropriate to decide this question at this stage. However, we would like to make it absolutely clear that in the present case, the Assessing Officer acted in a high handed and arbitrary manner while levying the penalty. He passed orders on 14.05.2007, issued notice for imposition of penalty on the same date and penalty was imposed on the next date itself, i.e. 15.05.2007. In our opinion, when show cause notice has to be given, that must be of a reasonable period and the party to whom such notice has been given must have reasonable opportunity to put forth its case. Therefore, the imposition of penalty is illegal. But we make it clear that we have not decided the question whether penalty can be imposed or not and it shall be open to the petitioner to raise this issue before the Assessing Officer and subsequent proceedings, if any.

40. Some other issues with regard to limitation and reopening of certain assessments which, according to the petitioner-company, could not be reopened have been raised. Since we are remanding the case, we are not deciding these issues and the petitioner-company shall be free to raise these issues before the Assessing Authority.

41. We, therefore, partly allow the writ petition and quash the impugned orders of the Assessing Officer assessing the market fee as well as the penalty. We also hold that the finding of the Assessing Officer that *khairwood* falls within the scope of the entry *katha* is totally illegal and no market fee can be levied on *khairwood.*

42. Having set aside the assessing orders and the order of penalty, we remand the matter to the Assessing Officer, who shall now consider the same in line of the judgment of the **Apex Court in Krishi Utpadan Mandi Samiti, Ghaziabad and another versus Metal Craft and others, (2008) 7 Supreme Court Cases 780,** and **Heinz India Private Limited and another versus State of Uttar Pradesh and others, (2012) 5 Supreme Court Cases 443**. The Assessing Authority shall have to decide whether the transactions in question are mere stock transfers or sales to third parties.

43. The parties are directed to appear before the Secretary of the Market Committee on **25th February, 2013,** and the Secretary, Market Committee shall hear the case on day to day basis and dispose of the same latest by **31st May, 2013.** In view of the fact that we have set aside the order of assessment, the FDRs pledged by the petitioner-company are ordered to be returned to it.

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BEFORE HON'BLE MR. JUSTICE SURINDER SINGH, J.

Hardev Singh, Son of Sh. Fauja Singh & Ors. .....Appellants

Vs.

State of Himachal Pradesh .....Respondent

Cr. Appeal No. 6 of 2007
Decided on : 25th February, 2013.

N.D.P.S. Act, 1985- Section 15- Accused was transporting 1500 grams of poppy husk- he was tried and convicted by the Trial Court- held in appeal that report of FSL shows that tests were conducted for meconic acid and morphine- both tests were found positive- poppy husk has not been defined in the Act but poppy straw has been defined- opium poppy means all plants except seeds of plant of the species of papaver somniferm-L or a plant of any other species of papaver from which the opium or any other phenanthrene alkaloid can be extracted and which the Central Government by notification in the Official Gazette has declared to be opium poppy for the purpose of the Act- no tests were conducted to determine the presence of the plant of the species of papaver from which opium or any phenanthrene alkaloid can be extracted and which the Central Government by notification has declared to be opium poppy for the purposes of the Act- hence, report does not prove that the accused was found in possession of opium poppy or poppy straw- appeal allowed- judgment of the Trial Court set aside- accused acquitted. (Para-7 to 11)

Case referred:
Rajiv Kumar @ Guglu *versus* State of H.P. 2008 (1) Shim.LC168

For the Appellants :	Mr. Praveen Chandel,Advocate vice Mr. R.L. Chaudhary, Advocate.
For the Respondent:	M/s V.K. Verma and H.K.S.Thakur, Additional Advocates General.

The following judgment of the Court was delivered:

Surinder Singh, Judge (Oral)

Heard and gone through the record. The appellants were convicted for the offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985, in short the "***Act***", for allegedly transporting 1500 grams of

"**poppy husk"** in Maruti Car No. PB-11 H-0427 and each of them was sentenced to undergo rigorous imprisonment for one year and to pay a fine of ` 10,000/- each and in case of default of payment of fine, they were sentenced to further undergo imprisonment for one month.

2. The appeal was admitted for hearing on 10.1.2007. The sentence imposed on the appellants, hereinafter referred to as **"the accused",** was suspended vide order dated 2.2.2007.

3. In short, the prosecution story can be stated thus. In the year 2002, PW-1 Head Constable Ghanshyam was posted in Police Station, Sarkaghat. On 5.7.2002 at Kainchi Mod (Bhambla) at about 2.30 p.m., the above stated white coloured maruti car came from Mandi side. It was signaled to spot, but however, driver Baldev Singh (absconding accused) did not stop and sped away the vehicle. In the meantime, a taxi jeep bearing No. HP-01-8485 came from Jahu side. It was being driven by PW-2 Manoj Kumar. PW-1 Head Constable Ghanshyam took lift in that vehicle and chased the maruti car which was intercepted at some distance. Co-accused Surjit was sitting besides the driver, whereas co-accused Hardev was on the rear seat.

(ii) PW-1 Head Constable Ghanshyam aforesaid demanded the documents of the vehicle, but the driver failed to produce the same. Even, he was not having his driving licence. Thereafter, Head Constable Ghanshyam casually checked the vehicle and recovered a gunny bag lying in the dickey of the car, containing 1500 grams of **'Poppy Husk'**. The car aforesaid was taken to Police Station, Sarkaghat. On the statement of Ghansyam Ext. PA recorded under Section 154 Cr.PC, a formal FIR Ext. PK was registered.

(iii) PW-8 SHO Ashish Sharma, conducted further search of the maruti car, but no other incriminating article was found therein. The alleged recovered contraband was weighed and two samples of 100 grams each were separated and sealed with seal impression 'H'. The remaining bulk was also sealed with the same seal . The NCB forms in triplicate, one of which is Ext. PJ, were filled in. The impressions of the seal were taken on a piece of cloth. The seal after use was handed over to PW-2 Manoj Kumar. The case property was taken into possession vide seizure memo Ext. PB in the presence of PW-7, another Manoj Kumar, S/o Shri Surat Ram. The car aforesaid was taken into possession vide memo Ext. PC. All the three accused persons were arrested. Grounds of arrest were informed to each of them in writing.

(iv) The case property was deposited in the **'Malkhana'** for the safe custody and one of the samples so taken, was sent for its examination alongwith NCB forms, copies of seizure memo and FIR through PW-6 Constable Suresh Kuamar to CTL Kandaghat vide R.C. No. 28/2002 which were deposited on the same day and receipt was obtained on the RC which was further handed over on his return to MHC PW-3 Jaspal.

(v) On analysis, the report Ext. PO on the reverse side of NCB form

Ext. PJ, was issued and the Chemical Examiner was of the opinion that the exhibit contains the contents of "**Poppy Husk"** on the basis of qualitative and quantative tests qua meconic acid and morphine which were found positive.

(vi) The statements of the witnesses were recorded.

4. After completing investigation, the challan was presented in the Court for trial of the accused persons. All the three accused persons were granted bail by this Court. They were charge- sheeted for the offence punishable under Section 15 of the Act and also under the Motor Vehicles Act. The accused persons aforesaid pleaded not guilty and claimed trial.

5. To prove its case, the prosecution examined its witnesses. The accused persons were also examined under Section 313 of the Code of Criminal Procedure. Their case was of total denial. According to accused Baldev Singh (absconding accused), he had stopped the car on the signal given by the police officer and the documents of his vehicle were checked. It took about ½ hour, but denied the recovery of any contraband. The other accused persons also pleaded the same case. Thereafter, the case was fixed for defence evidence. Accused Baldev Singh had absconded. Despite various opportunities given by the learned trial Court, he was not traceable, as such, vide order dated 19.10.2006, he was declared proclaimed offender. At the end of the trial, the accused persons i.e. the appellants were held guilty and convicted and sentenced, as aforesaid, hence, the present appeal.

6. I have re-examined the evidence on record and found that though recovery of some article was affected by PW-1 Head Constable Ghanshyam from the vehicle, which was being driven by accused Baldev Singh and the other co- accused were traveling in the said vehicle, but before the accused persons could have held guilty for the offence charged, it is incumbent upon the prosecution to prove that it was a contraband falling within the ambit of the Act aforesaid.

7. The accused persons were charged for the offence under Section 15 of the Act for allegedly transporting 1500 grams of '**Poppy Husk'**. Report Ext. PO reveals that two tests were conducted in the laboratory, one was for meconic acid and the other for morphine. Both were found positive. On these findings, the chemical examiner was of the opinion that the exhibit contained the contents of "**Poppy Husk"**

8. **"Poppy Husk"** has not been defined under the Act, whereas Section 2(xviii) of the Act defines "**Poppy Straw"** which means all parts (except the seeds) of the opium poppy after harvesting whether in their original form or cut, crushed or powdered and whether or not juice has been extracted therefrom. As per Section (xvii) "Opium poppy" means-(a) The plant of the species papaver somniferum L; and (b) The plant of any other species of papaver from which opium or any phenanthrene alkaloid call be extracted and which the Central Government may, be notification in the Official Gazette, declare to be opium poppy for the purposes of this Act.

9. To understand the meaning of "poppy straw" it is essential to refer to the meaning of "opium poppy" and "poppy straw", as stated above. When read with the definition, "opium poppy" means (a) all parts (except seeds) of the plant of the species of papaver somniferm-L or a plant of any other species of papaver from which the opium or any other phenanthrene alkaloid can be extracted and which the Central

Government by notification in the Official Gazette has declared to be opium poppy for the purposes of this Act.

10. In the instant case, only qualitative and quantative tests were undertaken and the chemical examiner on the basis of the presence of meconic acid and morphine opined the sample to be that of "poppy husk". This does not indicate that the stuff examined consists of the parts of either of the plant of species of papaver from which opium or any phenanthrene alkaloid can be extracted and which the Central Government by notification in the Official Gazette, had declared it to be "opium poppy" for the purposes of this Act. If it is so, report of the chemical examiner Ext. PO that the stuff contains the contents of "poppy husk" which term is similar to the term "poppy straw" cannot be used as enough evidence to hold that the stuff recovered from the accused persons which was analyzed by the chemical examiner was that of "poppy straw", as held by the Division Bench of this Court in **Rajiv Kumar @ Guglu *versus* State of H.P. 2008 (1) Shim.LC168**.

11. Thus, for the reasons aforesaid, I find that the prosecution had failed to prove the alleged recovery falling within the definition of either of "**Opium Poppy"** or "**Poppy Straw".** Therefore, the impugned judgment of conviction and sentence deserves and is accordingly set aside. In the result, the appeal is dismissed. Consequently, the accused persons stand acquitted by giving them the benefit of doubt. The bail bonds entered upon by them at any time during the proceedings of the case are hereby discharged. The fine amount, if any deposited, be refunded to them.

12. Send down the records.

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BEFORE HON'BLE MR. JUSTICE SURINDER SINGH, J.

Pyare Lal s/o Shri Lachhman Dass, R/o VPO Sainj, Tehsil Sunni, District Shimla, H.P. (since deceased) ..... Appellants.

Versus

Sansar Chand Sahani, s/o Sh. Narain Dass & Ors. ..... Respondents.

FAO (MVA) No.238 of 2009.
Date of Decision: 25.2.2013.

Motor Vehicles Act, 1988- Section 166- MACT awarded compensation of Rs.25,000/- for the damage caused to his building by the fall of the truck on the kitchen and upper portion of the building- petitioner filed the present appeal seeking enhancement of compensation - held that it was not disputed that truck had fallen on the roof and kitchen of the building of the petitioner causing damage to the property- petitioner stated that he had suffered loss of Rs. 1,50,000/- - PW-3 prepared the report, however, he has not specified that he was competent to assess and value the damaged structure -simply because, he retired as an Executive Engineer would not mean that he falls within the definition of expert -petitioner has not produced the receipt of the material or the details of the money spent by him for repair- Tribunal had rightly awarded the compensation of Rs.25,000/- - appeal dismissed. (Para-6 to 9)

For the Appellants : Mr. Sanjeev Prashar, Advocate, vice Mr. Y.P. Sood, Advocate.
For the Respondents: None for respondent No.1.
Respondent No.2 ex parte.
Mr. B.M. Chauhan, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Surinder Singh, J (oral).

Late Shri Pyare Lal felt aggrieved by the award passed by learned Motor Accident Claims Tribunal in M.A.C. No.87-S/2 of 2005/03, decided on 16.2.2009, whereby he was awarded an amount of Rs.25,000/- as compensation for the damage caused to his building on 25.2.1999, as Truck No.HP-51-0409 had fallen on the upper storey of the building causing damage to the roof and kitchen. Thus, by means of the present appeal, he sought enhancement.

2. During the pendency of this appeal, Pyare Lal had expired and his legal representatives were brought on record vide order dated 5.7.2012.

3. Sh. Sanjeev Prasher, learned counsel appearing for the appellants forcefully argued that the claimant had examined an expert who had given his report Ext.PW3/A with respect to the damage to the tune of Rs.1,50,000/-, caused to his building due to accident, but the learned trial Tribunal conveniently ignored it without any rhyme and reason and wrongly assessed the compensation to the tune of Rs.25,000/-. It is further argued that the learned Tribunal wrongly held that no labourer or mason was examined nor any photograph of damaged portion was placed on record. According to him, there has been mis-appreciation and misinterpretation of evidence and other materials on record. It is also submitted that the loss to the building was even more than assessed by the expert, but the learned Tribunal did not consider the evidence in the right perspective.

4. On the other hand, Shri Brij Mohan Chauhan, learned counsel for respondent-New India Assurance Company supported the impugned award and vehemently argued that PW3 Shiv Saran Dass did not conform to the requirement of an expert nor so testified and also submitted that he had inspected the spot much after the alleged incident, i.e. in the month of June, 1999. Also according to him, the expert had nowhere stated in his report about the damage to the tune of Rs.1,50,000/-, but report only mentions about the damage to the extent of 200 square feet valuing about Rs.45,680/- which fact can also not be taken into consideration as the claimant has failed to produce the Mason or Carpenter who has worked to repair his house or any receipt of the material used therein.

5. I have given my thoughtful consideration to the rival contentions of the parties and have gone through the evidence on record.

6. It is an admitted fact that the truck aforesaid had fallen on the roof of the building and kitchen of the deceased appellant, causing some damage to his property. To substantiate the plea of damage, the deceased-claimant had stepped into witness box as PW4 and stated that the damage, which was caused to the said property was to the tune of Rs.1,50,000/-. To lend strength his version, he examined PW3 Shiv Saran Dass, a retired Executive Engineer, who had assessed the damage caused vide assessment report Ext.PW3/A. PW3 stated that when he visited the spot, he noticed

the damage to the kitchen and the roof of the house and prepared the report applying the rates of plinth area, but significantly, he also stated that on his visit to the spot, the house was already repaired, but the kitchen was in the same condition and no repair was being undertaken, however the material was lying besides it. Accordingly, he prepared the report as desired by the claimant.

7. The claimant did not produce any receipt of the material purchased by him nor he had produced and proved on record how much money was spent by him and who was the labourer employed for the repair of his house, except his own self serving statement, which is not supported by any document. Even PW3 Shiv Saran Dass, who claims himself to be a retired Executive Engineer from Himachal Pradesh Public Works Department did not say anywhere that he was a competent person to assess and value the damaged structure falling within the category of an expert.

8. According to the provisions contained in Section 45 of the Indian Evidence Act, when the Court has to form an opinion, inter-alia about any question of science or art etc, then opinion of the expert in the aforesaid field is relevant and is admissible in evidence, but before his evidence can be taken into consideration, it is necessary to take into account some technical aspects like that the person so deposing must be competent and is an expert in such technical field. Under this section an expert witness should necessarily be specialised of technical subjects meant for adjudication of Court. In other words, the expert witness means such person who has acquired special knowledge in science, art, trade or business and who has special knowledge about market value of lands etc. Unless he deposes or proves to be an expert in the field aforesaid or had studied to a special branch of learning and is specially skilled on those points on which he is asked to state his opinion, his evidence cannot be accepted unless he qualifies such basic requirement. Merely that he retired as Executive Engineer as stated in his address would not mean that he conforms to the requirement of Section 45 of the Act. Therefore, in absence of it, he cannot be said to be an expert witness on the subject and his report is nothing, but a waste paper.

9. Though I have examined the evidence as well as issue-wise findings of the learned Tribunal, but I do not find any illegality therein in awarding the amount of Rs.25,000/- as compensation with interest as contained in the relief clause, as such, the appeal is devoid of any merit, hence dismissed, so also the pending application(s), if any. Send down the records of the learned Tribunal forthwith.

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BEFORE HON'BLE MR. JUSTICE V.K. SHARMA, J.

Shri Dharma Nand, son of Shri Bijlu Ram ..Petitioner.

Versus

Himachal Pradesh Financial Corporation, through its Managing Director, New HIMRUS Building, Circular Road, Shimla 171001, H.P. & Ors. ..Respondents.

CWP No.3671 of 2010-D
Date of decision: 27.2.2013

Constitution of India, 1950- Article 226- Petitioner was appointed as a Junior Clerk- he was promoted to the post of Senior Assistant- he was entitled for the higher pay scale after the completion of seven years- he and respondent No.11 were considered for the post but petitioner was not found suitable by the Departmental Promotion Committee- his case was again considered with respondent No.12 but again he was not found suitable- he filed a writ petition challenging the promotion of respondents No. 11 and 12- Department filed a reply stating that the overall assessment of the petitioner was average and therefore, he was found unfit- held that the entries in the ACRs were fair/average – they contained advisory and adverse remarks but these were not communicated to the petitioner – an uncommunicated ACR cannot be relied for ignoring the petitioner for grant of higher pay scale- petition allowed – direction issued to the respondents No.1 and 2 to re-consider the case of the petitioner for the grant of higher pay scale on the basis of overall service record ignoring the uncommunicated ACRs.

(Para-5 to 11)

Cases referred:

Dev Dutt vs. Union of India and others (2008) 8 Supreme Court Cases 725

Abhijit Ghosh Dastidar vs. Union of India and others (2009) 16 Supreme Court Cases 146

S.B. Bhattacharjee vs. S.D. Majumdar and others (2007) 10 Supreme Court Cases 513

Union of India and another vs. S.K. Goel and others (2007) 14 Supreme Court Cases 641

Hardev Singh vs. Union of India and another (2011) 10 Supreme Court Cases 121

Om Parkash, Conductor vs. State of Haryana and others 2006 (3) SLR 46

For the petitioner:	Mr. C.N. Singh, Advocate.
For the respondents:	Mr. Ashwani K. Sharma, Advocate, for respondents No.1 to 10.

The following judgment of the Court was delivered:

V.K. Sharma, J. *(Oral).*

The petitioner, who had joined the employment of respondent No.1-Corporation as Junior Clerk way back in the year 1992, was promoted as Junior Assistant in 1997 and thereafter as Senior Assistant on 11.6.2002 and was confirmed as such on 30.7.2003 in the pay scale of Rs.5800-9200. Thereafter, on completion of seven years of service as Senior Assistant to be reckoned from 11.6.2002, he was entitled for the higher pay scale of Rs.6400-10640 subject to his suitability for the post. Accordingly, he along with private respondent No.11 was considered for the said post, but on appraisal of his Annual Confidential Reports (ACRs) for the period 2004-05 to 2008-09, he was not found suitable by the Departmental Promotion Committee (DPC), which met on 15.7.2009. Thereafter, he was again considered along with private respondent No.12 by the DPC in its meeting held on 18.11.2009, but met the same fate.

2. Being aggrieved, the petitioner has filed the present petition on the following substantive prayers:-

"i) Issue writ of certiorari, mandamus or any other appropriate writ order or directions quashing the order dated 28th July, 2009 i.e. Annexure P-7 whereby the junior person Shri Nand Lal (respondent No.11) & later DPC's recommendation dated 18.11.2009 by which respondent No.12 has been recommended for the grant of time scale promotion on the post of Senior Assistant in Grade-I scale of Rs.6400-10640 over and above the petitioner.

ii) Issue writ of certiorari, mandamus or any other appropriate writ order or directions quashing the order dated 15th September, 2009 i.e. Annexure P-10 whereby the representation of the petitioner dt. 19th August, 2009 have been rejected.

iii) Issue writ of mandamus directing the respondent to call review Departmental Promotion Committee and consider the case of the petitioner for the grant of time scale promotion on the post of Senior Assistant in Grade-I scale of Rs.6400- 10640 from the due date, without considering the un-communicated adverse entries made in his ACRs or all intents and purposes."

3. The petition is opposed on behalf of respondents No.1 and 2 mainly on the ground that "to adjudge the suitability, the DPC follows the same procedure as is followed for the promotion of an employee to higher post. The suitability is assessed on the basis of gradation of Annual Confidential Reports (ACRs) of concerned employee for the last five years and he is classified separately for each year as **'Outstanding'**, **'Very Good'**, **'Good'** and **'Fair/Average'**. Each type of assessment carries 5, 4, 3 and 2 marks. Thereafter average marks are worked out by dividing the total marks by the same number of years for which confidential reports are considered. The employee who earns less than 2.5 average marks is classified as **'Unfit'**." It is further stated that the overall assessment of four ACRs of the petitioner considered by the DPC were 'Fair' and in fifth ACR, the overall assessment was 'Average', meaning thereby that the overall average earned by the petitioner was less than 2.5%. Since as per the relevant instructions, the said ACRs were not adverse, those were not required to be communicated to the petitioner. Therefore, the representation dated 19.11.2009 submitted by the petitioner for the expunction of adverse remarks was not required to be considered.

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

5. By placing reliance upon the law laid down by the Hon'ble Supreme Court in ***Dev Dutt vs. Union of India and others*** (2008) 8 Supreme Court Cases 725 (paras 10 & 13) and ***Abhijit Ghosh Dastidar vs. Union of India and others*** (2009) 16 Supreme Court Cases 146 (paras 5, 8 & 9), it is submitted on behalf of the petitioner that the ACRs on the basis of which he was allegedly not found suitable were never communicated to him and as such the same could not have been made basis for ignoring him for grant of the higher pay scale.

6. Per contra, it is contended on behalf of the respondent-Corporation that the settled legal position is that though an employee has a vested legal right for consideration for promotion, yet he cannot claim such promotion as a matter of right. The petitioner, who was not found suitable for grant of the higher pay scale, can have no

grievance in law. In this regard, reliance has been placed on the law laid down by the Hon'ble Supreme Court in ***S.B. Bhattacharjee vs. S.D. Majumdar and others*** (2007) 10 Supreme Court Cases 513 (para 13), ***Union of India and another vs. S.K. Goel and others*** (2007) 14 Supreme Court Cases 641 (Paras 27 & 28), ***Hardev Singh vs. Union of India and another*** (2011) 10 Supreme Court Cases 121 (para 17) and by the Hon'ble Punjab and Haryana High Court in ***Om Parkash, Conductor vs. State of Haryana and others*** 2006 (3) SLR 46 (Para 9).

7. Since admittedly the entries in the ACRs for the relevant period (2004-05 to 2008-09), which are Fair/Average and also contained certain 'Advisory' and 'Adverse' remarks were not communicated to the petitioner and copies of the same (Annexure P.13 colly.) were obtained by him under Right to Information Act, the same could not have been found basis for ignoring the petitioner for grant of the higher pay scale, as has been authoritatively held by the Hon'ble Supreme Court in the case of Dev Dutt (supra), which in turn was further reiterated in the case of Abhijit Ghosh (supra).

8. The record reveals that the petitioner had submitted representation dated 1.4.2010, Annexure P.14, for review of the aforesaid ACRs to the Managing Director of the respondent- Corporation. Vide communication dated 4.6.2010, Annexure P.15, the petitioner was informed that the representation submitted by him was being sent to the Competent Authority for review.

9. However, the learned counsel for the petitioner submits that since the disputed ACRs pertained to the period 2004-05 to 2008-09, no opportunity is left for him to make any improvement in his work and conduct, as these ACRs were never communicated to him and further since in view of the ratio laid down by the Hon'ble Supreme Court in the case of Dev Dutt (supra), these cannot be relied upon to his detriment, it shall be expedient and in the interest of justice that his case for grant of higher pay scale is reconsidered by the respondent-Corporation on the basis of his overall service record including his ACRs for the previous and subsequent period.

10. Once the disputed ACRs for the period 2004-05 to 2008-09, are taken out of consideration as not having been communicated to the petitioner, his case for grant of higher pay scale can be considered only on the basis of his overall service record including his previous and subsequent ACRs and in case the disputed ACRs for the period 2004-05 to 2008-09 are reviewed by the respondent-Corporation, the same can also be taken into consideration.

11. In view of the above, the petition is allowed with a direction to respondents No.1 and 2/Competent Authority to reconsider the case of the petitioner for grant of higher pay scale of Rs.6400-10640 along with designation of Senior Assistant Grade-I on the basis of his overall service record including his ACRs for the previous and subsequent period and in case his ACRs for the disputed period 2004-05 to 2008-09 are also reviewed in the meantime by taking into consideration the same as well, within four months from today, by holding a review DPC and in case he is found suitable, he shall be granted the higher pay scale along with the higher designation from the due date, that is, the date from which his juniors, respondents No.11 and 12, were granted such benefits.

12. The petition, as also pending CMP(s), if any, stand disposed of.

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BEFORE HON'BLE MR. JUSTICE DEV DARSHAN SUD, J.

Amrik Singh alias Bau ....Appellant.
Versus
State of Himachal Pradesh ....Respondent.

Cr. Appeal No. 38 of 2006.
Date of Decision: 28.2.2013.

N.D.P.S. Act, 1985- Section 18(c)- Accused was found in possession of 50 grams of opium- he was tried and convicted by the Trial Court- held in appeal that the option memo does not mention that accused was apprised of his legal right to be searched by the Gazetted Officer or Magistrate- recovery was effected after the personal search and there was no compliance of Section 50 of the N.D.P.S. Act- further, link evidence is missing – sample seal was not produced and facsimile of seal is not legible- appeal allowed and accused acquitted. (Para-2 to 11)

Cases referred:
State of H.P. Vs. Harish Thakur, Latest HLJ 2010 (HP) 1472
Vijaysinh Chandubha Jadeja Vs. State of Gujarat, (2011) 1 SCC 609
Narcotics Control Bureu Vs. Sukh Dev Raj Sodhi, (2011) 6 SCC 392

For the appellant: Mr. Rajiv Jiwan, Advocate.
For respondent: Mr.Ashok Chaudhary, Addl. Advocate General with Mr. R.P.Singh, Asstt. Advocate General.

The following judgment of the Court was delivered:

Dev Darshan Sud, J (Oral).

The appellant challenges his conviction for offences under Section 18(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'ND&PS Act'). He has been sentenced to undergo imprisonment of five years and fine of Rs. 20,000/- and in default to suffer rigorous imprisonment for one year.

2. All the facts are not being considered in detail but only those necessary for adjudication for the points urged in this appeal. Mr.Rajiv Jiwan, learned counsel urges that the provisions of Section 50 of the 'NDPS Act' have not been complied with which fact *per se* entitles the appellant for acquittal (b) that the seal impression 'A' which was affixed on the contraband (opium weighting 50 grams) has not been produced in Court but only the seal sample of the packet after it was re-sealed. No evidence or explanation has been placed on the record as to why the first seal impression 'A' was not produced.

3. On the first point, learned counsel relies upon the Ext. PA to urge that the Investigating Officer has not complied with the provisions of Section 50 of the 'NDPS Act' and this document nowhere states that there is right vested in the appellant to have been searched conducted either by the police officer(s), gazetted officer or a

Magistrate. He also refers to the evidence of PW9 Sh. Nardev Singh, Investigating Officer, who admits in his cross examination that:

> **"Yaha Thik hai ki ish mukadmay kay record may yaha na leekah hai ki doshi ko option datay samay waha apnee talashi kishi rajpatrit adhikari ya magistrate kay pass daay sakta hai jo ushka kanuni adhikar hai yaha thik hai ki aisha furd wa gawahan kay bayan wa report jair dhara 57 of the Act kay bheji hai na leekhi hai."**
>
> **"It is correct that in the record of the case I have not recorded while giving option to the accused to be searched before the Gazetted Officer, Magistrate or Police that he has legal right in this regard. It is correct that this omission is there in the memo, statements of witnesses and report sent U/S 57 of the Act."**

4. Learned counsel submits that there is no evidence on the record to establish the compliance of Section 50 of the 'NDPS Act' and Ext.PA nowhere mentions that the accused has legal right and option to be searched either by the police officials, gazetted officers or a Magistrate. Learned counsel places reliance on the decision of this Court in *State of H.P. Vs. Harish Thakur, Latest HLJ 2010 (HP) 1472,* holding:

> **16. In our considered view, the law is well settled that in respect of personal search mere asking the accused in the presence of witnesses as to whether he wanted to be searched before a Magistrate or a Gazetted Officer or by the police official, is not the compliance of Section 50 of NDPS Act, but the accused must be informed that he has right to be searched. From the documents, we find that no such endeavour was made on the part of PW-9 SI Lal Singh to inform the accused that he has right to be searched. As such, there is non- compliance of Section 50 of the 'NDPS Act'. So much so, merely taking consent of accused to be searched is not sufficient compliance of the provisions of Section 50 of the 'NDPS Act', rather the accused has to be very categorically and specifically be informed about his right to be searched. Such view has also been taken by the Division Bench of this Court in Fateh Singh (supra).** (P.1476)

5. Learned counsel then urges that the Supreme Court in ***Vijaysinh Chandubha Jadeja Vs. State of Gujarat, (2011) 1 SCC 609*** holds:

> **"29. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and**

requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.

30. As observed in Re: Presidential Poll, (1974) 2 SCC 33: "13.....it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. "The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole."

31. We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh's case (supra). Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf.

32. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well".

(P.622)

6. This judgment has been subsequently followed and applied in ***Narcotics Control Bureu Vs. Sukh Dev Raj Sodhi, (2011) 6 SCC 392*** , holding:

"3. Now, the learned counsel for the appellant submits that in the instant case, from the search notice (at Annexure P-1), it will appear that the requirement of Section 50 of the NDPS Act has been complied with. From the said notice, it appears that the accused was informed that he has the option of being searched either in the presence of gazetted officer or Magistrate and it appears that the accused wanted to be searched in the presence of gazetted officer. The learned counsel for the appellant submits that by giving the option to the accused, the appellant has complied with the requirement under Section 50 of the NDPS Act.

***4. The obligation of the authorities under Section 50 of the NDPS Act has come up for consideration* before this Court in several cases and recently, the Constitution Bench of this Court in the case of Vijaysinh Chandubha Jadeja v. State of Gujarat [(2011) 1 SCC 609] has settled this controversy. The Constitution Bench has held that requirement of Section 50 of the NDPS Act is a mandatory requirement and the provision of Section 50 must be very strictly construed.**

***5. From the perusal of the conclusion arrived at by this Court in Vijaysinh Chandubha Jadeja's case, it appears that the requirement under Section 50 of the NDPS Act is not complied with by merely informing the accused of his option to be searched either in the presence of a gazette* officer or before a *Magistra*te. The *requirement continues* even after *that* and *it* is required that *the accused personisactually brought before the gazetted officer or the Magistrate and in Para 32, the Constitution* Bench made it clear *that in order to impart authenticity, transparency and creditworthiness to the entire proceedings, an endeavour should be made by the prosecuting agency to produce the suspect before the* nearest Magistrate.**

6. That being the law laid down by the Constitution Bench of this Court on interpretation of Section 50 of the NDPS Act, we do not think that the obligation under Section 50 of the Act has been discharged statutorily by the appellant in this case. We, therefore, find no reason to interfere with the finding made by the High court. The appeal is, accordingly, dismissed". (P.393)

7. Submission made by learned Additional Advocate General that there has been compliance with the provisions of sub section(1) of Section 50 of the 'NDPS Act', cannot be accepted in the factual matrix and on the settled law.

8. Learned counsel submits that the evidence of the prosecution is that the seizure was made from the personal search of the accused appellant i.e. from the pocket of his trousers and the evidence of PW9 Nardev Singh is that two samples of 5 grams each were separated from the bulk of 50 grams opium and put into two separate parcels and sealed with seal impression 'A'. The case property along with the accused and N.C.B forms etc. were produced before the Station House Officer. PW5 Harnam Singh, S.H.O. states that H.C. Nardev Singh (PW9) had produced two parcels, one bulk parcel of opium duly sealed with seal impression 'A' along with specimen seal and one parcel containing currency notes. But he does not produce the sample of the seal in Court. In these circumstances, the case of the prosecution cannot be accepted.

9. It is pointed out by learned counsel that the link evidence in the instant case is missing. On the scrutiny of the record, the facsimile of seal 'A' is not legible on Ext.PJ nor the same can be said to be properly affixed in order to facilitate its comparison with the seal on the sample.

10. Appraisal of the evidence on record as also the exhibits shows that the sample of seal 'A' was neither produced or placed on the record.

11. In the totality of the facts and circumstances of the case, I find that the judgment of the learned trial Court cannot be sustained as the provisions of Section 50 of the 'NDPS Act' have not been considered and the learned trial Court does not consider the fact that the sample of seal has not been produced and proved on the record and there is no explanation for its non production. Appeal is allowed. Bail bonds furnished by the appellant shall stand cancelled. Fine of Rs. 20,000/- which has been imposed on the accused shall be refunded to him.

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