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EDITOR
RAKESH KAINTHLA
Director,
H.P. Judicial Academy,
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for a period of two years and to pay fine of Rs.3,000/- each- the petitioner was also convicted of the commission of offence punishable under Section 302 of I.P.C and was sentenced to undergo imprisonment for life –conviction for the commission of offence punishable under Section 302 of I.P.C was altered to the commission of offence punishable under Section 304(I) of I.P.C– sentence was modified to the imprisonment already undergone – petitioner was convicted of the commission of offences punishable under Sections 341 and 323 of I.P.C and was sentenced to undergo imprisonment for a period of two years and to pay fine of Rs.1,500/- each –the petitioner was convicted of the commission of offences punishable under Sections 8/9 of H.P. Good Prisoners (TR) Act, 1968 and was sentenced to undergo imprisonment for a period of one year – the petitioner applied for the release but the application was rejected – held, that the date on which the petitioner was convicted of the commission of three out of four sentences was subsequent to imposition of sentence of imprisonment for life – the petitioner had undergone sentences in all the three convictions before the sentence of life imprisonment was modified by the Court – the further detention of the petitioner is not justified and petitioner ordered to be released, unless required in any other case not mentioned in the petition. (Para-11 to 16) Title: Satish Kumar Vs. State of H.P. and others (D.B.) Page-159

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Section 279, 337 and 338 of I.P.C. – a petition for quashing the FIR filed on the ground that matter has been compromised between the parties and FIR be quashed- held, that if quashing of FIR becomes necessary for securing the ends of justice , Section 320 will not be a bar for the same - when the matter has been compromised amicably without any pressure, the FIR can be quashed – petition allowed, FIR and consequent proceedings ordered to be quashed. (Para-6 to 11) Title: Rishabh Kharbanda Vs. State of Himachal Pradesh & Ors. Page-85

Code of Criminal Procedure, 1973- Section 482- Prosecutrix was married to N – three children were born- she started residing separately from N on account of differences and came in contact with accused- when the accused assured to marry her,she started residing with the accused under one roof - she became pregnant – she was taken to a clinic and her pregnancy was terminated- the accused refused to marry her on which she lodged the FIR- accused sought the quashing of FIR- held, that prosecutrix is married and could not have fallen prey to the allurement of marriage – she started residing with the accused under one roof, which shows consent on her part – continuation of proceedings would be abuse of the process of the Court- petition allowed and FIR cancelled.(Para-6 to 12) Title: Dushyant Kumar Vs. State of Himachal Pradesh & anr. Page-34

Companies Act, 1956- Section 433, 434 and 439- Petitioner is a trader trading in all types of H.C. Ferro, Manganese Silicone and Metal Touch Slag etc. and supplies the material to customers all over the country – the respondent company had requested the petitioner to supply the material as per the business needs – the material was supplied as per requirement – payments were made initially but the respondent company defaulted in the payment – requests were made to make the payment repeatedly but in vain – an amount of Rs. 2,03,67,020/- was outstanding towards the payment of bill and an amount of Rs.84,50,360/- was payable as interest – hence, a petition for winding up the company was filed – held, that the documents placed on record clearly prove that respondent/company has failed to make the payment – no reply was filed to the petition – the respondent company is not only closed but has lost its financial substratum – hence, order issued to wind up the respondent/company.(Para-10 to 14) Title: M/S Oswal Alloys Private Limited Vs. M/S GilvertIspat Private Limited and others Page-108

Constitution of India, 1950- Article 226- D and P adopted S vide an adoption deed – the correction was not made in the revenue record, on which the petitioner filed a writ petition, which was disposed with a direction to decide the representation of the petitioner – the representation was rejected – aggrieved from the order, present writ petition was filed- held, that adoption was

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Constitution of India, 1950- Article 226- Petitioner was appointed as drawing teacher on PTA basis –she continued teaching for five years and no complaint was made against her – her services were terminated by respondent No.5 without following the procedure- held, that the appointment of the petitioner cannot be questioned after a long time – respondent No.5 made a report that petitioner and her husband had beaten him and misbehaved with him – however, no inquiry was conducted prior to the termination of the petitioner – the order of termination is against the principle of natural justice and mala-fide- writ petition allowed and termination order quashed.(Para-13 to 18) Title: Savitri Devi Vs. State of Himachal Pradesh & Ors. Page- 15

Constitution of India, 1950- Article 226- Petitioner was initially appointed as Anganwari helper – an appeal was filed by the respondent No.6 against her appointment, which was allowed – the petitioner filed an appeal, which was accepted on the ground that ADM, Kangra had no jurisdiction to adjudicate the appeal filed by respondent No.6- power was conferred upon ADM by the State Government and the appeal was again heard – appeal was allowed on the ground that income of the petitioner was more than what was mentioned in the income certificate- a writ petition was filed, which was allowed and the case was remanded with a direction to obtain income certificate from Tehsildar – Tehsildar submitted a report that the income of the petitioner was Rs. 7,609/- as against Rs. 7,000/- shown in income certificate - the appointment of the petitioner was set aside – aggrieved from the order, present writ petition has been filed – held, that as per the eligibility criteria only such female candidates were eligible to apply for the post of anganwari worker, whose annual income did not exceed Rs.8,000/- per annum – the income of the petitioner was Rs.7,609/- as per the inquiry report, which is less than Rs. 8,000/- prescribed in the Rules – Appellate Authority had wrongly set aside the appointment on the ground that the income certificate of the petitioner was false – Appellate Authority was required to see whether the income of the petitioner was as per the eligibility criteria or not- petition allowed and order of the Appellate Authority set aside.(Para-11 to 15) Title: Anju Bala Vs. The State of Himachal Pradesh and others Page-104

Constitution of India, 1950- Article 226- Petitioner was registered as class-B contractor and was eligible to submit tender upto Rs.50,00,000/- he submitted a tender for the construction of primary health center building at Nainidhar, which was rejected on the ground that petitioner is ineligible - aggrieved from the rejection, he filed the present writ petition- respondent pleaded that petitioner is not eligible to participate in e-tendering process pertaining to Class-D, he had failed to submit the work done of similar nature and list of machinery, tools and plants referred in form-8 - the petitioner is a diploma holder engineer and is eligible to submit the tender upto Rs.30 lacs – held, that petitioner has not amended the writ petition to assail the decision declaring him to be ineligible on the grounds referred in the writ petition- he has not challenged the rules declaring him to be ineligible – the petitioner is registered as class-B contractor and is not eligible to participate in e-tendering process pertaining to Class-D as per Enlistment Rules, 2015 – his bid was rightly rejected – petition dismissed. (Para-5 to 9) Title: Virender Singh Vs. State of H.P. and others (D.B.) Page-199

Constitution of India, 1950- Article 226- Respondent No.1 created an additional post of Senior Assistant –Departmental Promotion Committee was held and respondent No.3 was promoted – the petitioner challenged the appointment on the ground that post was reserved for Scheduled Caste candidate and respondent No.3 belongs to General Category and could not have been promoted on the post- the Writ Court dismissed the writ petition – held, that the promotion was made in the year 2007 and the writ petition was filed in the year 2011 – writ petition was clearly barred by delay and laches and ought to have been dismissed on this ground alone – a person

aggrieved by the promotion should approach the Court within six months or one year at the most- the Court should not entertain stale petitions in exercise of writ jurisdiction– even on merits, the State Government had taken a conscious decision not to provide the reservation in case of promotion – therefore, the writ petition was liable to be dismissed on this ground as well – appeal dismissed. (Para- 6 to 22) Title: Manohar Lal Vs. H.P. Vidhan Sabha and others (D.B.) Page-121

Constitution of India, 1950- Article 226- Respondent No.1, institute of Banking Personnel Selection (IBPS) announced a common written examination for selection of Officers and Clerks in Indian Banks – the petitioner applied for the post of clerk in OBC category – she secured 57.20 marks and was allotted Punjab National Bank – she received an email informing her that there was deficiency qua caste certificate – she submitted fresh caste certificate – however, her candidature was cancelled on the ground that she had not submitted caste certificate as per prescribed norms – petitioner challenged the cancellation- respondents stated that the caste certificate should have been issued between 1.4.2013 to 31.3.2014 and the petitioner had submitted the caste certificates issued on 23.2.2012, 5.5.2014 and 7.6.2014 - held, thatthe certificate dated 5.5.2014 shows that the petitioner belongs to Bairagi community, which is recognized as a backward class – the petitioner produced the certificate showing that prior to 11.6.2014, the parents of the petitioner were having an annual income of less than Rs.5 lacs and the petitioner belongs to OBC category – the petitioner was entitled to the benefit of OBC category- the act of the respondents in denying the benefit of OBC category was arbitrary - a clarification was issued that petitioner belongs to OBC category since 2011 and appointment letter should have been issued to the petitioner – petition allowed with a cost of Rs. 10,000/- .(Para-9 to 17) Title: Deepika Vaishnav Vs. Institute of Banking Personnel Selection & others Page-73

Constitution of India, 1950- Article 226- The husband of the petitioner was an active worker of Praja Mandal movement – he was externed under the verbal order of the Ruler in May, 1946- he could only return to his home in October, 1948 after the merger of Bilaspur State in Union of India – the husband of the petitioner applied for grant of pension as a freedom fighter but his claim was rejected on the ground of delay – he made representations but they were rejected – Supreme Court of India declared that the application for grant of pension could not have been rejected on the ground of delay – husband of the petitioner filed a writ petition, which was disposed of with a direction to decide the application in accordance with the judgment of Supreme Court of India - however, his case was rejected – aggrieved from the rejection, present writ petition has been filed – held, that as per the scheme of State Government, widows of the freedom fighter are entitled for the benefits – the petitioner is a widow of the freedom fighter and is entitled to the benefits as per the rules- respondents are delaying the matter on one ground or the other – record shows that husband of the petitioner had suffered externment – hence, the petition allowed- respondents directed to grant benefits to the petitioner.(Para-19 to 25) Title: Mahanti Devi Vs. Union of India & Anr. Page-79

Constitution of India, 1950- Article 226- Writ Court disposed of the writ petition by providing that writ petitioner is at liberty to file representation before the Government – representation was made but was rejected – fresh writ petition was filed and the writ Court directed the respondents to consider the case of the writ petitioner afresh- held, that the judgment is non-speaking, illegal and arbitrary – the same is set aside- writ Court requested to hear the writ petition afresh and decide the same on merits. (Para-3 to 5) Title: The Director HIMURJA Vs. Oasis Power Project Private Limited and another (D.B.) Page-156

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Constitution of India, 1950- Article 227- Petitioner filed a petition under Article 227 of the Constitution of India praying that the order dismissing the application filed by the petitioner for impleadment of society for Promotion of Information Technology and e-governance (SITEG) be set aside – Learned Single Judge referred the question regarding the exercise of power of superintendence over Arbitral Tribunal- held, that the interference by the High Court with the order made by the Arbitral Tribunal is not permissible – Arbitrator is not a Court but outcome of an agreement –reference answered accordingly- petition dismissed as not maintainable. (Para-9 to 17) Title: M/s CNG Trading Company Pvt. Ltd. Vs. H.P. State Electricity Board Ltd. (D.B.) Page-127

'E'

Employees Compensation Act, 1923- Section 4- Claimant received an injury on his right eye during the course of employment- he filed an application seeking compensation, which was allowed- held, that Commissioner had assessed income of the claimant as Rs.8,000/- per month – however, the income has to be assessed as Rs.4,000/- even if it is more than the same in view of Section 4 – claimant had suffered 30% permanent disability – Commissioner had assessed loss of earning capacity as 30%, which is contrary to Section 4(1)(c)- appeal allowed and the case remanded to the Commissioner to decide the same afresh in accordance with law. (Para-3 to 8) Title: Prem Lal Vs. The Associated Cement Company Ltd. and others Page-52

Employees Compensation Act, 1923-Section 4- Deceased was employed by respondent No. 5- he sustained multiple injuries during the course of employment causing his death – an application seeking compensation was filed, which was allowed and a compensation of Rs.4,26,132/- was awarded – held in appeal that deceased was drawing wages of Rs.4,000/- per month and he was also being paid Rs.150/- per day as daily allowance- the travelling allowance has been excluded from the wages but the amount was being paid to the deceased as daily remuneration and cannot be excluded – cover note shows that three persons were covered and the insurer is liable to indemnify the employer –insurance company is not liable to pay penalty – award modified and employer directed to pay the penalty. (Para-7 to 11) Title: Oriental Insurance Company Vs. Piplo and others Page-49

Employees Compensation Act, 1923- Section 10- Deceased was employed as driver on a truck – he died in an accident involving the truck – an application seeking compensation was filed, which was allowed – held, that dead body of the deceased was not recovered- legal heirs filed a civil suit for declaration regarding the death, which was decreed in the year 2013- the application was filed thereafter and is within time – however, the interest is to paid on the amount not from one month of the date of occurrence but from the date of filing of the claim petition. (Para-3 to 8) Title: United India Insurance Company Ltd. Vs. Raj Kumari & others Page-90

'H'

H.P. Urban Rent Control Act, 1987- Section 14(2)- Landlady filed a petition on the ground that successors-in-interest of original tenant had sublet the premises to respondent No.2 and the premises was being used for a purpose other than for which it was let out – Rent Controller allowed the petition – an appeal was filed, which was allowed and eviction petition was dismissed- held, that if the dominant purpose for which a premises is let out is maintained, tenant may not be liable to be evicted in absence of any covenant to the contrary – change of user from one commercial activity to another is no ground for eviction - tenancy devolved upon the widow and minor children of the tenant – they were not in a position to run the business and employee helped them in running the business on profit sharing basis- he set up his independent business

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'I'

Indian Penal Code, 1860- Section 279, 337, 304-A and 338- Accused was driving a truck in a rash and negligent manner on the wrong side of the road – the truck hit the bus- one passenger died and other passengers suffered injuries- the accused was tried and convicted by the Trial Court- an appeal was filed, which was dismissed- held in revision that it was found in the mechanical report that steering wheel, clutch and brake of the truck were locked – the possibility of accident having been caused by the mechanical defect cannot be ruled out – the prosecution version that accident was caused by the rashness and negligence of the accused has not been proved beyond reasonable doubt- revision allowed and accused acquitted. (Para-9 to 20) Title: Diwan Chand Vs. State of Himachal Pradesh Page-44

Indian Penal Code, 1860- Section 302 and 201- A was working as an assistant with R- A did not return to his home on 23.5.2011 and his wife sent her son to inquire about A – R told that he and A had returned from work at about 5-5:15 P.M. and A had gone towards jungle – dead body of A was found during search operation – the accused was arrested on the basis of investigation - recoveries were effected at the instance of the accused– the accused was tried and acquitted by the trial Court- held in appeal that the prosecution version that accused and R were last seen together was not proved – disclosure statements were also not established satisfactorily – rope/Nawar stated to have been recovered pursuant to the disclosure statements did not contain the blood to connect the accused with the commission of offence- motive to commit the crime was also not proved – the chain of circumstances do not point towards the guilt of the accused- accused was rightly acquitted by the Trial Court- appeal dismissed.(Para-6 to 24) Title: State of Himachal Pradesh Vs. Suneel Kumar @ Bobby (D.B.) Page-150

Indian Penal Code, 1860- Section 302 read with Section 34- Deceased alongwith his friends was walking on the road- juvenile V and co-accused picked up a quarrel and assaulted him with sticks – he sustained injuries – he was taken in a vehicle and was thrown at some distance – juvenile was tried and acquitted by Juvenile Justice Board – held, thatthe complaint filed by the accused was not taken to logical end by the police, which shows unfairness of the investigations - genesis of the occurrence was not established – the matter was not reported to the police immediately after the incident – independent witnesses had not supported the prosecution version- testimonies of eye-witnesses were contradictory and they had materially improved upon their version- the deceased was under the influence of alcohol-the possibility of deceased having fallen down and sustaining injuries under the influence of alcohol cannot be ruled out – the blood taken from the spot could not be connected to the accused – the recovery is also doubtful – the guilt of the accused was not proved beyond reasonable doubt and the juvenile was rightly acquitted by the Juvenile Justice Board- appeal dismissed.(Para-17 to 43) Title: State of Himachal Pradesh Vs. Vikrant @ Vicky (D.B.) Page- 7

Indian Penal Code, 1860- Section 304-B- **Dowry Prohibition Act**, **1961**- Section 4- Deceased was married to the accused – one child was born – the deceased told her uncle that her husband was demanding money for opening the shop – she told after two months that her husband used to beat her and demand scooter – the deceased died – blood was oozing from her nose and there were injuries on her arm – the accused/husband was tried and acquitted by the Trial Court- held in appeal that it was proved by the evidence that accused was helping her mother-in-law in the construction of the house- he had provided grills, doors and frames for the roof of uncle of the deceased - the incident was not reported to any person – material witness was not examined – allegations of maltreatment, dowry demand and torture are not specific – no signs of violence were detected in the postmortem and the death had taken place due to the consumption of the poison – the allegations were not proved beyond reasonable doubt and accused was rightly

acquitted- appeal dismissed. (Para-5 to 16) Title: State of Himachal Pradesh Vs. Surjit Singh (D.B.) Page-1

Indian Penal Code, 1860- Section 325- Some trans-genders reached the shop of the informant and demanded Rs.50/- - informant paid Rs.5/- but they refused and used filthy language- they also gave beatings to the informant – one S reached at the spot and rescued the informant from the trans-genders – informant and S went to the police station and trans-genders followed them – they inflicted a blow by a scale on the head of the informant- police officials rescued the informant – the accused wastried and acquitted by the Trial Court- held in appeal that witnesses have contradicted the prosecution version- PW-1 stated that injury could have been caused by way of a stick– the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-6 to 17) Title: State of Himachal Pradesh Vs. Monika Kinnar alias Priya Page- 18

Indian Penal Code, 1860- Section 376 and 417- Accused established physical relation with the prosecutrix on the allurement of marrying her – the accused solemnized marriage with the prosecutrix in a temple and kept her in a rented house for sometime – the accused informed the prosecutrix that his parents had refused to accept her and he had to marry somewhere else- the prosecutrix became pregnant but the accused refused to keep her – she delivered a child but the accused refused to own the child – the accused was tried and acquitted by the Trial Court- held in appeal that physical relation between the parties were duly established - it was also proved by DNA that accused is the biological father of the child- prosecutrix admitted that her affair continued for about eight years – she was aware of the consequences of physical relations - she had not disclosed the factum of marriage to her parents – the testimony of the prosecutrix does not establish that physical relations were developed due to allurement – the conduct of the prosecutrix shows that she was a willing party – the prosecution version regarding the rape was not established – the accused was willing to maintain the prosecutrix but her family members had refused to keep her- therefore, it cannot be said that accused had cheated the prosecutrix- appeal dismissed. (Para-8 to 23) Title: State of Himachal Pradesh Vs. Sanjiv Kumar (D.B.) Page-138

Indian Penal Code, 1860- Section 376 and 506- The prosecutrix was a student of 10+1 class – she was aged 16 years – she was taken to a hotel and was raped by the accused after alluring her to marry him- the accused continued to have sexual intercourse with the prosecutrix for about three years – he used to intimidate her by saying that he would show her MMS – the prosecutrix lodged a report after attaining the age of 18 years – the accused was tried and acquitted by the Trial Court- held in appeal that the accused had entered into a sexual relations with the prosecutrix in the year 2010- the matter was reported to the police in the year 2012 – a complaint was lodged by the prosecutrix, which was withdrawn by her – the prosecutrix had concealed her relations with the accused from every person including her parents – the prosecutrix had stayed with the accused in different hotelsbut had not raised any hue and cry – the version that accused had threatened her to show her MMS was not established as no MMS was found by the police – the testimony of prosecutrix is not cogent, trustworthy or reliable – the Trial Court had rightly acquitted the accused- appeal dismissed.(Para-9 to 38) Title: State of Himachal Pradesh Vs. Pankaj Samkadia (D.B.) Page-162

Indian Penal Code, 1860- Section 376(g), 341 and 506-II read with Section 34- The prosecutrix was going to her parental house – accused S caught her by her arm and sexually assaulted her – he called his co-accused H telephohically, who also assaulted the prosecutrix sexually – prosecutrix gave birth to a child and accused S was found to be biological father of the child – the accused was tried and acquitted by the Trial Court-held in appeal that the FIR was lodged after delay of 1½ month – no explanation for the delay was provided – the prosecutrix had not mentioned the name of the accused in the FIR – she admitted that she filed the report only because she had got pregnant – the fact that accused is biological father of the child is not sufficient to implicate him – the Trial Court had rightly acquitted the accused- appeal

dismissed.(Para-5 to 17) Title: State of Himachal Pradesh Vs. Suraj @ Surjit Singh and another (D.B.) Page-3

Indian Penal Code, 1860- Section 451, 323, 325, 302 read with Section 34- Deceased H was sleeping with his minor son A – H went out of the room between 10-11 P.M.- A heard the noise of quarrel – he went out and saw accused giving beatings to his father – accused R inflicted injury by stick- accused B gave fist blows to the deceased – A brought his father inside the room, where they went to sleep – A narrated the incident to his uncle – H was taken to hospital where he died - the accused were tried and acquitted by the Trial Court– held in appeal thatthe prosecution had examined close relatives of the deceased – testimony of the son of the accused is full of contradictions– prosecution witness admitted that A had told him that deceased had fallen in a state of intoxication – medical Officer admitted that the deceased was brought with the history of fall- the disclosure statement was not proved – Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-9 to 23) Title: State of Himachal Pradesh Vs. Bhime Ram and another (D.B.) Page-189

Industrial Disputes Act, 1947- Section 11(3)(b)- A reference petition was pending before the Labour Court – an application for producing the complete record was filed, which was dismissed – held, that the documents were relevant to determine whether the applicant was employed by the respondents and whether his services were terminated in accordance with law – the Labour Court had wrongly dismissed the application – petition allowed and respondent directed to produce the documents before the Labour Court. (Para-7 to 10) Title: Rajeev Vs. Divisional Forest Officer, Rohru & Ors. Page-115

'L'

Land Acquisition Act, 1894- Section 18- Parcels of the land of the claimants were acquired for the construction of Kol dam- the Collector determined the market value on the basis of classification ranging from Rs.87,376/- toRs.3,93,170/- - reference was filed and the market value was enhanced to Rs.4.5 lacs per bigha and Rs.3,93,170/- per bigha, irrespective of classification- held, that award of the Collector is a mere offer and the Court is bound to determine just fair and reasonable market value on the basis of material placed on record –when the purpose of acquisition is common and no developmental activity is required to be carried out, compensation can be awarded on uniform basis – in the present case, the purpose of acquisition was construction of Kol dam and payment of compensation on uniform basis cannot be faulted – no exemplar sale deed was placed on record and only an exemplar award granting compensation of Rs.5 lacs was proved– the exemplar award pertained to the land situated in Tehsil Arki, which has commercial potential – hence, the market value was scaled down to Rs.4.5 lacs- beneficiary had placed the sale deed on record but had not examined any witness to prove the similarity of the land shown in the exemplar sale deed with the acquired land – the market value enhanced to Rs.4.5 lacs uniformly irrespective of classification.(Para-10 to 38) Title: NTPC Limited, Kol Dam. Vs. Krishan Chand Sharma & others Page-56

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N.D.P.S. Act, 1985- Section 15- Accused was found in possession of 80.6 k.g. of poppy husk – he was tried and acquitted by the Trial Court- held in appeal thatindependent witness had not supported the prosecution version and there are major contradictions in the statements of police officials- this casts doubt regarding the prosecution version – the Trial Court had taken a

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N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 600 grams charas – he was tried and convicted by the Trial Court- held in appeal that sample analyzed in the laboratory was not connected to the sample drawn at the spot as there was discrepancy regarding the seal impression and number of seals – the Trial Court had wrongly convicted the accused, in these circumstances- appeal allowed and accused acquitted of the commission of offence punishable under Section 20 of N.D.P.S. Act. (Para-8 to 16) Title: Balle Ram Vs. State of H.P Page-26

'S'

Specific Relief Act, 1963- Section 34- Plaintiff is the son of deceased R, who was the tenant over the suit land on the payment of ¼th of the produce – plaintiff claimed that he inherited the suit land on the death of R and name of D, his step mother, was wrongly recorded- plaintiff had become owner on the commencement of H.P. Tenancy and Land Reforms Act- suit was decreed by the Trial Court – an appeal was filed, which was allowed and defendant was declared to be the owner in possession of the suit land – held in second appeal that D being a widow could not have inherited the tenancy rights of R, in view of Section 45 of H.P. Tenancy and Land Reforms Act- she could not have bequeathed the suit land to defendant No.1 and another by executing a Will – defendant No.1 is in possession and plaintiff has to file a suit for possession- appeal allowed – judgment passed by Appellate Court set aside and judgment passed by Trial Court restored.(Para-11 to 15) Title: Kanshi Ram Vs. Saju alias Roop Lal & anr. Page-39

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit pleading that a road was constructed through his land without his permission – this fact was also verified in demarcation – plaintiff filed a writ petition, which was allowed and defendants were directed to acquire the land – an award was passed acquiring the land – plaintiff raised construction of guest house – it was found during settlement that guest house was constructed on the acquired land – a civil suit was filed for restraining the defendants from interfering with the land of the plaintiffs- the suit was dismissed by the Trial Court- an appeal was preferred, which was dismissed- held in second appeal that plaintiff had admitted that some other land besides the land in possession of the defendants was acquired – according to documents, the width of the road was 80 feet, whereas it was 16 feet at the spot – thus, the plaintiff had encroached upon the land, which was acquired by the defendants – Local Commissioner had also found that guest house was constructed on the acquired land – the Courts below had rightly dismissed the suit- appeal dismissed. (Para-9 to 16) Title: Rajinder Singh Cahuhan Vs. State of H.P. & another Page-99

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that suit land was recorded in the ownership of defendant No.1- it was "Rafai-am Gair Mumkin Talab" and was being used by plaintiff and other inhabitants of the village – cattle used to drink water from the talab and talab was being used for ancillary purposes by inhabitants of the area – defendants have no right to change the nature of the same- the defendants pleaded that plaintiff had no locus standi and the jurisdiction of the Court was barred – the suit land was a barren land and not a talab– the suit was decreed by the Trial Court – an appeal was preferred, which was allowed – held in second appeal that nature of suit land was recorded to be Gair Mumkin Toba in the revenue record – Rafai-am is recorded to be in possession – it was proved that the suit land was pond/talab/toba and was being used for the purpose of drinking water by inhabitants and cattle – Local Commissioner had also found remains of talab at the spot – the community resources cannot be used for construction purposes- the father of the petitioner possessed the land in the Village and therefore, petitioner had locus standi to file the suit- appeal allowed- judgment of Trial Court set aside and judgment of Trial Court restored.(Para-14 to 22) Title: Sat Paul Vs. State of H.P. and another Page-64

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Vijay Kumar Kaul and others vs. Union of India and others, (2012) 7 SCC 610

Vijay Thakur Vs. State of Himachal Pradesh, (2014) 14 Supreme Court Cases 609

Viluben Jhalejar Contractor (Dead) by LRs Versus State of Gujarat, (2005) 4 SCC 789 (paras 22 and 23)

BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

State of Himachal Pradesh .....Appellant

VERSUS

Surjit Singh .....Respondent

Criminal Appeal No. 635 of 2008
Date of Decision: 26.10.2016

Indian Penal Code, 1860- Section 304-B- **Dowry Prohibition Act**, **1961**- Section 4- Deceased was married to the accused – one child was born – the deceased told her uncle that her husband was demanding money for opening the shop – she told after two months that her husband used to beat her and demand scooter – the deceased died – blood was oozing from her nose and there were injuries on her arm – the accused/husband was tried and acquitted by the Trial Court- held in appeal that it was proved by the evidence that accused was helping her mother-in-law in the construction of the house- he had provided grills, doors and frames for the roof of uncle of the deceased - the incident was not reported to any person – material witness was not examined – allegations of maltreatment, dowry demand and torture are not specific – no signs of violence were detected in the postmortem and the death had taken place due to the consumption of the poison – the allegations were not proved beyond reasonable doubt and accused was rightly acquitted- appeal dismissed. (Para-5 to 16)

For the appellant : Mr. Vikram Thakur and Mr. Puneet Rajta, Deputy Advocate Generals.
For the respondent : Mr. Ramakant Sharma, Sr. Advocate with Mr. Basant Thakur, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge(Oral)

The instant appeal has been preferred by State of Himachal Pradesh against acquittal of respondent-accused passed by learned Sessions Judge Solan, District Solan, H.P. in Sessions Trial No. 14-NL/7 of 2007, in case FIR No.108/2007, dated 26.04.2007, registered under Section 304-B of the Indian Penal Code read with Section-4 of Dowry Prohibition Act in Police Station Nalagarh, District Solan, H.P.

2. Investigating Agency in present case was set in motion by complainant PW-1 Lachhmi Devi by lodging FIR Ex.PW-1/A stating therein that her daughter deceased Kirna was married to respondent-accused on 21st May, 2005 and out of their wedlock, a child was born. After 6 months of marriage, her daughter had come to parental house and told her uncle Tulsi Ram that her husband was asking for money for opening a shop. PW-1 sent her daughter back without asked money. About two months thereafter deceased Kirna again came and complained to her uncle Krishan Chand that under influence of liquor, her husband used to beat her for not acceding to his demands. She again came and told her uncle Krishan Chand that respondent-accused was demanding scooter and used to beat and torture her. However, she again sent Kirna back to her in-laws. Thereafter, on 26th April, 2007 at about 2.00 AM firstly, her son-in-law i.e. respondent and thereafter his mother informed that Kirna is not feeling well. She asked them to take her daughter to hospital. At about 5.00 AM brother-in-law (Jeth) of deceased Kirna telephonically informed about death of her daughter Kirna and asked them to reach there whereupon she alongwith her brother and other villagers reached in the house of in-laws of her daughter and saw deceased lying on the bed with blood oozing from her nose. There were injuries on her arms. On inquiry, her father-in-law and mother-in-law replied that everything was evident to them and Kirna was stated to be suffering stomach pain.

3. On lodging complaint by PW-1 with police, postmortem of dead body was conducted on 26th April, 2007 at about 2.00 PM. After completion of investigation, challan under Section 304-B of Indian Penal Code read with Section-4 of the Dowry Prohibition Act was presented in the Court. On conclusion of trial, respondent-accused was acquitted by the trial Court.

4. We have heard learned counsel for parties and have also gone through the entire record.

5. In evidence led by prosecution, three incidents have come in the statements of witnesses with regard to demand of money. PW-1 Lachhmi Devi, PW-2 Harbans Singh, PW-3 Tulsi Ram and PW-10 Shyam Singh have been examined to prove the allegations levelled against the respondent-accused. In their examination-in-chief these witnesses, in principle, have narrated similar version as alleged in the FIR but with some variations and improvements. Scrutiny of their statements reflects that the respondent-accused was running a welding shop prior to his marriage, having vehicle and had also purchased a plot for parking his vehicle. It is also admitted by prosecution witnesses that respondent–accused was helping PW-1 i.e. mother of the deceased in construction of her house by providing grills, doors and frames and also by putting his personal labour during the said construction. Respondent-accused had also provided grills, doors and frames for roof of house of Krishan Chand, uncle of deceased. It has also come in evidence that respondent-accused had also provided drain pipe to his in-laws from market. However, it was also claimed that payments for goods were made to respondent-accused. PW-1 also admitted that respondent-accused had informed about seriousness of her daughter and had also offered a Tempo to her for reaching his house.

6. PW-3 Tulsi Ram who remained Pradhan of Gram Panchayat Manpura and Zila Parshid Member, is uncle of deceased and claimed to have been informed by deceased about maltreatment and demand of money and scooter, by respondent-accused.

7. PW-2 Harbans Singh and PW-10 Shyam Singh brothers of deceased have also claimed to have been informed by deceased about maltreatment and demand of dowry and scooter, by respondent-accused and they reiterated the facts deposed in statement of PW-1.

8. PW-1 has also stated that a few days before the death, deceased Kirna had again come to her and complained against respondent-accused for torturing her for not fulfilling demands including that of scooter. It appears that PW-1 made improvements in her statement by stating a few words 'before death of Kirna' and few words 'after her death' with regard to maltreatment and dowry in order to bring prosecution case within the ambit of dowry death. However, she was confronted with her statement made before police wherein she had stated that few months before death, her deceased daughter had complained regarding maltreatment and demand of dowry.

9. The deposition of PW-1, PW-2, PW-3 and PW-10 does not inspire confidence because as per prosecution, respondent was regularly beating deceased for his demands and PW-2 also claims to have noticed slap marks caused by beatings by respondent. But, none of the incidents was ever reported to police or even Panchayat and it is not a case where the parental side of the deceased was not able to report the matter to police or to Panchayat with regard to maltreatment and demand of dowry, particularly when PW-3 Tulsi Ram, uncle of deceased remained Pradhan as well as Zila Parishad Member and PW-10 Shyam Singh was serving in Indian Army.

10. In FIR, PW-1 stated that uncle of deceased Krishan Chand was also informed by her deceased daughter about demand of dowry and maltreatment whereas in deposition in the Court she remained silent about this and said Krishan Chand had also not been examined as a witness for which an adverse inference is to be drawn against the prosecution. It has also come in evidence that respondent-accused provided grills, doors and frames for construction of house not only to PW-1 but also to the said Krishan Chand uncle of deceased.

11. Allegations of maltreatment, dowry demand and torture to deceased are not specific, rather vague with respect to time, place and manner of demand and there is no evidence on record that soon before committing suicide the deceased was subjected to cruelty for demand of dowry deriving her to commit suicide, so as to convict the respondent under Section 304-B of Indian Penal Code.

12. As per postmortem report Ex.PW-5/B, there was no sign of violence at any part of body and cause of death was consumption of 'organo phosphorous'.

13. Learned Deputy Advocate General contended that in present case, death has taken place within seven years of the marriage and that too for demand of dowry, therefore, provision of Section 113-B of Indian Evidence Act, 1972 (for short the 'Act') for presumption of dowry death is to be invoked and he further argued that even if the demand of dowry is not proved, then provision of Sections 113-A of the Act for drawing presumption for abetment of suicide to deceased Nisha Devi by subjecting her to cruelty is attracted.

14. The burden of proving charge in criminal case is upon the prosecution. Prosecution has to lead cogent, reliable, credible and positive evidence for proving the guilt of respondent-accused and even for raising presumption as to abetment of suicide or that of dowry death under Sections 113-A and 113-B of the Indian Evidence Act, initial burden is on the prosecution to atleast prove prima facie ingredients of offences alleged to have been committed by respondent-accused. Committing suicide by a woman within seven years of marriage is not sufficient to draw positive inference that the suicide was committed because of maltreatment or demand of dowry raised by husband unless it is proved by leading cogent, reliable, credible, clear and specific evidence. Person may commit suicide for so many reasons other than maltreatment or demand of dowry and sometimes in a spur of moment for a reason which may not be sufficient for committing suicide for an ordinary person.

15. Therefore, in absence of cogent, reliable, credible, clear and specific evidence on record to prove commission of offence by respondent-accused under Section 304-B IPC and under Section 4 of the Dowry Prohibition Act, we are of the considered view that no case for interference is made out. Trial court has correctly and completely appreciated the evidence and acquittal of the accused has not resulted into travesty of justice nor has caused mis-carriage of justice.

16. The present appeal being devoid of merit, is dismissed, as also pending applications, if any. Bail bonds, if any, furnished by the respondent-accused are discharged. Records of the Court below be sent back immediately.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

State of Himachal Pradesh ...Appellant.

Versus

Suraj @ Surjit Singh and another ...Respondents.

Criminal Appeal No.340 of 2012
Date of Decision: November 16, 2016

Indian Penal Code, 1860- Section 376(g), 341 and 506-II read with Section 34- The prosecutrix was going to her parental house – accused S caught her by her arm and sexually assaulted her – he called his co-accused H telephohically, who also assaulted the prosecutrix sexually – prosecutrix gave birth to a child and accused S was found to be biological father of the child – the accused was tried and acquitted by the Trial Court-held in appeal that the FIR was lodged after delay of 1½ month – no explanation for the delay was provided – the prosecutrix had not mentioned the name of the accused in the FIR – she admitted that she filed the report only

because she had got pregnant – the fact that accused is biological father of the child is not sufficient to implicate him – the Trial Court had rightly acquitted the accused- appeal dismissed.(Para-5 to 17)

Cases referred:

Dipanwita Roy v. Ronobroto Roy, (2015) 1 SCC 365
Narayan Dutt Tiwari v. Rohit Shekhar and antoher, (2012) 12 SCC 554
Sandeep v. State of Uttar Pradesh, (2012) 6 SCC 107
Selvi and others v. State of Karnataka, (2010) 7 SCC 263
Patangi Balarama Venkata Ganesh v. State of Andhra Pradesh, (2009) 14 SCC 607
Jarnail Singh and others v. State of Punjab, (2009) 9 SCC 719
Narender G. Goel v. State of Maharashtra and another, (2009) 6 SCC 65
Kamalanantha and others v. State of T.N., (2005) SCC 194
Banarsi Dass v. Teeku Dutta (Mrs) and another, (2005) 4 SCC 449
Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94

For the Appellant	:	Mr. R.M. Bisht, Additional Advocate General and Mr. Puneet Rajta, Deputy Advocate General.
For the Respondents	:	Mr. N.K. Thakur, Senior Advocate with Mr. Divya Raj Singh, Advocate, for respondent No.1. Mr. Jeevesh Sharma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

In relation to FIR No.94, dated 9.11.2008, registered at Police Station, Nirmand, District Kullu, Himachal Pradesh, accused Suraj and Hari Singh, hereinafter referred to as the accused, were charged to face trial, for having committed offences, punishable under Section 376(g) of the Indian Penal Code; and Sections 341 and 506-II, both read with Section 34 of the Indian Penal Code.

2. Finding the prosecution not to have established its case, through the testimonies of 12 witnesses, trial Court, vide judgment dated 25.4.2012, passed by Additional Sessions Judge, Kinnaur at Rampur, Himachal Pradesh, in Sessions Trial No.25-AR/7 of 2009/11, titled as *State of Himachal Pradesh v. Suraj @ Surjit Singh & another,* has acquitted both the accused on all counts.

3. Prosecution case primarily rests upon the testimonies of prosecutrix (PW-1) as also her husband Durga Dass (PW-2).

4. It is not in dispute that prosecutrix is a married lady. Allegedly, she was subjected to sexual assault by both the accused on 26.9.2008. This was in a secluded path, while she was on way to her parental house at a place known as Lagora, accused Suraj caught her by her arm and after committing sexual assault, called his co-accused Hari Singh on telephone, who also committed the said act. Such incident of assault never came to be reported by her to anyone, purely on account of threats extended by these two persons. However, subsequently prosecutrix realized that she was pregnant, as such, on 8.11.2008, she disclosed the incident to her husband, who immediately reported the matter to the police, which led to the registration of FIR, referred to supra. Prosecutrix was got medically examined and report of the doctor (Ex.PW-4/B & Ex.PW-4/C) taken on record. During the course of investigation, so conducted by ASI Kanwar Singh (PW-8) and SI Dulo Ram (PW-9), prosecutrix gave birth to a

child. Police got conducted test of DNA profiling, which revealed accused Suraj to be the biological father of the child.

5. When we peruse the testimonies of the prosecutrix and her husband, we find the prosecution not to have established its case. Testimonies of the witnesses cannot be said to be inspiring in confidence and their version believable. We find testimony of the prosecutrix to be self contradictory. Also, there are improvements, exaggerations and embellishments on record, which not only remain unexplained but further renders their version to be doubtful. In our considered view, delay of more than 1½ month in lodging the FIR also remains unexplained. Also, if the version of prosecutrix and her husband is to be believed, then it remains unexplained as to how, either they or the Investigating Officer, was able to reach up to the accused at the first instance, for in the FIR, identity of the accused remained undisclosed. In fact, there is nothing disclosed herein, which would even remotely link, only the accused to the crime.

6. Perusal of the FIR reveals that prosecutrix was subjected to sexual assault on 26.9.2008. At the time of lodging of the FIR, she only disclosed that one person, whose name she is not aware, but whom she can identify, for he plies a bus as a driver on Tharla-Ani route, had subjected her to rape, and whereafter, on telephone, he called the Conductor of the Bus, who also subjected her to rape. She further narrates that purely on account of shame, she could not disclose the incident to anyone. Only when she realized that she had conceived a child, which cannot be that of her husband, for he had already undergone operation of sterilization, did she disclose the incident to her husband on 8.11.2008.

7. Quite apparently, the Investigating Officers did not conduct the Test Identification Parade. There is nothing on record to establish as to how police reached to the accused. No doubt, in Court, prosecutrix and her husband have identified the accused to be the persons who allegedly committed the crime, but however, the question which arises for consideration is as to how, at the first instance, did the police reach to the accused and got conducted their medical examination during the course of investigation. Police was not aware of the identity of the accused, which also never came to be disclosed either by the prosecutrix or her husband. Bus driven by the accused was not the only one plied on the said route. Certainly, police has not recorded the whole truth. We clarify that this fact has not weighed with us at all, while deciding the present appeal.

8. Prosecutrix wants the Court to believe that out of shame and alleged threats, she did not disclose the incident to anyone, muchless her parents or her husband. But we do not find this version of hers to be inspiring in confidence. In fact, the alleged threats never came to be disclosed by her either to her husband or to the police. Quite evidently, prosecutrix disclosed the incident and lodged the complaint only, as is so admitted by her, after she realized that she had become pregnant, for she uncontrovertedly states that "*I have filed this case as I got pregnant*". One may only observe that the alleged threats is a mere exaggeration, for she admits not to have got recorded the said fact, in her previous statement, with which she was confronted. Also, prosecutrix admits that from the spot of crime, she went to her parents' house. She admits that closeby, i.e. within a vicinity of half a kilometer, one JCB machine was operating. Alleged incident took place not in the thick of dark or middle of the night. The alleged crime came to be committed during broad day light. Prosecutrix walked up to her parental house. Hence, she could have immediately reported the incident to anyone. She also admits not to have resisted the acts of the accused. In fact, she goes to state that she had asked the Driver not to call the Conductor. Admittedly, this Conductor reached the spot after five minutes. What all did she do during this period remains unexplained by her. It is not her case that alleged threats came to be extended prior to accused Suraj ravishing her or immediately thereafter. Her version of having been subjected to sexual assault is thus rendered uninspiring in confidence.

9. Version of the prosecutrix of accused Suraj having called, on telephone, his co-accused Hari Singh, also remains uncorroborated on record. Record of the telephonic conversation has not been produced in Court. That apart, this version of the prosecutrix is

rendered doubtful from her admissions made in the cross-examination part of her testimony, where she admits that the Bus in question stood parked at village Kalag, which was at a distance of 4-5 kms from the spot of crime. It is humanly impossible to cover such a distance, on foot, within five minutes.

10. Significantly, she did not make any attempt of finding the identity of the accused. She only states that later on "*I came to know that the name of the Driver was Suraj and name of the Conductor was Hari*", whom she identified in Court. On this issue, we find her to have contradicted herself, for she states that "*I had not seen the accused person prior to this occurrence as they had never met me before*", but in the very next breath she states that "*it is correct that I had visited Durah two to four times in the bus of the accused person*". It is not the case of prosecution that the Bus driven by the accused was the only one which plies on the Tharla-Ani route. She admits that after the occurrence, she continued to conduct her day-to-day affairs in a normal manner. She had been freely visiting several places, including her relatives and house of her parents. Hence, her version of both the accused having subjected her to sexual assault is absolutely uninspiring in confidence.

11. When we peruse the testimony of Durga Dass (PW-2), husband of the prosecutrix, we find him not to have advanced the case of the prosecution any better or further. He only states that lateron, on enquiry made by him, he learnt about the identity of the assailants, but then from whom and how, he does not disclose.

12. It has come on record that within 2½ months of birth, the child died. To establish the factum of paternity, our attention is invited to the report of the Expert (Ex.PW-8/N), which prima facie establishes that accused Suraj was the biological father of the deceased baby Satish Kumar. This fact alone itself would not be sufficient enough to establish complicity of the accused in the crime. To us, it appears not to be a case of sexual assault but that of consent, if any.

13. Under what circumstances, Court can direct a party to undergo DNA test, what is the presumptuous value of the report of DNA examination, is now well settled by the apex Court in *Dipanwita Roy v. Ronobroto Roy,* (2015) 1 SCC 365; *Narayan Dutt Tiwari v. Rohit Shekhar and antoher,* (2012) 12 SCC 554; *Sandeep v. State of Uttar Pradesh,* (2012) 6 SCC 107; *Selvi and others v. State of Karnataka,* (2010) 7 SCC 263; *Patangi Balarama Venkata Ganesh v. State of Andhra Pradesh,* (2009) 14 SCC 607; *Jarnail Singh and others v. State of Punjab,* (2009) 9 SCC 719; *Narender G. Goel v. State of Maharashtra and another,* (2009) 6 SCC 65; *Kamalanantha and others v. State of T.N.,* (2005) SCC 194; and *Banarsi Dass v. Teeku Dutta (Mrs) and another,* (2005) 4 SCC 449.

14. In the given facts and circumstances, one need not dilate thereupon, for the simple reason that in the instant case testimony of the prosecutrix itself, on the question of sexual assault, is found to be uninspiring in confidence.

15. Hence, it cannot be said that prosecution has been able to prove its case, by leading clear, cogent, convincing and reliable piece of evidence so as to prove that the accused persons gang raped the prosecutrix, and in furtherance of their common intention, they wrongfully restrained and also criminally intimidated her.

16. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence so placed on record by the parties.

17. The accused have had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in *Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94*, it cannot be said that the Court below has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice. No ground for interference is called

for. The present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged.

Appeal stands disposed of, so also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh ...Appellant.
Versus
Vikrant @ Vicky ...Respondent.

Criminal Revision Petition No.106 of 2013
Date of Decision: November 23, 2016

Indian Penal Code, 1860- Section 302 read with Section 34- Deceased alongwith his friends was walking on the road- juvenile V and co-accused picked up a quarrel and assaulted him with sticks – he sustained injuries – he was taken in a vehicle and was thrown at some distance – juvenile was tried and acquitted by Juvenile Justice Board – held, thatthe complaint filed by the accused was not taken to logical end by the police, which shows unfairness of the investigations - genesis of the occurrence was not established – the matter was not reported to the police immediately after the incident – independent witnesses had not supported the prosecution version- testimonies of eye-witnesses were contradictory and they had materially improved upon their version- the deceased was under the influence of alcohol-the possibility of deceased having fallen down and sustaining injuries under the influence of alcohol cannot be ruled out – the blood taken from the spot could not be connected to the accused – the recovery is also doubtful – the guilt of the accused was not proved beyond reasonable doubt and the juvenile was rightly acquitted by the Juvenile Justice Board- appeal dismissed.(Para-17 to 43)

Case referred:
Prandas v. The State, AIR 1954 SC 36

For the Appellant : Mr. Vikram Thakur, Deputy Advocate General.
For the Respondents : Mr. Nitin Khanna, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

State has filed the present Revision Petition against the judgment dated 19.9.2012, passed by learned Principal Magistrate, Juvenile Justice Board, Kullu, Himachal Pradesh, in Criminal Case No.12-I of 2010/13 of 2008, titled as *State v. Vikrant alias Vicky,* challenging acquittal of juvenile Vikrant (hereinafter referred to as the Juvenile), who stands charged for having committed an offence punishable under the provisions of Section 302 read with Section 34 of the Indian Penal Code.

2. It is the case of prosecution that in the night intervening 27th & 28th October, 2007, Varun Mahajan (deceased) alongwith his friends Divesh (PW-3), Lal Chand (PW-4), Arpit & Vinod Kumar (both not examined) were walking on the road somewhere at a place known as Shallang (Kullu). Juvenile Vikrant and main co-accused Manoj Kumar & Gauri Shankar, who also happened to be present there, picked up a fight and assaulted them with dandas. As a result, except Lal Chand, all received serious injuries. Soon co-accused Sanjeev Kumar arrived and forcibly took Varun Mahajan and Divesh Sharma in a vehicle (TATA SUMO). After covering some distance, he threw down Varun Mahajan and asked Divesh Sharma to deboard the vehicle.

3. Body of Varun Mahajan, who died as a result of beatings given by the juvenile and the co-accused, was first spotted by an unknown person, at a place known as Shishamati, information whereof came to be furnished on telephone at Police Post, Akhara Bazar. After recording rapat, SI Ram Karan (PW-18), immediately rushed to the spot and conducted the necessary investigation. Rukka (Ex.PW-14/A), sent to the Police Station, led to registration of FIR No.622, dated 28.10.2007 (Ex.PW-14/B), for commission of offence under Section 279/304A of the Indian Penal Code. With the preparation of inquest report and completion of other formalities on the spot, dead body, so taken into possession was sent for postmortem, which was conducted by Dr. Sushil Chander (PW-14), who issued Postmortem Report (Ex.PW-12/A).

4. In the morning of 29.10.2007, Ashok Mahajan (PW-1), father of the deceased, after reading report in the daily newspaper, about recovery of a dead body of an unidentified person, came to the police station and identified it to be that of his son. Same day, police picked-up samples of blood stained soil (*Bajri*) vide memo (Ex.PW-2/A & Ex.PW-2/B), in the presence of Vinay Sharma (PW-2). Investigating Officer also prepared spot map (Ex.PW-14/C).

5. On 30.10.2007, police got Divesh Sharma (PW-3), Vinod Kumar (PW-4), Arpit (PW-5) and Lal Chand (PW-6) medically examined at a government hospital and took on record their medical record (Ex.PW-8/B, Ex.PW-10/B, Ex. PW-10/A & Ex.PW-8/A, respectively). Their statements, under the provisions of Section 161 of the Code of Criminal Procedure, were also got recorded.

6. Also, police arrested co-accused Manoj Kumar, Gauri Shankar and Sanjeev Kumar on 30.10.2007, 31.10.2007 and 1.11.2007, respectively.

7. On 2.11.2007, Prem Singh (PW-16) handed over possession of the vehicle, allegedly used in the crime, to the police vide memo (Ex.PW-3/A), which led the police lift samples of blood vide Memo (Ex.PW-3/D), in presence of Divesh Sharma and Arpit.

8. On 6.11.2007, co-accused Gauri Shankar made a disclosure statement (Ex.PW-3/D) to the effect that he could get recovered weapons of offence, i.e. Dandas (Ex.P-6,7 & 8), which also were got recovered by him vide memo (Ex.PW-3/F), in the presence of Divesh Sharma and Arpit.

9. Police sent blood stained soil/grit (*Bajri*) so lifted from the spot and samples of blood stains lifted from the vehicle, for analysis to the Forensic Laboratory and report (Ex.PB) taken on record. Also, report with regard to viscera of deceased Varun Mahajan, so issued by the State Forensic Science Laboratory, Junga was taken on record.

10. With the completion of investigation, which prima facie revealed complicity of the juvenile in the alleged crime, challan was presented in the Court for trial.

11. Juvenile Vikrant was charged for having committed an offence, punishable under the provisions of Sections 302 read with Section 34 of the Indian Penal Code, to which he did not plead guilty and claimed trial.

12. In order to establish its case, prosecution examined as many as 18 witnesses and statement of the Juvenile, under the provisions of Section 313 of the Code of Criminal Procedure, was also recorded, in which he took plea of innocence and false implication.

13. Not finding the version of the prosecution witnesses, more importantly Divesh Sharma (PW-3) and Lal Chand (PW-4), to be inspiring in confidence, trial Court acquitted the Juvenile of the charged offence. Hence, the present Revision Petition, so filed by the State.

14. At this juncture, we may also observe that in relation to the very same crime, co-accused Manoj Kumar, Gauri Shankar and Sanjeev Kumar were tried separately, and on the basis of separate evidence, so led by the prosecution, also stand acquitted by the learned Sessions Judge, Kullu, Himachal Pradesh, vide judgment dated 29.12.2010, passed in Sessions Trial No.22 of 2008, titled as *State v. Manoj Kumar & others,* which is also is subject matter of challenge in Criminal Appeal No.173 of 2011, listed alongwith the present petition.

15. It stands clarified that in the present petition, this Court is examining correctness of findings returned by the Principal Magistrate, in relation to Juvenile Vikrant.

16. We have heard Mr. Vikram Thakur, learned Deputy Advocate General, on behalf of the State as also Mr. Nitin Khanna, Advocate, on behalf of the Juvenile. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find that the judgment rendered by the trial Court is based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice.

17. It is a settled principle of law that acquittal leads to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. Having considered the material on record, we are of the considered view that prosecution has failed to establish essential ingredients so required to constitute the charged offence.

18. In *Prandas v. The State*, AIR 1954 SC 36, Constitution Bench of the apex Court, has held as under:

> "(6) It must be observed at the very outset that we cannot support the view which has been expressed in several cases that the High Court has no power under S. 417, Criminal P.c., to reverse a judgment of acquittal, unless the judgment is perverse or the subordinate Court has in some way or other misdirected itself so as to produce a miscarriage of justice. In our opinion, the true position in regard to the jurisdiction of the High Court under S. 417, Criminal P.c. in an appeal from an order of acquittal has been stated in – 'Sheo Swarup v. Emperor', AIR 1934 PC 227 (2) at pp.229, 230 (A), in these words:
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> > "Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice." "

19. From the evidence led by the parties, it is evident that co-accused Manoj Kumar and Gauri Shankar were present at Shallang, the spot of alleged incident.

20. It is a matter of record, as is so admitted by SI Ram Karan (PW-18) that co-accused Manoj Kumar was administered medical treatment at a hospital at Kullu. Also, written complaint filed by this accused could not be taken to its logical end by the police. This only is indicative of unfairness on the part of police, in conducting the investigation. We may only observe that this fact, has not weighed with us at all, in adjudication of the present petition, for we have independently appreciated and evaluated the evidence led by the prosecution, considering the fact that co-accused Manoj Kumar and Gauri Shankar record their presence at Shallang.

21. From the testimony of SI Ram Karan, it is evident that in the morning of 28.10.2007, he received information from an "unknown person" that a dead body was lying on the road at Shishamati. He made entry in the *Rojnamcha* and proceeded to the spot. With the completion of formalities, he sent the dead body for postmortem.

22. He further states that on 29.10.2007, Ashok Mahajan (PW-1), father of the deceased, came to the police station and disclosed that his son, who had gone to attend the Dussehra festival at Kullu, was missing "for the last two days". When taken to the mortuary, the dead body was identified to be that of his son Varun Mahajan. He further states that only thereafter, he visited the spot and in the presence of Divesh Sharma (PW-3), Vinod Kumar, Arpit and Lal Chand (PW-4), lifted blood stained *Bajri*, vide memo (Ex.PW-2/A & 2/B).

23. The question, which arises for consideration, is as to how did he get to know the spot of crime, for it is not his case or for that matter any one of the prosecution witnesses that by that time, the incident stood narrated by any one of them to the police.

24. Investigating Officer further states that on 30.10.2007, he summoned four friends of the deceased, who had also gone to watch the Dussehra Festival. They also were medically examined and their statements recorded.

25. We find the Investigating Officer not to have disclosed the whole truth. In fact, genesis of the prosecution story, of the juvenile and the co-accused having assaulted the deceased at a place known as Shallang and thereafter dumped the dead body at another place known as Shishamati, cannot be said to have been established on record.

26. Either the genesis of crime remains unearthed or the prosecution has cooked up certain facts. And, this we say so also for the reason that in Court, Divesh Sharma, a friend of the deceased, is categorical of having narrated the incident in the evening of 28.10.2007 itself.

27. Careful perusal of testimony of this witness only reveals that in the morning of 28.10.2007, he went and got himself medically examined at a hospital at Kullu and in the evening disclosed the incident. Well, this is what he wants the Court to believe. It being a different matter that even he has not revealed the truth about involvement of the juvenile in the crime. The incident was witnessed by him, then why is it that he did not go to the house of the deceased, which was just at a walking distance of 5 minutes or to the police station which also was at a walking distance of 5 to 10 minutes, to narrate or lodge the report, for after all, he was under no fear, threat or intimidation from any one of the co-accused persons, muchless the juvenile. This witness wants the Court to believe that while he was walking with the deceased and two other friends, co-accused Manoj Kumar picked up a quarrel with the deceased and after hurling abuses, gave blows with *Dandas*. Also, co-accused Gauri Shankar and Sanjeev Kumar actively participated in the crime. Soon Vicky reached the spot in a vehicle (Tata Sumo) and after lifting him and the deceased, dropped them near Kullu. Even in the vehicle, all the co-accused and the juvenile continued to give beatings to him and the deceased.

28. But when we examine the cross-examination part of his testimony, we find him to have made several improvements and exaggerations, further rendering his testimony to be absolutely uninspiring in confidence. We find his version of the juvenile having given blows with *Danda* or his having disclosed to the police that he was thrown down the cliff from the vehicle or the co-accused and the juvenile having dumped the body of the deceased or the juvenile having given beatings in the vehicle (Tata Sumo), not to have been recorded in his previous statement with which he was confronted. In fact, even on material aspect of the co-accused and the juvenile giving beatings to deceased Varun Mahajan or hurled abuses, we find it to be a case of exaggeration.

29. Independent witnesses Divesh Sharma (PW-3) and Lal Chand (PW-4) were declared hostile and despite extensive cross-examination by the learned Public Prosecutor, nothing fruitful could be elicited from their testimonies. Be that as it may, even otherwise, their testimonies are wholly uninspiring in confidence. They want the Court to believe that at the time

of occurrence of the incident, other persons, i.e. villagers and passengers of the Bus were also present, but prosecution has not examined or associated anyone of them. In any event, on the question of identity of the assailants, both of them have not supported the prosecution. Perusal of cross-examination part of their testimonies also does not advance the case of prosecution any further. Not only there are contradictions, which are major and material, but also their testimonies are full of exaggerations, improvements and embellishments. On all these aspects, we are in agreement with the findings returned by the trial Court.

30. We may observe that none of the friends of the deceased came forward to narrate the incident to anyone, public authority, much less the police. Why is it that for two days all of them kept silent. It is not that they were under any threat; living in a remote area; having no access to police or public authority. In fact, they got themselves medically examined in the heart of Kullu town. Obviously, they were concealing the genesis of the crime.

31. As observed, testimonies of independent witnesses are full of contradictions, exaggerations and embellishments. We need not dilate thereupon, save and except that on material aspect, when they were confronted with their previous statements, they admit (a) not having known the identity of the juvenile and co-accused, (b) not having seen each one of them assault the deceased or for that matter anyone else, (c) not having reported the incident to the authorities, (d) each one of them having contradicted the testimony of the Investigating Officer as also themselves, by deposing that they went to the Police Station on 29.10.2007 and narrated the incident, thus, belying the version of Investigating Officer, who states that it was only on 30.10.2007 that these witnesses were called to the Police Station, when the incident first came to the notice of the police, (e) Contradiction in the version of Divesh Sharma that he went to the Police Station on 30.10.2007 and not 29.10.2007, (f) version of Vinod Kumar that the deceased had not consumed alcohol stands belied by medical record. He admits of having informed the incident to his parents, in the morning of 28.10.2007. In fact, he goes on to state that he went to the hospital on 29.10.2007 where he informed the incident. In fact, police came to his house on 29.10.2007, wherefrom he was brought to the Police station, where Divesh etc. were also present, thus totally belying the version of the Investigating Officer.

32. We are of the opinion that in the instant case, Investigating Officer has totally misled the Court. In Court, he states that body of an unknown person came to be found lying on the road at Shishamati, information whereof was sent to the Police Station, vide Rukka (Ex.PW-14/A), which led to registration of FIR No.622, dated 28.10.2007 (Ex.PW-14/B). Thereafter, he took the dead body in possession and sent it to the hospital for postmortem, which was so conducted by the doctor. The FIR records it to be a case of hit and run accident. He further states that it was only on 29.10.2007 that Ashok Mahajan (PW-1) came to the Police Station and identified the dead body to be that of his son. It is here, we find the witness to have deposed falsely, for the postmortem report (Ex.PW-12/A) categorically records identity of the deceased as also presence of his father. Postmortem was conducted in the morning of 28.10.2007 at 10.35. Such fact stands corroborated by Dr. Sushil Chander (PW-14). If that were so, then obviously version of this witness as also Ashok Mahajan about the factum of identification conducted on 29.10.2007 is false. It appears that the Investigating Officer was shielding witnesses Divesh Sharma, Vinod Kumar, Arpit and Lal Chand, who perhaps may have been involved in the incident, in relation to which complaint came to be filed by co-accused Manoj Kumar. Judicial notice can be taken of the fact that Kullu is a very small town. Also, deceased was a local resident. Thus, it is unbelievable that identity of the deceased could not be made known to the police for more than 24 hours. This very document records that the dead body came to be identified by one Anuj and Baldev Sharma (PW-8). Whereas the former remains unexamined but the latter admits presence of father of the deceased at the time of identification of the dead body. It be only observed that this witness is the real uncle (*Masad*) of the deceased. Obviously, the Investigating Officer has misled and not disclosed the whole truth.

33 Dr. Sushil Chander is the doctor who conducted postmortem of the deceased. As per his version, death was a result of head injury leading to intracranial haemorrhage leading to

shock. Significantly, in the viscera, the Chemical Analyst found traces on ethyl alcohol to the extent of 86.8 mg%. With certainty, doctor opined the deceased to have been under the influence of alcohol.

34. We may only observe that the police has not ruled out possibility of involvement of Divesh Sharma, Vinod Kumar and Arpit in the crime. Police has also not ruled out possibility of the deceased having fallen down and sustained injuries, under the influence of alcohol.

35. Even by way of corroborative evidence, prosecution has not been able to link the juvenile to the crime. Blood stained samples of *Bajri* (grit), so lifted from the spot of crime did not contain sufficient quantity of blood, leading the Analyst, by way of report (Ex.PB), to opine, the result of the blood group to be inconclusive.

36. Mr. Vikram Thakur, learned Deputy Advocate General, invites our attention to the disclosure statement (Ex.PW-3/B) alleged to have been made by co-accused Gauri Shankar in the presence of Divesh Sharma. In terms of Ex.PW-3/B, said co-accused disclosed that the *Dandas* used by him and his accomplices Manoj Kumar and Vicky, during a scuffle, were thrown by him down the cliff, at an unknown place, which only he could get identified and get the same recovered. Now significantly, in this statement, he does not even record involvement of co-accused Sanjeev Kumar. We have already held Divesh Sharma not to be a witness worthy of credence. Also, there is contradiction with regard to the place from where *Dandas* came to be recovered. According to Divesh Sharma, they were recovered from the bushes, but according to the Investigating Officer, as is also recorded in memo (Ex.PW-3/C), recovery came to be effected from a place known as Shallang. But what is important is that despite admission made by the Investigating Officer, that *Dandas* were blood stained, police never sent them for analysis to the expert. Why so? remains unexplained. After all, either blood of the injured or the deceased or finger prints of the juvenile and the co-accused could have been found thereupon.

37. In any event, version of the prosecution of having lifted blood stained grit from the spot on 29.10.2007 stands belied by Lal Chand, according to whom they were lifted on 31.10.2007.

38. There is yet another issue, which remains unexplained by the prosecution. Divesh Sharma admits that he was not aware of particulars of any one of the co-accused persons. If that were so, then how is it that police reached to the juvenile and co-accused. The Investigating Officer is conspicuously silent with regard to any test identification parade carried out by the police, but perhaps truth stands revealed by Divesh Sharma, who does state that for identifying the juvenile and co-accused, police got conducted the identification parade. In fact, he goes on to disclose that at that time, he was not even aware of name of Lal Chand. All this has further rendered the genesis of the prosecution story to be doubtful. In fact, in response to a Court question, Divesh Sharma categorically states that identity of the juvenile and the co-accused came to be disclosed to them by the police.

39. Also, Lal Chand, in his cross-examination, uncontrovertedly, categorically admits of not having seen anyone of the co-accused or the juvenile, assault the deceased or the witnesses.

40. From the material placed on record, prosecution has failed to establish that Juvenile Vikrant is guilty of having committed the offence, he has been charged with. The circumstances cannot be said to have been proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the juvenile does not stand proved beyond reasonable doubt to the hilt.

41. Hence, it cannot be said that prosecution has been able to prove its case, by leading clear, cogent, convincing and reliable piece of evidence so as to prove that Juvenile Vikrant alongwith co-accused Manoj Kumar, Gauri Shankar and Sanjeev Kumar, in furtherance of their common intention, committed murder of Varun Mahajan.

42. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence so placed on record by the parties.

43. The juvenile has had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in *Prandas (supra)*, it cannot be said that the Court below has not correctly appreciated the evidence on record or that acquittal of the juvenile has resulted into travesty of justice. No ground for interference is called for. The present appeal is dismissed. Bail bonds, if any, furnished by the juvenile are discharged.

Appeal stands disposed of, so also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Kishori Lal. .....Petitioner.

Versus

Mahima Devi .....Respondent.

Cr.MMO No. 84 of 2016
Reserved on: 23.11.2016
Decided on: 05.12.2016

Code of Criminal Procedure, 1973- Section 125- Marriage between petitioner and respondent was solemnized about 36 years ago – two daughters and one son were born – the petitioner fell down from a tree – her legs were fractured and she became bedridden – she was sent to the house of her brother - efforts were made to reconcile but failed - the petitioner does not have any source of income, while the respondent is earning Rs.40,000/- per month – respondent pleaded that the petitioner started misbehaving with him at the instance of her brother and son-in-law – she left the home voluntarily – Trial Court awarded maintenance of Rs.7,500/- per month to the petitioner- a revision was preferred, which was dismissed- held, that Medical Officer proved the disability of the petitioner- she is residing with her brother- the income of the respondent was taken as Rs.14,000/- per month and the maintenance of Rs.7,500/- per month is reasonable – petition dismissed. (Para-6 to 12)

For the petitioner: Mr. Saurav Rattan, Advocate.
For the respondent: Mr. Suneet Goel, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition is maintained by the petitioner (husband), who was the respondent before the learned Trial Court (hereinafter to called as "the respondent"), under Section 482 of the Code of Criminal Procedure (hereinafter to be called as "the Code") read with Section 227 of the Constitution of India for quashing order dated 26.12.2015, passed by the learned Sessions Judge, Sirmour, H.P. in criminal revision No. 31-Cr.R/10 of 2015, whereby order dated 19.06.2015, passed by the learned Judicial Magistrate 1st Class, Nahan, Sirmour, H.P. in criminal petition No. 01/4 of 2013, was affirmed, wherein the respondent (wife), who was the petitioner before the learned Trial Court (hereinafter to be called as "the petitioner"), was granted maintenance to the tune of Rs. 7,500/- per month from the date of passing of the order.

2. Briefly stating the facts, giving rise to the present petition are that, the marriage between the petitioner and respondent was solemnized about 36 years ago, as per Hindu customs and tradition, out of the said wedlock two daughters and a son were born. The relation between the parties remained cordial for about 20 years. However, 16 years back, the petitioner

fell down from a tree and her both legs were fractured. As per the respondent, the petitioner did not conduct her treatment properly and she became bedridden. Thereafter, the respondent started misbehaving with her, she was beaten up by him on many occasions and she was sent to the house of her brother. Several efforts were made by the brother of the petitioner to send her back to her matrimonial house, but the respondent refused to reside with her. As per the petitioner, she is residing in the house of his brother, since 07.06.2012 and she has no source of income to maintain herself. On the other hand, the respondent is an Ex. Army personnel, getting pension of Rs.11,000/- per month and he had been working in BSNL, from where he was getting salary of Rs. 25,000/- per month. The respondent is also having agricultural land, wherefrom his monthly income is stated to be Rs.40,000/- per month.

3. The respondent by filing reply in the learned trial Court, contested the claims of the petitioner and refuted the assertions, as made by her. According to the respondent, relation between the parties became strained about a year and eight months ago, when the brother and son-in-law of the petitioner have started motivating her to misbehave with the respondent. It is further alleged that the petitioner had also relinquished her share in favour of her brother. The respondent denied that the petitioner became bedridden, as he had not provided proper facilities to her. The respondent specifically stated that he had tried his level best to bring the petitioner back, but she refused. The respondent served several legal notices upon her to call her back, but at the instance of her brother, she refused to join the company of the respondent. The respondent has further submitted that previously, he was getting pension of Rs.10,021/- from Army and Rs.14,107/- as salary, from BSNL, as he was working there as Class IV employee. However, as of now he had been retired from BSNL, getting a pension of Rs. 3,996/- per month and he has no income, as alleged by the petitioner.

4. The learned Court below has allowed the petition file by the petitioner, under Section 125 of the Code of Criminal Procedure and granted maintenance to her to the tune of Rs. 7,500/- per month. Thereafter, respondent filed revision petition in the Court of learned District & Sessions Judge, Sirmaur, District at Nahan, H.P. and vide order dated 26.12.2015 the same was dismissed. Hence the present petition.

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

5. Learned counsel appearing on behalf of the respondent (petitioner before this Court) has argued that as the findings arrived at by the learned Courts below are perverse, the present petition is required to be entertained, under Section 482 of the Code, read with Article 227 of the Constitution of India. Learned counsel for the respondent has further argued that by exercising extraordinary jurisdiction, the orders of the learned Courts below may be set aside.

6. On the other hand, learned counsel appearing on behalf of the petitioner (respondent before this Court) has argued that the present revision petition is not maintainable, as the respondent had already maintained a revision petition in the Court of learned District and Sessions Judge, Sirmaur, District at Nahan and the orders, passed therein, are just and reasoned, hence the present petition is not maintained at all. As orders, passed by the Courts below, are just and reasoned, therefore, the respondent is barred from maintaining the second revision petition.

7. To appreciate the arguments of the parties, I have gone through the record of the case carefully.

8. The petitioner while appearing in the witness box, as AW-1, has stated that her both legs have been paralyzed and she has become bedridden. She has no other source of income, accordingly she is now dependent on the respondent. She had further alleged that the respondent was getting Rs. 11,000/- as pension from Army and Rs.25,000/- from BSNL, therefore, she has demanded Rs. 10,000/- as maintenance. In her cross-examination she has admitted that she was treated at Command Hospital, Chandimandir and subsequently after discharge, she was being treated there. She stated that she was ready to join the company of the respondent, but he left her.

9. Dr. Naveen Gupta, has proved on record the disability of the petitioner to the extent of 100%, vide certificate Ex. AW2/A.

10. The respondent has himself appeared in the witness box, as RW-1 and deposed that he is only getting pension of Rs. 3,996/- from BSNL and Rs.10,000/- pension from Army. He further stated that he had issued notices to the petitioner, besides that he had also sent medicines to her, but she had refused to receive.

11. The learned Courts below have rightly came to the conclusion that the respondent is liable to maintain the petitioner, who is residing with her brother, having 100% disability, as the respondent is not keeping her. The learned Courts below have rightly appreciated the income of the respondent i.e. Rs.14,000/-. So, Rs.7,500/-, as granted to the petitioner, is just and reasonable, as there is no one else to support the petitioner. Whereas, the respondent is an able-bodied person, capable to earn enough and having agricultural land too, thus, the orders passed by the learned Courts below are well reasoned and needs no interference.

12. In view of what has been discussed hereinabove, this Court finds that the present petition, being devoid of merits, deserves dismissal and is accordingly dismissed.

13. The petition is accordingly disposed of alongwith pending applications, if any.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Savitri Devi. .....Petitioner.

Versus

State of Himachal Pradesh & Ors. .....Respondents.

CWP No. 2902 of 2013
Reserved on: 16.11.2016
Decided on: 05.12.2016

Constitution of India, 1950- Article 226- Petitioner was appointed as drawing teacher on PTA basis –she continued teaching for five years and no complaint was made against her – her services were terminated by respondent No.5 without following the procedure- held, that the appointment of the petitioner cannot be questioned after a long time – respondent No.5 made a report that petitioner and her husband had beaten him and misbehaved with him – however, no inquiry was conducted prior to the termination of the petitioner – the order of termination is against the principle of natural justice and mala-fide- writ petition allowed and termination order quashed.(Para-13 to 18)

For the petitioner: Ms. Ranjana Parmar, Sr. Advocate with Ms. Komal Kumari, Advocate.

For the respondents: Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG, for respondents No. 1 to 3 & 5.
Mr. Pavnesh Thakur, Advocate, for respondent No. 4.
Mr. Onkar Jairath, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present writ petition is maintained by the petitioner, laying challenge against the order dated 04.05.2013, terminating the services of the petitioner, as Drawing Teacher, on which she was working as PTA (GIA) basis.

2. As per the petitioner, she was initially appointed on 20.09.2007, as Drawing Teacher on PTA basis, under grant in aid policy. The petitioner continued teaching for last five years and there was no complaint from any quarter concern against her. On 13.03.2013, respondent No. 5, being Principal of the School, misbehaved with the petitioner and before that also humiliated the petitioner on different occasions. On 13.05.2013, respondent No. 5 also gave beatings to the petitioner and threatened her that he will terminate her services. According to the petitioner, respondent No. 5 has physically exploited her, when she agitated, the services of the petitioner had been wrongly terminated. To this effect, the petitioner lodged FIR, bearing No. 33/2013 at Police Station Kot Kehloor, District Bilaspur and case under Section 353, 332 read with Section, 34 of IPC was registered against respondent No. 5. The husband of the petitioner was also teaching in the same School and vide resolution dated 04.05.2013, he was recommended to be transferred to remote area. The service of the petitioner has been terminated by respondent No. 4 by passing the resolution, as he was the Secretary of the SMC. Respondent No. 5 has tried to force the petitioner to withdraw her complaint and when she did not accede his request, services of the petitioner, through SMC, were terminated. It is averred in the writ petition that no show cause notice was issued to explain the charges leveled against the petitioner, as such no enquiry was conducted to this effect. Respondent No. 5, has passed the resolution only to take revenge, as petitioner has lodged FIR against him. Thus, the petitioner is praying for setting aside the order dated 04.05.2013 (Annexure P-1).

3. Reply to the writ petition, on behalf of respondents No. 1, 2, 3 & 5 has been filed through respondent No. 2, wherein it is averred that on 20.09.2007, in absence of PTA Committee, the petitioner was engaged as Drawing Master on PTA basis by the then officiating Principal (who is the husband of the petitioner) of GSSS Saloa, District Bilaspur. The person, who was working earlier as Drawing Master in the said school, was transferred to GHS Kallar, District Bilaspur and was relieved from his duties on 18.09.2007. On the same day, resolution for filling up the post of Drawing Master, was passed by PTA Committee and applications were invited amongst the eligible candidates upto 19.09.2007. However, no record regarding said advertisement has been annexed by the petitioner. The date of interview was fixed for 20.09.2007 and petitioner was shown meritorious and appointment letter was issued to the petitioner. It is further averred in the reply that the appointment of the petitioner has not been made as per procedure laid down under Grant in Aid Rules, 2006, as adequate time for other candidates to submit their applications were not provided by the PTA Committee and the whole process was concluded in hastily manner, which was merely a formality. Thus, the petition filed by the petitioner deserves to be dismissed.

4. Reply to the writ petition was also filed by respondent No. 4, wherein it is averred that the petitioner was not eligible to be appointed as Drawing Master, as she did not studied the Drawing subject upto matriculation. The petitioner has undertaken two courses i.e. 10+2 examination in the month of March, 2004 (Annexure R-4/A) and two years' diploma in Art & Craft in the month of July, 2005 (Annexure R-4/B), which show that the petitioner has done two courses at the same time. It is further averred that the petitioner has been awarded marks under the head "experience", for which she was not eligible, as she failed to produce the experience certificate at that relevant time, but later on her husband managed to produce the same by forged signature of Deputy Director of Education i.e. Annexure R-4/C. It is further averred that when the interview for the said post was conducted, husband of the petitioner was officiating as Principal of the School, which is illegal and against the settled principle of law. The merit list (Annexure R-4/D) prepared by the Selection Committee was signed by the husband of the petitioner. Thus, the appointment of the petitioner has been rightly terminated by the replying respondent and the petition filed by the petitioner deserves to be dismissed with heavy costs.

5. Respondent No. 6 has also filed a reply and stating therein that the husband of the petitioner, in order to give undue advantage to her wife, selected his wife and denied the appointment of replying respondent, who was eligible for being appointed as Drawing Master. It is further averred that the marks under the head "experience" were awarded to the petitioner, by way of forging the experience certificate. The experience certificate was also counter signed by the

Deputy Director, Bilaspur on 07.07.2008 i.e., much later to the date of interview i.e. 20.09.2007. Hence, the present petition, preferred by the petitioner deserves to be dismissed.

6. The petitioner filed separate rejoinders to the replies filed by the respondents, wherein contents of the reply were denied and the averments made in the petition were reiterated.

7. Learned counsel for the petitioner has argued that the services of the petitioner have been terminated, without following the principles of natural justice. Respondent No. 5, against whom the petitioner has filed the complaint, acted as a disciplinary authority to terminate the services of the petitioner. Learned counsel for the petitioner has further argued that, inspite of taking action against respondent No. 5, the respondents have chosen to terminate the services of the petitioner. Respondent No. 5, who was interested person himself, passed the resolution for terminating the services of the petitioner.

8. On the other hand, learned Additional Advocate General, has argued that the conduct of the petitioner and her husband was illegal and they had given beatings to the Principal of the School, i.e. respondent No. 5, hence the services of the petitioner were rightly terminated by the Committee.

9. Learned counsel appearing on behalf of respondent No. 4 has argued that the services of the petitioner were terminated after following the due process.

10. Learned counsel appearing on behalf of respondent No. 6 has vehemently argued that the petitioner was appointed by none else, but her husband, when the husband of the petitioner was working as a Principal of the School and her appointment is void *ab initio*.

11. In rebuttal, learned counsel for the petitioner has argued that the petitioner was not appointed by her husband, but she was appointment by the Committee of which her husband was not a member. She has further stated that respondent No. 6, who was not eligible on the day of interview, manipulated the things against the petitioner. She has further argued that the husband of the petitioner has only counter signed the recommendations of the Selection Committee as officiating Principal.

12. To appreciate the arguments of learned counsel for the parties, I have gone through the record carefully.

13. At the very outset, I would like to discuss the process of appointment of the petitioner. The petitioner was selected by the Committee, through proceedings, enclosed alongwith the writ petition, as Annexure A-1. The proceedings shows that out of four candidates called, three candidates including the petitioner and respondent No. 6 were called for the interview and the petitioner obtained maximum marks. The proceedings of the Committee are, however, counter signed by Raj Kumar, who is stated to be the husband of the petitioner, but *prime facie* do not show that husband of the petitioner was a member of the Selection Committee, as the members of the Selection Committee were other three persons, including President of PTA, Subject expert and Secretary of the PTA. It has also come on record that respondent No. 6 has already assailed the appointment of the petitioner by filing a civil writ petition before this Hon'ble High Court. The aforesaid writ petition had been taken up by this Hon'ble Court on 21.04.2008 and direction was passed to the authority to consider and decide the same in accordance with law by passing a speaking order. Pursuant to the directions of this Hon'ble Court, the matter was taken up by the competent authority and the same was decided on 10.10.2008, whereby the competent authority has upheld the appointment of the petitioner. Thereafter, the said order was not assailed and it attained finality, thus appointment of the petitioner cannot be questioned again, after such a longtime by the respondents.

14. Now, the next question which arises for determination in the present writ petition is that whether the termination order of the petitioner, passed by the respondents is legally sustainable or not? Respondents No. 1 to 3 & 5 in their reply, has specifically stated in this regard, that as per the information received from respondent No. 5, the petitioner and her husband have oftenly misbehaved with him and disobeyed his orders, which created nuisance in

the School and adversely affected the studies of the students, consequently, the services of the petitioner were rightly terminated by the SMC of the said institution. It has been further alleged that the petitioner was under the shelter of her husband, who was also working as Lecturer (Hindi) and used to officiate as Principal, in the absence of respondent No. 5. As per respondents No. 1 to 3 & 5, the petitioner and her husband have badly beaten respondent No. 5 while he was on duty and the matter was also reported to the Police, vide FIR No. 32 dated 13.03.2013, registered under Sections 353, 332 and 34 of IPC. It is further stated that respondent No. 5 is competent to terminate the services of the petitioner, as per the guidelines.

15. The respondents have nowhere stated that they had followed the procedure, as prescribed, nor given any notice to the petitioner before terminating her services. It has come on record that the petitioner has also lodged report against respondent No. 5, which was not registered by the Police and only after the intervention of the Court, the same was registered i.e., FIR No. 33 of 2013 at Police Station Kot Kehloor, District Bilaspur, under Sections 353, 332 read with Section, 34 of IPC. Meaning thereby that the FIR is also pending against respondent No. 5. In these circumstances, it is very clear that respondent No. 5 passed the order of termination when he was interested, so, the same is nothing, but a mala fide order, which is unreasonable, unconstitutional and not sustainable in the eyes of law. Respondent No. 5 was interested, as he was himself a complainant, as well as named accused by the petitioner in her complaint. The petitioner has specifically stated that inspite of taking action against respondent No. 5, as per the guidelines of Hon'ble Supreme Court in "***Vishakha's"*** case, respondent No. 5 was asking the petitioner to withdraw her complaint and allegations and when she refused, the order was passed. Further the petitioner was not heard before passing the order against her.

16. So, it is amply clear that the order of termination passed by respondents, terminating the services of the petitioner, as PTA Teacher, is beyond the confines of legitimacy, arbitrary, unconstitutional, against the principles of natural justice, void *ab initio* and without affording opportunity of being heard to the petitioner, passed by respondent No. 5, who was an interested person and is thus mala fide and not sustainable. Therefore, the termination order of the petitioner, as Drawing Master PTA, (Annexure P-1) dated 04.05.2013, is not sustainable and is accordingly quashed. As a result of quashing of this order, the petitioner is held entitled for all the benefits which accrued to her, after passing order dated 04.05.2013 (Annexure P-1), being non-existent.

17. Accordingly, the present writ petition is allowed and order dated 04.05.2013 (Annexure P-1) is quashed and the petitioner is held entitled for all consequential benefits, including reinstatement.

18. However, in the peculiar facts and circumstances of the case, parties are left to bear their own cost(s).

19. In view of the above, the writ petition, as also pending application(s), if any, shall stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh .....Appellant.

Versus

Monika Kinnar alias Priya. .....Respondents

Cr. Appeal No. 26 of 2008
Reserved on : 21.11.2016
Decided on : 05.12.2016

Indian Penal Code, 1860- Section 325- Some trans-genders reached the shop of the informant and demanded Rs.50/- - informant paid Rs.5/- but they refused and used filthy language- they

also gave beatings to the informant – one S reached at the spot and rescued the informant from the trans-genders – informant and S went to the police station and trans-genders followed them – they inflicted a blow by a scale on the head of the informant- police officials rescued the informant – the accused wastried and acquitted by the Trial Court- held in appeal that witnesses have contradicted the prosecution version- PW-1 stated that injury could have been caused by way of a stick– the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-6 to 17)

Cases referred:

K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258

T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the appellant	Mr. Virender K. Verma, Additional Advocate General with Mr. Pushpinder Singh Jaswal, Dy. Advocate General and Mr. Rajat Chauhan, Law Officer, for the appellant.
For the respondent	Mr. Ajay Dhiman, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, J.

The present appeal is maintained by the appellant/State of Himachal Pradesh, under Section 378 of the Code of Criminal Procedure, assailing the judgment, dated 28.09.2007, passed by the learned Judicial Magistrate 1st Class, Manali, District Kullu, H.P., whereby the accused/respondent (hereinafter to be called as "the accused") was acquitted under Section 325 of the Indian Penal Code.

2. Briefly stating the facts, as per the prosecution story, giving rise to the present appeal are that on 17.06.2005, some transgenders, while singing songs, reached the complainant's shop, at Model Town Manali and demanded Rs. 50/- from her. The complainant was not having Rs.50/- currency note, therefore, she gave Rs. 5/- to them, but the transgenders refused to take Rs. 5/- and said that in these days of high prices, Rs. 5/- does not carry any value and used filthy language also. When complainant objected about their filthy language, they started given beatings to her. After the said occurrence the complainant made a phone call to the Police, in the meantime, Sunita Sharma, also reached on the spot alongwith other persons and saved the complainant from the transgenders. Thereafter, complainant alongwith Sunita Sharma, went to the Police Station and reported the matter to SI Roop Singh. SI Roop Singh advised her to lodge the report with the MHC. Therefore, the complainant and Sunita Sharma went to the room of Munshi and they were followed by three transgenders, who started quarrelling with the complainant. When the complainant asked them not to use filthy language, they scuffled with the complainant and one transgender picked up a scale (futa) from the table and hit the complainant on her head, due to which she sustained injury and the blood started oozing from her head. After such occurrence, Police officials intervened and Rapat No. 26, dated 17.06.2005, was registered. Thereafter, the complainant was taken to CHC Manali for treatment, wherefrom the complainant was referred to Lady Willington Hospital, Manali, where the Medical officer opined the injury as grevious, which led to registration of FIR.

3. The prosecution, in order to prove its case, has examined as many as seven witnesses. Statement of accused was recorded under Section 313 Cr.P.C, wherein accused denied the prosecution case and claimed innocence. No defence evidence was led by the accused.

4. I have heard learned Additional Advocate General for the appellant/State and learned defence counsel for the respondent/accused.

5. To appreciate the arguments of learned Additional Advocate General and learned defence counsel, this Court has gone through the record in detail and minutely scrutinized the statements of the witnesses.

6. PW-1, Dr. Philip Alexander, Medical Officer, Mission Hospital, Manali, who has medically examined the complainant has stated that the injuries sustained by the complainant, could be sustained with danda.

7. PW-2, MC, Bhoop Singh, the alleged eye witness, has completely contradicted the prosecution version. He has stated that on 17.06.2005, he was posted at Police Station, Manali as MC. At about 6.00 P.M. the complainant visited the Police Station, followed by one transgender named Monika. Both of them were started quarrelling and the complainant slapped the accused, she also picked up the scale from the table and tried to hit the accused, but, the accused snatched the scale from the complainant and hit the complainant with the same on her head, due to which blood started oozing from her head. He has further stated that after the said occurrence he and MHC Hari Singh, intervened and took the complainant to CHC Manali, for medical examination. The case was registered and scale, which was used during the alleged occurrence was taken into possession, vide seizure memo Ex. PW2/A. However, this witness has also stated that danda, Ex. P-1, was produced in the Court. In his cross-examination he has stated that the complainant slapped the accused and danda was picked up for hitting the accused. PW-2 admitted that danda, Ex. P-1, was the same, though, as per the prosecution version, as well as PW-2, the accused hit the complainant with the scale, but the scale was not produced before the Court.

8. PW-4, complainant, has stated that on 17.06.2005, at 6:00 p.m., she alongwith Sunita Sharma went to Police Station to report the matter, qua beatings given to her by some transgenders. She went to Additional SHO, SI Roop Singh, who advised her to report the matter to Munshi. Thereafter, complainant alongwith Sunita Sharma went to the room of Munshi, but they were followed by the accused and the accused started using filthy language against the complainant and hit her on her head, as a result, blood started oozing from her head.

9. PW-5, Sunita Sharma, has also described the same version as deposed by PW-4, but, she contradicted the statements of PW-1 and PW-2. As per her version the weapon of offence was scale not danda. PW-1, Dr. Philip Alexander, Medical Officer, Mission Hospital, Manali, has also stated that the injuries sustained by the complainant could be possible with danda. Thus, the statement of PW-1, makes the prosecution version doubtful. The statement of PW-5 also contradicts the contents of FIR Ex. PW-6/B and Rapat Ex. PW-6/C, as this witness has not stated qua the factum of entering into the room of Munshi by three transgenders. PW-5, is admittedly of the same community of which the complainant is and she has accompanied the complainant to the Police Station, thus it seems that PW-5 is an interested witness and she has a reason to depose in favour of the complainant.

10. PW-6, SI Dharam Singh, Investing Officer of the present case had visited the spot on 19.06.2005, prepared site plan Ex. PW-6/A and taken into possession the weapon of offence i.e. danda, Ex. P-1 vide seizure memo Ex. PW-2/A.

11. PW-7, ASI Ram Saran, has partly investigated the present case and recorded the statement of PW-5, whereas PW-3, PC, Duni Chand, was the witness to seizure memo, Ex PW-2/A.

12. From the above discussion of evidence on record, it is clear that the witnesses have completely contradicted the prosecution story, as set up against the accused. As per PW-2, the accused and the complainant had visited the Police Station and started quarrelling with each other. The complainant slapped the accused, thereafter, she picked up the scale from the table and tried to hit the accused, however, the accused snatched the scale from the complainant and hit the complainant on her head, so the injury was caused. PW-2 also contradicted the statements of PW-4 and PW-5. PW-1, has specifically stated that the injury, which was shown to him at the time of medical examination, was possibly caused with a danda. PW-5, had been in

close association with the complainant, thus she cannot be termed as an independent witness. Accordingly, the statements of PW-2, PW-4 and PW-5 are not consistent and sufficient enough to prove the guilt of the accused. Consequently, the statements of PW-4 and other witnesses, as examined by the prosecution has become doubtful. The alleged occurrence took place in presence of PW-2, MC, even though the name of the accused was not find mention in FIR, Ex. PW-6/B, as well as, in Rapat, Ex. PW-6/C.

13. Thus, in the absence of any reasonable and plausible explanation, an adverse inference has to be drawn against the prosecution version and the contradictory statement of the witnesses create suspicion.

14. It has been held in **K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258,** that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non consideration/misappreciation of evidence on record, reversal thereof by High Court was not justified.

15. The Hon'ble Supreme Court in **T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401,** has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

16. So, in the opinion of this Court, when the identity of the accused is not established, the findings of the learned Court below cannot be said to be perverse and against the law, as the prosecution has failed to prove the guilt of the accused conclusively and beyond reasonable doubt.

17. In view of the aforesaid decisions of the Hon'ble Supreme Court and the discussion made hereinabove, I find no merit in this appeal and the same is deserves dismissal and is accordingly dismissed. Pending application(s), if any, shall also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Vipul Kumar Kapadi .....Petitioner.

Versus

State of Himachal Pradesh & Ors. .....Respondents.

Cr. Revision No.287 of 2015
Reserved on : 07.11.2016
Decided on : 05.12.2016

Code of Criminal Procedure, 1973- Section 321- An application for withdrawal of the case was filed on the ground that matter has been compromised- the application was dismissed by the Trial Court- held, that if quashing of FIR is necessary for securing the ends of justice Section 320 of Code of Criminal Procedure will not be a bar - where the matter has been compromised, continuation of the proceedings will be an abuse of the process of the Court – petition allowed and the proceedings pending before CJM, Nahan ordered to be quashed. (Para-6 to 10)

Cases referred:

B.S. Joshi and others vs. State of Haryana and another, (2003) 4 SCC 675
Preeti Gupta and another vs. State of Jharkhand and another, (2010) 7 SCC 667
Jitendra Raghuvanshi and others vs. Babita Raghuvanshi and another, (2013) 4 SCC 58

For the petitioner : Mr. Amit Kumar Dhumal, Advocate.

For the respondents : Mr. Virender Kumar Verma, Addl. Advocate General with Mr. Pushpinder Jaswal, Dy. Advocate General and Mr. Rajat Chauhan, Law Officer,for respondent No. 1.
Respondent No. 2 *ex parte*.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present Criminal Revision Petition is maintained by the petitioner under Section 397 read with Section 401 of the Code of Criminal Procedure (hereinafter called as "the Cr.P.C"), against the order dated 05.05.2015, passed by learned Chief Judicial Magistrate, Sirmaur, District at Nahan, H.P. on an application under Section 321 of the Cr.P.C in case No. 1/3 of 2015, titled as State of Himachal Pradesh Versus Vipul Kumar Kapadi, pending before learned Chief Judicial Magistrate, Nahan, H.P.

2. The brief facts giving rise to the present petition are that case No. 1/3 of 2015 has been presented against the petitioner for allegedly having committed offences under Sections 43, 65, 66 and 72 of the Information Technology Act, 2000 before the learned trial Court in case FIR No. 177/2011, dated 17.08.2011, registered at Police Station, Sadar Nahan, District Sirmaur, H.P. During the course of the proceedings, an application under Section 321 of the Cr.P.C has been filed by the State of Himachal Pradesh for withdrawal of the case with the plea that the complainant/respondent No. 2 has amicably compromised the dispute with the accused/petitioner (hereinafter called as "the petitioner"). However, the learned trial Court has not appreciated the compromise between the parties and vide its order, dated, 25.06.2014, issued notice to the complainant and the complainant appeared before the trial Court on 22.07.2014 and made a statement that the matter was compromised with the petitioner, as such, the complainant has no objection if the same is withdrawn by the State, but the learned Trial Court has come to the conclusion that permission to withdraw the case cannot be granted and vide order dated 05.05.2015, dismissed the application and ordered to put up the case for consideration on charge. Feeling aggrieved by the decision of learned trial Court, the petitioner preferred the present petition.

3. In the present matter, challan for having committed offences under Sections 43, 65, 66 & 72 of the Information Technology, Act, 2000, was presented against the petitioner. It is alleged that petitioner was appointed as Deputy Manager (Master Batch) vide appointment letter dated 27.05.2007. At the time of his appointment, the company's E-mail ID, i.e, vipulkapadi@silkolite.com, was provided to him and he was conferred the power to use propriety data relating to colour development and decodification of company shade numbers in the company shade card. It is also alleged that company's ID was solely in possession of the petitioner and the said Id was used by the petitioner for handling the various secrets, developments and trace data of the company. The petitioner, without the consent of the company, had transferred many trade secrets of the company to his personal Id. It is further alleged that the secrets of the company's developments, stolen by the petitioner, not only caused financial loss to the company, but also the same have been misappropriated by the petitioner. Police after investigating the matter, came to the conclusion that petitioner in order to take profit, sent data shade through his E-mail ID to other concerns, as such committed offences under Sections 43, 65, 66 & 72 of the Information Technology, Act, 2000.

4. The complainant, who lodged the complaint, has appeared before the learned Court below and stated that the matter has been compromised with the petitioner. If the complainant, whose ID was misused by the petitioner, has settled their dispute, this Court finds that no fruitful purpose will be served by keeping the complaint alive.

5. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

6. Their Lordships of the Hon'ble Supreme Court ***B.S. Joshi and others*** vs. ***State of Haryana and another***, (2003) 4 SCC 675, have held that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, section 320 would not be a bar to the exercise of power of quashing. It is well settled that the powers under section 482 have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers. Their Lordships have held as under:

> *[6] In Pepsi Food Ltd. and another v. Special Judicial Magistrate and others ((1998) 5 SCC 749), this Court with referenc e to Bhajan Lal's case observed that the guidelines laid therein as to where the Court will exercise jurisdiction under Section 482 of the Code could not be inflexible or laying rigid formulae to be followed by the Courts. Exercise of such power would depend upon the facts and circumstances of each case but with the sole purpose to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It is well settled that these powers have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers.*
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> *[8] It is, thus, clear that Madhu Limaye's case does not lay down any general proposition limiting power of quashing the criminal proceedings or FIR or complaint as vested in Section 482 of the Code or extraordinary power under Article 226 of the Constitution of India. We are, therefore, of the view that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, Section 320 would not be a bar to the exercise of power of quashing. It is, however, a different matter depending upon the facts and circumstances of each case whether to exercise or not such a power.*
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> *[15] In view of the above discussion, we hold that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code.*

7. Their Lordships of the Hon'ble Supreme Court ***in Preeti Gupta and another*** vs. ***State of Jharkhand and another***, (2010) 7 SCC 667, have held that the ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. The tendency of implicating the husband and all his immediate relations is also not uncommon. At times, even after the conclusion of the criminal trial, it is difficult to ascertain the real truth. Experience reveals that long and protracted criminal trials lead to rancor, acrimony and bitterness in the relationship amongst the parties. The criminal trials lead to immense sufferings for all concerned. Their Lordships have further held that permitting complainant to pursue complaint would be abuse of process of law and the complaint against the appellants was quashed. Their Lordships have held as under:

> *[27] A three-Judge Bench (of which one of us, Bhandari, J. was the author of the judgment) of this Court in Inder Mohan Goswami and Another v. State of Uttaranchal & Others, 2007 12 SCC 1 comprehensively examined the legal position. The court came to a definite conclusion and the relevant observations of the court are reproduced in para 24 of the said judgment as under:-*
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> *"Inherent powers under section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute."*
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> *[28] We have very carefully considered the averments of the complaint and the statements of all the witnesses recorded at the time of the filing of the complaint. There are no specific allegations against the appellants in the complaint and none of the witnesses have alleged any role of both the appellants.*

[35] The ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. To find out the truth is a herculean task in majority of these complaints. The tendency of implicating husband and all his immediate relations is also not uncommon. At times, even after the conclusion of criminal trial, it is difficult to ascertain the real truth. The courts have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realities into consideration while dealing with matrimonial cases. The allegations of harassment of husband's close relations who had been living in different cities and never visited or rarely visited the place where the complainant resided would have an entirely different complexion. The allegations of the complaint are required to be scrutinized with great care and circumspection.

36. Experience reveals that long and protracted criminal trials lead to rancour, acrimony and bitterness in the relationship amongst the parties. It is also a matter of common knowledge that in cases filed by the complainant if the husband or the husband's relations had to remain in jail even for a few days, it would ruin the chances of amicable settlement altogether. The process of suffering is extremely long and painful.

[38] The criminal trials lead to immense sufferings for all concerned. Even ultimate acquittal in the trial may also not be able to wipe out the deep scars of suffering of ignominy. Unfortunately a large number of these complaints have not only flooded the courts but also have led to enormous social unrest affecting peace, harmony and happiness of the society. It is high time that the legislature must take into consideration the pragmatic realities and make suitable changes in the existing law. It is imperative for the legislature to take into consideration the informed public opinion and the pragmatic realities in consideration and make necessary changes in the relevant provisions of law. We direct the Registry to send a copy of this judgment to the Law Commission and to the Union Law Secretary, Government of India who may place it before the Hon'ble Minister for Law & Justice to take appropriate steps in the larger interest of the society.

8. Their Lordships of the Hon'ble Supreme Court in ***Jitendra Raghuvanshi and others*** vs. ***Babita Raghuvanshi and another,*** (2013) 4 SCC 58, have held that criminal proceedings or FIR or complaint can be quashed under section 482 Cr.P.C. in appropriate cases in order to meet ends of justice. Even in non-compoundable offences pertaining to matrimonial disputes, if court is satisfied that parties have settled the disputes amicably and without any pressure, then for purpose of securing ends of justice, FIR or complaint or subsequent criminal proceedings in respect of offences can be quashed. Their Lordships have held as under:

[13] As stated earlier, it is not in dispute that after filing of a complaint in respect of the offences punishable under Sections 498A and 406 of IPC, the parties, in the instant case, arrived at a mutual settlement and the complainant also has sworn an affidavit supporting the stand of the appellants. That was the position before the trial Court as well as before the High Court in a petition filed under Section 482 of the Code. A perusal of the impugned order of the High Court shows that because the mutual settlement arrived at between the parties relate to non-compoundable offence, the court proceeded on a wrong premise that it cannot be compounded and dismissed the petition filed under Section 482. A perusal of the petition before the High Court shows that the application filed by the appellants was not for compounding of non-compoundable offences but for the purpose of quashing the criminal proceedings.

[14] The inherent powers of the High Court under Section 482 of the Code are wide and unfettered. In B.S. Joshi , this Court has upheld the powers of the High Court under Section 482 to quash criminal proceedings where dispute is of a private nature and a compromise is entered into between the parties who are willing to

settle their differences amicably. We are satisfied that the said decision is directly applicable to the case on hand and the High Court ought to have quashed the criminal proceedings by accepting the settlement arrived at.

[15] In our view, it is the duty of the courts to encourage genuine settlements of matrimonial disputes, particularly, when the same are on considerable increase. Even if the offences are non-compoundable, if they relate to matrimonial disputes and the court is satisfied that the parties have settled the same amicably and without any pressure, we hold that for the purpose of securing ends of justice, Section 320 of the Code would not be a bar to the exercise of power of quashing of FIR, complaint or the subsequent criminal proceedings.

[16] There has been an outburst of matrimonial disputes in recent times. The institution of marriage occupies an important place and it has an important role to play in the society. Therefore, every effort should be made in the interest of the individuals in order to enable them to settle down in life and live peacefully. If the parties ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law, in order to do complete justice in the matrimonial matters, the courts should be less hesitant in exercising its extraordinary jurisdiction. It is trite to state that the power under Section 482 should be exercised sparingly and with circumspection only when the court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice require that the proceedings ought to be quashed. We also make it clear that exercise of such power would depend upon the facts and circumstances of each case and it has to be exercised in appropriate cases in order to do real and substantial justice for the administration of which alone the courts exist. It is the duty of the courts to encourage genuine settlements of matrimonial disputes and Section 482 of the Code enables the High Court and Article 142 of the Constitution enables this Court to pass such orders.

[17] In the light of the above discussion, we hold that the High Court in exercise of its inherent powers can quash the criminal proceedings or FIR or complaint in appropriate cases in order to meet the ends of justice and Section 320 of the Code does not limit or affect the powers of the High Court under Section 482 of the Code. Under these circumstances, we set aside the impugned judgment of the High Court dated 04.07.2012 passed in M.C.R.C. No. 2877 of 2012 and quash the proceedings in Criminal Case No. 4166 of 2011 pending on the file of Judicial Magistrate Class-I, Indore."

9. Thus, taking into consideration the law as discussed hereinabove, I find that the interest of justice will be met, in case, the proceedings are quashed, as the parties have already compromised the matter, which is placed on record.

10. Accordingly, the Criminal Revision Petition under Section 397, read with Section 401 of the Cr.P.C, against the order dated 05.05.2015, passed by learned Chief Judicial Magistrate, Sirmaur, District at Nahan, H.P. is allowed and order on application under Section 321 of the Cr.P.C, in case No. 1/3 of 2015, titled as State of Himachal Pradesh Versus Vipul Kumar Kapadi is quashed and proceedings pending before learned Chief Judicial Magistrate, Nahan, H.P., are also ordered to be quashed.

11. The petition stands allowed in the aforesaid terms. Pending application(s), if any, shall stand(s), disposed of.

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

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

Cr. Appeal No. 527 of 2008 a/w
connected matters.
Decided on : 14.12.2016

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 600 grams charas – he was tried and convicted by the Trial Court- held in appeal that sample analyzed in the laboratory was not connected to the sample drawn at the spot as there was discrepancy regarding the seal impression and number of seals – the Trial Court had wrongly convicted the accused, in these circumstances- appeal allowed and accused acquitted of the commission of offence punishable under Section 20 of N.D.P.S. Act. (Para-8 to 16)

For the Appellant(s): Mr. Anoop Chitkara, Advocate with Ms. Sheetal, Advocate.
For the Respondent: Mr. Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the impugned judgment of 21.7.2008 rendered by the learned Special Judge, Hamirpur in Sessions trial No. 13/07, whereby the learned trial Court convicted the appellants (hereinafter referred to as "accused") for theirs committing an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the Act") also sentenced them as follows:-

> ".....to undergo rigorous imprisonment for two years and to pay a fine in a sum of Rs.25,000/-each and in default of payment of fine, they shall further undergo simple imprisonment for four months."

2. Brief facts of the case are that as per rapat No. 36 of 30.1.2007 ASI Rajinder Paul alongwith some other police officials left the police station at 12.45 a.m. in a Government vehicle towards Bhareri-Ladraur etc. side for patrolling duty. When they were returning to the police station at about 4.30 a.m. and reached Bailag Ghat, one vehicle bearing registration No. HP-01H-2710 was found parked on the road side. The accused persons were found to be sitting in the same. On seeing the police party they got frightened. They were questioned by the police. They disclosed theirs names and addresses. On suspicion the vehicle was got checked. On checking, one polythene envelope was recovered from the back of accused Balle Ram and Durga Dass. The words "Yarkey Boot House, Lower Dhalpur, Kullu" were inscribed on the same. Inside the polythene envelope, one handkerchief was found. It was opened. There was another polythene wallet inside. It was containing charas. On weighment the charas was found to be 600 grams. Two samples of 25 grams each were separated from the same. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. The accused stood charged by the learned trial Court for theirs committing an offence punishable under Section 20 of the Act to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 9 witnesses. On closure of prosecution evidence the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded in which they pleaded innocence and claimed false implication. They chose not to lead any evidence in defence.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of conviction against the accused for theirs committing an offence punishable under Section 20 of the Act.

6. The learned counsel appearing for the accused has concertedly and vigorously contended qua the findings of conviction recorded by the learned trial Court standing not based on a proper appreciation of evidence on record rather theirs standing sequelled by gross mis-appreciation of material on record. Hence he contends qua the findings of conviction being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of acquittal.

7. The learned Deputy Advocate General has with considerable force and vigor contended qua the findings of conviction recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference rather meriting vindication.

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

9. Under memo Ex.PW-1/B recovery of charas holding a weight of 600 grams stood effectuated from vehicle bearing registration No. HP-01H-2710, vehicle whereof stood at the relevant time occupied by all the accused. Recovery of the aforesaid relevant item of contraband stood effectuated from the rear seat of the vehicle aforesaid. The learned trial Court while imputing credence to the testimonies of the prosecution witnesses, it pronounced an order of conviction upon the accused. A thorough perusal of the testimonies of the PWs underscores the trite factum qua each in their respective testimonies communicating qua the reflections borne on Ex.PW-1/B a version unbereft of any taint of any inter-se contradictions occurring in their respective examinations-in-chief vis-à-vis their respective cross examinations also a studied perusal of their respective testifications do not unveil qua theirs respectively therein revealing a version qua the relevant occurrence with any blemish of any intra-se contradictions occurring respectively therein, thereupon it was apt for the learned trial Court to record a conclusion qua the prosecution succeeding in proving the charge against the accused.

10. However the gravamen of the entire prosecution case rested upon the prosecution unfailingly clinching the trite factum probandum qua the sample Ex.P-2 drawn from the seized bulk of charas at the relevant site of occurrence whereon an opinion stood recorded by the FSL embodied in Ex.PW-7/B qua its apposite affirmative opinion borne thereon qua the sample charas borne on parcel Ex.P-2 also standing unfailingly connected with its drawl occurring from the relevant bulk charas seized at the site of occurrence from the alleged conscious and exclusive possession of the accused.

11. A thorough besides an incisive perusal of the record unveils qua the communications embodied in NCB form comprised in Ex. PW-1/C making a graphic unfoldment therein qua the sample parcel of charas borne on Ext.P-2 whereon the FSL concerned recorded its apposite affirmative opinion borne on Ex. PW-7/B standing at the relevant site of occurrence sealed with seal impression holding thereon English alphabet 'D' also Ext.PW-1/C underscores qua Ext.P-2 on its standing re-sealed by the SHO concerned at the police station concerned its holding thereon resealed impressions displaying seal impression(s) of English alphabet 'H'. Though the seal impressions borne on sample parcel Ex.P-2 throughout the stages whereat it stood dispatched to the FSL concerned for the latter recording an opinion thereon besides upto the stage when Ex. P-2 after its standing subjected to examination thereat evinced from the FSL concerned an affirmative opinion on Ex. P-2 also at the stage when Ex. P-2 emanated therefrom hence hold evident concurrence with the display in NCB Form Ext.PW-1/C qua the seal impressions respectively embossed thereon, thereupon conspicuously with visible concurrence standing displayed inter se Ext.PW-1/B and Ext.PW-1/C qua Ex. P-2 in congruity thereof holding four seals thereon bearing English Alphabet 'D' also its holding thereon 4 resealed impression(s) bearing English alphabet 'H'. However, dehors the aforesaid concurrence occurring inter-se

the relevant factum of seal impression(s) borne on Ex. P-2 at the stage whereat Ex.PW-1/C stood prepared besides at the stage whereat the contents of Ex. P-2 stood received for examination at the FSL concerned, besides when Ex. P-2 emanated therefrom would yet not coax this court to conclude nor would lean this court to infer therefrom qua the opinion formed by the FSL depicted in Ex.PW-7/B wherewithin unfoldments occur qua Ext.P-2 holding Charas therewithin, holding the apposite connectivity vis-à-vis Ext.P-2 unless also at the stage contemporaneous to the production of Ext.P-2 in Court for its standing shown to the material prosecution witnesses, it also thereat displayed congruity vis-à-vis the apposite reflections displayed in Ex.PW-1/C also enunciated in Ex.PW-7/B vis-à-vis the English alphabet(s) borne on all the seals as stood embossed thereon whereupon alone the opinion of the FSL concerned recorded in Ext.PW-7/B would stand concluded to be vis-à-vis the relevant seizure of bulk charas effectuated from the alleged conscious and exclusive possession of the accused by the Investigating Officer concerned in the manner unfolded in Ex. PW-1/B. However for resting the aforesaid factum probandum of compatibility qua the aforesaid factum probandum existing at the stage whereat sample parcel Ext.P-2 stood produced in Court, an allusion to the testimony of PW-2, to whom Ext.P-2 stood shown in Court by the PP concerned is imperative wherewithin he has articulated qua sample parcel comprised in Ex.P-2 on its standing shown to him in Court besides holding thereon seal impression(s) embossed thereon by the FSL its also holding thereon seal impression 'B'.

12. The aforesaid communication(s) made by PW-2 at the stage whereat sample parcel Ex.P-2 stood shown to him in Court whereupon an affirmative opinion comprised in Ex.PW-7/B stood recorded by the FSL concerned unveils an open dichotomy existing inter se it vis-à-vis the underscorings manifested in Ex.PW-1/C besides in Ex.PW-7/B qua the seal impressions borne thereon, underscorings occurring wherewithin contradictorily enunciate qua on the two samples of charas as stood drawn from the bulk charas seized at the relevant site of occurrence seal impression(s) bearing English alphabet 'D' standing respectively embossed thereon also each sample of charas on standing resealed at the police station concerned theirs thereat standing embossed with resealed seal impression(s) bearing English alphabet 'H'. With the aforesaid apt dichotomy qua the factum probandum standing unfolded, the concert of the prosecution to efficaciously nail the charge against the accused qua the affirmative opinion recorded by the FSL concerned comprised in Ex.PW-7/B standing invincibly connected with sample parcel Ex.P-2 at the material stage when it stood produced in Court, is to obviously stand concluded to both stagger as well as founder. Since the FSL in its apposite report comprised in Ext.PW-7/B opined qua it holding Charas nonetheless with the opinion aforesaid formed/rendered thereupon by the FSL concerned standing for reasons aforestated not preeminently at the paramount crucial stage whereat Ex.P-2 stood produced in Court hence linking its apposite affirmative opinion vis-à-vis Ext.P-2 also coaxes an inference from this Court qua at the paramount apposite stage of the production of Ext.P-2 in Court its not holding therewithin Charas also this Court is leaned to form an opinion qua the contents of Ext.P-2 standing not efficaciously linked to theirs standing drawn from the bulk of charas seized at the site of occurrence from the conscious and exclusive possession of the accused by the Investigating Officer concerned. Besides an inference stands erected qua the case property standing tampered with.

13. The learned Deputy Advocate General has from his records produced before this Court a piece of cloth whereon seal impressions stand embossed wherefrom he contends qua on a circumspect perusal of seal impressions occurring thereon a misleading disclosure qua the English alphabet occurring thereon emanating therefrom also a circumspect reading thereof making a disclosure qua the seal impressions 'B' or 'D' occurring thereon being readable in any manner wherefrom he contends qua the aforesaid misleading decipherments arising from misleading disclosures qua the precise English alphabet borne thereon also hence constraining PW-2 to on Ex. P-2 standing produced before the learned trial Court whereat it stood shown to him to make a statement qua its holding thereon seal impression 'B'. However the aforesaid submission holds no weight given the presence of the learned PP before the learned Court concerned at the time contemporaneous to its production thereat besides at the time

contemporaneous to its standing shown to PW-2 whereupon an obligation stood cast upon him to hold PW-2 to re-examination for evincing from him a clarification qua the precise English alphabet held in the seal impressions borne on Ex.P-2. However, the PP omitted to make the aforesaid endeavor whereupon at this stage the address made herebefore by the learned Deputy Advocate General holds no succor nor vigor, it merely standing anvilled on seals impression existing on a piece of cloth produced herebefore unbereft of apposite clarifications standing assayed from PW-2 by the learned PP concerned at the stage whereat he deposed therebefore,. Contrarily the mere factum of arousal/existence of misdecipherments qua the precise English alphabet borne on seal impressions occurring on a piece of cloth produced before this Court by the learned Deputy Advocate General would not per se beget in consonance therewith any inference qua the seal impressions in congruity therewith also standing borne on Ext.P-2 nor also he can contend qua on a circumspect perusal of Ex.P-2 any purported mis-leading decipherments also emanating therefrom qua the relevant factum.

14. The learned counsel for the accused rests his contention upon Ex.PW-7/C, an abstract of malkhana register wherewith at Sr. No.3 thereof exists a portrayal qua the FSL purveying its apposite opinion qua the sample parcel sent thereat for analysis rendering hence the subsequent narrative therein qua an opinion standing pronounced thereupon on its standing dispatched to FSL concerned, to beget a conclusion qua the report of the FSL embodied in Ex.PW-7/B loosing its vigor. However the aforesaid submission appears to hold no weight significantly when the MHC concerned who had proven Ex.PW-7/C stood omitted by the learned defence counsel to stand subjected to an apt cross-examination qua the facet aforesaid also when for reasons afore-stated the date of dispatch unfolded in Ex.PW-1/C of parcel Ex.P-2 to FSL concerned also the apposite reflections thereto borne on the report of the FSL comprised in Ex.PW-7/B holds absolute tandem intra se each, whereupon this Court is constrained to conclude qua the existence of the aforesaid dichotomies inter-se narrations at Sr. No. 3 and 4 of Ex.PW-7/C being construable to merely arise from a pure clerical error.

15. The crux of the above discussion is of the prosecution not adducing cogent and emphatic evidence in proving the guilt of the accused. The appreciation of the evidence as done by the learned trial Court suffers from an infirmity as well as a perversity. Consequently, reinforcingly, it can be formidably concluded that the findings recorded by the learned trial Court merit interference.

16. In view of above discussion, the appeals are allowed and the impugned judgment of 21.7.2008 rendered by the learned Special Judge, Hamirpur is set aside. The accused are acquitted of the offence charged. The fine amount, if any, deposited by the accused is ordered to be refunded to them. Bail bonds, if any, furnished by the accused are discharged. Records be sent down forthwith.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

HPSEB & Ors. .....Appellants.

Versus

Rakesh Kumar alias Rockey. .....Respondent.

RSA No. 477 of 2007
Reserved on 28.11.2016
Decidedon: 19.12.2016

Code of Civil Procedure, 1908- Order 33 Rule 1- Plaintiff suffered injury on his right arm due to electrocution – the arm had to be amputated from the shoulder – plaintiff sought compensation of Rs.5 lacs- the suit was dismissed by the Trial Court- an appeal was filed, which was allowed and compensation of Rs.3,55,000/- was granted with interest @ 6% per annum – held in second appeal that the distance of 12 feet required to be maintained from the roof of the building was not

maintained and electricity board was clearly negligent- the Appellate Court had rightly decreed the suit – appeal dismissed.(Para-10 to 18)

For the appellants: Mr. Vivek Sharma, Advocate.
For the respondent: Mr. Lakshay Thakur, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present regular second appeal is maintained by the appellants/defendants (hereinafter called as "the defendants") against the respondent/plaintiff (hereinafter called as "the plaintiff") assailing the judgment and decree dated 03.07.2007, passed by learned District Judge, Mandi, District Mandi, H.P. in Pauper Appeal No. 1/2006, Civil Appeal No. 54/2007/06, whereby the judgment and decree passed by learned Civil Judge (Senior Division), Sarkaghat, District Mandi, H.P. in Civil Suit No. 134 of 2005, dated 12.07.2007, was set-aside and suit was decreed.

2. Briefly stating the facts giving rise to the present appeal are that as per the plaintiff, on 22.05.1998, after School hours, the plaintiff was grazing goats near his native place. All of a sudden, two goats of the plaintiff were climbed on the roof of the house of one Shri Suresh Kumar, the plaintiff in order to retrieve his goats, climbed on the roof, but suddenly L.T. Line, just adjacent to the house of Suresh Kumar, touched the right arm of the plaintiff, consequently he suffered electric burns on his right arm. After the said accident the plaintiff was taken to the hospital at Sarkaghat, wherefrom he was referred to the Zonal Hospital, Mandi and remained admitted there upto 26.05.1998. On 27.07.1998 he was further referred to IGMC, Shimla for advance treatment, where he was remained admitted upto 24.09.1998 and his right arm from the shoulder was amputated. As per the plaintiff, Electric line was at very low height and there was negligence on the part of the defendants. Due to the said accident, the plaintiff had to abandon his School for two years and his entire future has been spoiled. Thus, the plaintiff claimed Rs.5,00,000/- alongwith future interest at the rate of 18% per annum.

3. The defendants, by way of filing written statement, raised preliminary objections qua maintainability, *locus standi*, limitation and cause of action. On merits, the defendants have submitted that despite notices served to Suresh Kumar, he has constructed a house illegally and defendants are not liable to pay any damages for loss, as caused to the plaintiff. It is also averred that 11 K.V HT line was installed much earlier than Suresh Kumar constructed his house. Thus, they prayed that the suit may be dismissed.

4. The plaintiff, by filing replication, refuted the allegations of the defendants, as made in the written statement.

5. From the pleadings of the parties, the learned Trial Court framed the following issues:

"1. Whether the electric burns to the extent of 100% suffered by the plaintiff is the result of negligence on the part of defendants as alleged? OPP

2. Whether the defendants are liable for damages, if so to what extent? OPP

3. Whether the suit is bad for non-joinder of the necessity party? OPD

4. Whether the plaintiff has no locus standi to file the present suit? OPD

5. Whether the suit of the plaintiff is time barred and hit by the limitation? OPD

6. Relief".

After deciding issues No. 1, 2 and 5 against the plaintiff and issues No. 3 and 4 in favour of the defendants, the suit was dismissed by the learned trial Court.

6. In the first appeal, the learned lower Appellate Court allowed the appeal of plaintiff and granted Rs. 3,55,000/- with interest at the rate of 6% from the date of filing the appeal till its payment, against the defendants with costs. Hence the present appeal.

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

> *"1. Whether the negligence can be attributed to the Board without making the person who had constructed the illegal structure as party?*
>
> *2. Whether negligence can be attributed to the Board when it was the plaintiff itself who has trespassed into the property of a third person.?*
>
> *3. Whether the Board can be termed as negligent even if it was vigilant and it served notices on the person who had illegally constructed the house below HT Line.?*
>
> *4. Whether the learned first Appellate Court can totally overlook the admissions made by the PWs in which they say that no negligence can be attributed to the defendants.?*
>
> *5. Whether the findings of the learned first Appellate Court are perverse?*

8. Learned counsel appearing on behalf of the defendants/appellants (before this Court) has argued that the findings of the learned lower Appellate Court are perverse and liable to be set aside. On the other hand, learned counsel appearing on behalf of the plaintiff/respondent (before this court) has argued that the findings of the learned lower Appellate Court are in accordance with law and the appeal deserves to be dismissed.

9. To appreciate the arguments of the learned counsel for the parties, I have gone through the records in detail.

10. The plaintiff, was examined as PW-1 and he tried to prove certificate Ex. PW-1/A, medical slip/documents, Ex. PW-1/B, Ex. PW-1/C and Ex. PW-1/D. In his cross-examination plaintiff has stated that when the incident took place, Suresh Kumar was not present in the house. The plaintiff feigned ignorance about the length of danda, which he was using in order to retrieve his goats.

11. PW-2, Surender Kumar (who was grazing goats with the plaintiff) stated that the H.T. Line is passing very near to the house of Suresh Kumar. He further stated that the danda, which plaintiff was using to retrieve his goats, was about one metre in length and the electricity line was hardly at a distance of 5-6 feets from the slab of Suresh Kumar.

12. PW-3, Pano Devi (who is the mother of the plaintiff) had filed the present suit on behalf of plaintiff, who was minor at that relevant time. She has stated that the incident took place due to the construction of the house of Suresh Kumar, who was serving as a Teacher.

13. DW-1, Ram Lal Gupta, who was posted as SDO, Electricity Sub-division Sarkaghat, District Mandi, at that time, was informed about the incident by his Officials. He deposed that transmission line is at the height of 8-10 feets from the slab of Suresh Kumar. He further deposed that the incident took place due to coming in contact with the live electricity wire with danda, which plaintiff was carrying in his hand. In his cross-examination he has stated that Suresh Kumar has started raising construction of his house in the year 1996 and at that time he was not aware of the fact that construction of the house cannot be done below HT Line. He further stated that notice, in this regard, was also issued to him, but he did not reply to the said notice.

14. DW-2, Dharam Singh, who was the Bill Clerk in the office of the defendants, has stated that H.T. Line is about 7-8 feet from the house of Suresh Kumar and in the said incident, there is no fault of the Department. He has further stated that H.T. Line is very powerful and can attract people from distance.

15. Now, the vital question, which arises in the present case, is that whether the defendants were really negligent in maintaining the H.T. Line or whether the plaintiff has suffered burn injuries, due to sparks, coming down for the H.T. Line. Whenever a public authority is performing the duty under the common law, then there is equivalent duty to take reasonable care, so as to ensure the safety of the citizen. However, there may not be any direct evidence of such carelessness and same can also be derived from the circumstances of the case. Although, there must be some proximity of relationship of danger and duty of care to be performed by the defendants to avoid such accident or to prevent danger.

16. Even otherwise, the defendants, in the learned lower Appellate Court, have failed to prove that they have taken appropriate care and caution and also the height of 12 feet, which is required to be maintained from the roof of the building. Thus, the substantial questions of law No. 1, 2 & 3 are answered holding that it was the defendants who should have taken appropriate care and caution, the plaintiff cannot be held liable to be negligent, as he was a small boy and not aware about the fact that he was trespassing some other's property, the learned lower Appellate Court has rightly held the defendants liable for their act of negligence. Similarly, the defendants by taking plea that they have served Suresh Kumar, by issuing notice, cannot absolve them from liability. The substantial questions of law No. 1, 2 & 3 are answered accordingly. It has come in the evidence that it was defendants who were negligent, resulting injuries to the plaintiff, so the learned lower Appellate Court has not committed any illegality, holding the defendants liable. Thus, substantial question of law No. 4 is answered accordingly. As far as substantial question of law No. 5 is concerned, the findings of the learned lower Appellate Court are just, reasoned and cannot be said to be perverse at all. Besides, the learned Court below has rightly calculated the compensation amount at the rate of Rs.2,000/- per month, as he suffered 100% disability qua his right arm.

17. Resultantly, the findings arrived at by the learned Lower Appellate Court are just, reasoned and after appreciating the evidence on record to their true perspective and calls for no interference.

18. As a result of the above discussion, the appeal is devoid of merits, hence deserves dismissal and is accordingly dismissed.

19. In view of dismissal of the appeal, pending application(s), if any, shall also stand(s) disposed of. However, the parties are left to bear their own costs throughout.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh .....Appellant.

Versus

Lal Chand .....Respondent

Cr. Appeal No. 450 of 2008
Reserved on : 05.12.2016
Decided on : 19.12.2016

Code of Criminal Procedure, 1973- Section 378- Informant and other persons were sitting around the fire – accused came and pushed the informant into the fire causing hurt to him, when the informant came out of the fire, the accused pushed the informant from the danga – the accused was tried and convicted by the Trial Court- an appeal was preferred, which was allowed and the accused was acquitted- held in appeal that the informant was in a state of intoxication and possibility of his sustaining injuries cannot be ruled out – weapon of offence was not recovered – the delay in lodging FIR was not explained – eye-witnesses had contradicted the prosecution version– the Appellate Court had rightly acquitted the accused – appeal dismissed. (Para-7 to 14)

Cases referred:
K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the appellant	Mr. Virender K. Verma, Additional Advocate General with Mr. Pushpinder Jaswal, Dy. Advocate General and Mr. Rajat Chauhan, Law Officer, for the appellant.
For the respondent	Mr. Tek Chand Sharma, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant/State of Himachal Pradesh, under Section 378 of the Code of Criminal Procedure, assailing the judgment of acquittal, dated 31.03.2008, passed by the learned Sessions Judge, Kullu, H.P. in Cr. Appeal No. 18/2006, whereby the judgment of the conviction, dated 01.06.2006, passed by the Judicial Magistrate 1st Class, Manali, District Kullu, H.P., in Cr. Case No. 263-1/2004/9-II/2005, was set aside.

2. Briefly stating the facts, as per the prosecution story, giving rise to the present appeal are that on 04.11.2004, Devta Hari Narayan was brought to the village Neri (Pichlidhar) for the darshan of the public,. After taking dinner the people of the village left for their houses, but the complainant Raju alongwith Gian Chand, Kali Ram, Lalu and Lal Chand remained there. At about 10.00 p.m. when the complainant and other persons were sitting around the fire, the accused came their and threw complainant Raju into the fire and voluntarily caused hurt to him, when the complainant came out of the fire the accused again pushed him from the danga. Consequently the complainant sustained injuries on his body. On the next morning, i.e., 05.11.2004, the complainant was got admitted in Zonal Hospital, Kullu for medical treatment, message in this regard was received in the Police Station, Manali, on the basis of which Rapat Ex. PW-5/A, was recorded. After recording the Rapat, Police party rushed to the Zonal Hospital, Kullu, where statement of the complainant, under Section 154 of Cr.PC, Ex. PW-1/A, was recorded, on the basis of which, FIR Ex. PW-6/C, was registered against the accused. HC, Khem Chand, visited the spot and prepared spot map, Ex. PW-6/A, took into possession Jacket of the complainant, Ex. P-1, vide seizure memo, Ex. PW-2/A, and obtained MLR, Ex. PW-4/A, he also recorded the statements of witnesses under Section 161 of Cr.PC.

3. The prosecution, in order to prove its case, has examined as many as seven witnesses. Statement of accused was recorded under Section 313 Cr.P.C, wherein accused denied the prosecution case and claimed innocence. No defence evidence was led by the accused.

4. I have heard learned Additional Advocate General for the appellant/State and learned defence counsel for the respondent/accused.

5. Learned Additional Advocate General has argued that the judgment passed by the learned lower Appellate Court is perverse and required to be set aside. On the other hand, learned counsel appearing on behalf of the accused/respondent has argued that the prosecution has failed to prove the guilt of the accused, as the statements of the witnesses are contradictory with each other and the guilt of the accused was not proved on record at all. He has further argued that the complainant has grudge against the accused, due to land transaction, thus he was implicated in a false case.

6. To appreciate the arguments of learned Additional Advocate General and learned defence counsel, this Court has gone through the record in detail.

7. The prosecution has examined complainant, Raju as PW-2, who testified that on the said day, when he was around the fire alongwith other persons, the accused came and threw him in the fire, due to which he sustained burn injuries and when he came out of the fire he was

again pushed by the accused from the danga and he sustained injuries in his body. He further deposed that on the next day he was brought to the Hospital at Kullu, where his statement, Ex. PW-1/A, was recorded by the Police. In his cross-examination he denied that at the time of the said occurrence he was under the influence of liquor, due to which he fell into the fire of his own and sustained injuries.

8. PW-7, Kalu Ram, has testified that the occurrence had not taken place in his presence. In his cross-examination he admitted that on the said day the accused was under the influence of liquor.

9. Nothing has come on record why delay has occurred in lodging the FIR. In these circumstances, whether the complainant fell due to intoxication cannot be ruled out. At the same point of time, eye witnesses have not supported the case of the prosecution and noting favourable has come to the prosecution in their examination. It has also come on record that injuries were caused with blunt weapon, but no weapon was produced or recovered by the Police.

10. At the same point of time, in the absence of any reasonable and plausible explanation of delay in lodging FIR, an adverse inference has to be drawn against the prosecution version, and also the contradictory statements of the witnesses create suspicion.

11. It has been held in **K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258,** that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non consideration/misappreciation of evidence on record, reversal thereof by High Court was not justified.

12. The Hon'ble Supreme Court in **T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401,** has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

13. So, in the opinion of this Court, the findings of the learned Court below cannot be said to be perverse and against the law, as the prosecution has failed to prove the guilt of the accused conclusively and beyond reasonable doubt.

14. In view of the aforesaid decisions of the Hon'ble Supreme Court and the discussion made hereinabove, I find no merit in this appeal and the same deserves dismissal and is accordingly dismissed. Pending application(s), if any, shall also stands disposed of.

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

Dushyant Kumar. .....Petitioner.

Versus

State of Himachal Pradesh & anr. .....Respondents.

Cr.MMO No. 153 of 2016.
Date of decision: December 20, 2016.

Code of Criminal Procedure, 1973- Section 482- Prosecutrix was married to N – three children were born- she started residing separately from N on account of differences and came in contact with accused- when the accused assured to marry her,she started residing with the accused under one roof - she became pregnant – she was taken to a clinic and her pregnancy was terminated- the accused refused to marry her on which she lodged the FIR- accused sought the quashing of FIR- held, that prosecutrix is married and could not have fallen prey to the allurement of marriage – she started residing with the accused under one roof, which shows consent on her part – continuation of proceedings would be abuse of the process of the Court- petition allowed and FIR cancelled.(Para-6 to 12)

Case referred:
Prashant Bharti Vs. State (NCT of Delhi), (2013) 9 Supreme Court Cases 293

For the petitioner	Mr. Nimish Gupta, Advocate.
For the respondents	Mr. Pramod Thakur, Addl. AG, for respondent No. 1.
	Ms. Bhawana Dutta, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

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

Petitioner is an accused in a case registered by the police of Police Station, Chintpurni District Una under Section 376 of the Indian Penal Code vide FIR No. 48 of 2015. The second respondent is the complainant. She was married to one Shri Nitu in the year 1993 and three children born to her out of this wedlock. On account of certain differences with her husband she started living separately from her husband said Shri Nitu. She had been selling cloth bags at Chintpurni. She came in contact of accused-petitioner who also used to supply cloth bags in Himachal Pradesh. She told him that her marriage with said Shri Nitu stands dissolved by a decree of divorce. It is in the year 2011 he proposed to solemnize marriage with her and represented that he will look after her children also. He thereby succeeded in making physical relation with her. They both started living with each other under the same roof at Chintpurni. He had also been going and meeting to her parents and other relations. The accused-petitioner allegedly assaulted her sexually for a period over four years. As and when she insisted for solemnization of marriage he used to pacify her that the marriage will be solemnized soon as and when the dispute qua land and water at his native place is settled. He also deferred her visit to his native place and to his parents on lame excuses. It is somewhere in the year 2012, she became pregnant. He made her to have some tablets forcibly. On account of that she developed problems including pain in stomach. She was taken by him to Sonia Clinic, Mubarakpur, Nangloi (Delhi) and got pregnancy terminated there. Later on, he refused to solemnize marriage with her and she was also threatened with dire consequences in case tried to contact him even over telephone also.

2. It is in this backdrop, FIR came to be registered against the accused-petitioner. The investigation has been conducted by the police and now report under Section 173 Cr.P.C. has been filed in the Court.

3. The FIR has been sought to be quashed on several grounds, however, mainly that in view of the complainant legally wedded wife of Shri Nitu she could have not been allured to solemnize marriage by the accused-petitioner nor subjected to sexual intercourse at that pretext. It is also canvassed that the evidence collected by the investigating agency even if taken as it is, no finding of conviction could have been recorded against the accused-petitioner. Also that allowing the criminal proceedings to continue against the accused-petitioner would amount to abuse of the process of law.

4. Learned Additional Advocate General has contended that the offence the accused-petitioner has committed is not only heinous but serious in nature which according to him not only affect an individual i.e. the complainant but has wide repercussion in the society at large also.

5. Mrs. Bhawana Dutta, Advocate, learned Counsel representing the respondent No. 2-complainant while arguing that the accused-petitioner has taken undue benefit of the poverty and separation of the prosecutrix from her husband has subjected her to sexual intercourse at the pretext of solemnization of marriage with her and as such there is no question of quashing the FIR or the pending criminal proceedings against him.

6. The law on the subject is no more res-integra as the Apex Court in ***Prashant Bharti Vs. State (NCT of Delhi), (2013) 9 Supreme Court Cases 293*** in a similar set of facts and circumstances has quashed criminal proceedings initiated against the accused. This judgment reads as follows:

> "17. It is relevant to notice, that she had alleged, that she was induced into a physical relationship by Prashant Bharti, on the assurance that he would marry her. Obviously, an inducement for marriage is understandable if the same is made to an unmarried person. The judgment and decree dated 23.9.2008 reveals, that the complainant/prosecutrix was married to Lalji Porwal on 14.6.2003. It also reveals, that the aforesaid marriage subsisted till 23.9.2008, when the two divorced one another by mutual consent under Section 13B of the Hindu Marriage Act. In her supplementary statement dated 21.2.2007, the complainant/prosecutrix accused Prashant Bhati of having had physical relations with her on 23.12.2006, 25.12.2006 and 1.1.2007 at his residence, on the basis of a false promise to marry her. It is apparent from irrefutable evidence, that during the dates under reference and for a period of more than one year and eight months thereafter, she had remained married to Lalji Porwal. In such a fact situation, the assertion made by the complainant/prosecutrix, that the appellant-accused had physical relations with her, on the assurance that he would marry her, is per se false and as such, unacceptable. She, more than anybody else, was clearly aware of the fact that she had a subsisting valid marriage with Lalji Porwal. Accordingly, there was no question of anyone being in a position to induce her into a physical relationship under an assurance of marriage. If the judgment and decree dated 23.9.2008 produced before us by the complainant/prosecutrix herself is taken into consideration alongwith the factual position depicted in the supplementary statement dated 21.2.2007, it would clearly emerge, that the complainant/prosecutrix was in a relationship of adultery on 23.12.2006, 25.12.2006 and 1.1.2007 with the appellant-accused, while she was validly married to her previous husband Lalji Porwal. In the aforesaid view of the matter, we are satisfied that the assertion made by the complainant/prosecutrix, that she was induced to a physical relationship by Prashant Bharti, the appellant-accused, on the basis of a promise to marry her, stands irrefutably falsified.
>
> 22. The proposition of law, pertaining to quashing of criminal proceedings, initiated against an accused by a High Court under Section 482 of the Code of Criminal Procedure (hereinafter referred to as "the Cr.P.C.") has been dealt with by this Court in Rajiv Thapar & Ors. vs. Madan Lal Kapoor wherein this Court inter alia held as under:
>
> "29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 of the Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 of the Cr.P.C., at the stages referred to hereinabove, would have far reaching consequences, inasmuch as, it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section -482 of the Cr.P.C. the High Court has to be fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been

refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashing, raised by an accused by invoking the power vested in the High Court under Section 482 of the Cr.P.C.:-

30.1. Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?

30.2 Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.

30.3 Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?

30.4 Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

30.5 If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal proceedings, in exercise of power vested in it under Section 482 of the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused."

7. Similar is the ratio of the judgment of the High Court of Delhi dated 21.5.2015 title ***Manoj Bajpai*** v. ***State of Delhi, W.P. (CRL) 771/2014 and Crl. M.A. 5999/2014.*** This judgment also reads as follows:

"34. The factual details referred in the foregoing paras reflect that:-

(i) The complainant came in contact with the petitioner and started living in his house for 18 months and during this period, they had physical relationship.

(ii) The complainant was already married to Mukesh Jassal and had two children. The marriage was subsisting during this period. Even the petition for divorce by mutual consent u/s 13B Hindu Marriage Act was filed only on 3 rd December, 2012 and the marriage was dissolved by decree of divorce dated 4th July, 2013, i.e., much after the registration of this FIR.

(iii) The allegations of the complainant that her objectionable photographs were taken by applying narcotic on her is not substantiated as her allegations of use of narcotic could not be substantiated during the investigation of the case or through medical examination.

(iv) Keeping in view the fact that both, the petitioner as well as the complainant, were married which marriage was still subsisting, therefore, the complainant could not have been induced into physical relationship based on assurance of marriage.

(v) The physical relationship between the complainant and the accused was admittedly consensual.

(vi) In her statement u/s 164 Cr.P.C., the complainant asserted that her consent was based on inducement of marriage, however, this aspect of assurance stands falsified.

(vii) The acknowledged consensual physical relationship between the parties would not constitute an offence u/s 376 IPC, especially, because both the complainant as well as petitioner were major on the date of occurrence.

(viii) As per the FSL report, there was no evidence of any blood or semen and, therefore, DNA analysis was not conducted.

(ix) After the filing of this FIR, another complaint was filed by the complainant against the petitioner on the allegations of threatening her to withdraw this case which resulted in registration of FIR 295/13 dated 2nd June, 2013 u/s 195A/323/506 IPC, with PS New Ashok Kumar. As per the status report dated 9th March, 2015 filed by the State, allegations were not substantiated and as such, the case was cancelled on 2nd September, 2013.

(x) The petitioner had alleged that due to his ill health he closed his clinic at Mayur Vihar, Delhi in the month of May, 2012. On the request of the complainant to provide her accommodation for 2-3 days, petitioner allowed her to reside in Delhi Clinic for a few days, however, in the month of August, 2012, he came to know that the complainant had changed the locks of the premises and started misusing the clinic premises without his knowledge, therefore, he asked her to vacate the said premises. The complainant failed to accede to his request rather threaten to implicate him in false and baseless cases, as such, the petitioner approached different authorities vide his letter dated 1st September, 2012 to CDMO, East Delhi, SHO Police Station, New Ashok Nagar and through newspaper dated 2nd September, 2012 in Rashtriya Sahara. Against these allegations, no pleadings whatsoever have been filed by the complainant. Even during the course of hearing, the material relied upon by the accused was not refuted.

(xi) The petitioner filed a civil suit bearing Suit No.26/2013 for mandatory injunction/possession/mesne profits/damages against the complainant.

(xii) A settlement deed dated 7th October, 2013 was arrived at between the parties whereby it was agreed that the petitioner shall withdraw his suit pending before the Additional District Judge and the complainant would cooperate with the petitioner in quashing the FIR. As per the copies of the proceedings placed on record pursuant to the statement made by both the parties, the petitioner withdrew the suit.

(xiii)The factum of entering into a compromise deed between the parties has been verified by the State and in fact the prosecutrix herself furnished the copy of the MOU executed in October, 2013, whereby the petitioner agreed to execute a gift deed in respect of half portion of LIG Flat No. 97A, Ground Floor, Pocket A-III, Mayur Vihar, Phase-III, Delhi-96 in favour of the complainant after getting conversion from lease hold to free hold by DDA and the petitioner shall pay a sum of Rs.11,000/- per month to the complainant and both the parties would withdraw the cases filed against each other. It is the case of the petitioner that pursuant to this compromise, he withdrew the suit filed by him but the complainant resiled from the settlement and further put the condition that the petitioner should deposit sufficient amount in fixed deposit in bank in her name".

8. Now adverting to the facts of this case. The complainant admittedly is the legally wedded wife of Shri Nitu. In the report under Section 173 Cr.P.C. though there is a reference of dissolution of her marriage with said Shri Nitu in the year 2014, however, in view of the statement of her mother recorded on 3.8.2015 under Section 161 Cr.P.C. and placed on record along with the copy of police report the marriage of the prosecutrix with said Shri Nitu was not dissolved by a decree of divorce even by that date also. Being so, how she could have fallen prey to the allurement of solemnization of marriage allegedly given to her by the accused-petitioner knowing fully well that she was legally wedded wife of Shri Nitu aforesaid. Even if it is believed to be true that her marriage with said Shri Nitu was dissolved in the year 2014 how she could have allowed the accused to subject her to sexual intercourse in the year 2011 and started living with him under the same roof as her first marriage was subsisting at that time.

9. Admittedly, there were physical relations between the accused-petitioner and the complainant. Such relations on the face of the record available at this stage cannot be said to be forcible or against her will and without her consent and rather consensual as she was a consenting party to such relation with the accused-petitioner. A married woman having her husband alive and three children maintaining physical relation with a third person that too during the currency of her marriage, cannot be said to be heard of any complaint that she has been subjected to sexual intercourse without her consent and against her will.

10. Scientific investigation is not there because the prosecutrix did not opt for undergoing the medical examination. In such a situation, allowing the criminal proceedings to continue would amount to abuse of process of the court as is held by the Apex Court in Prashant Bharti's case cited supra. As a matter of fact in that case also the complaint was that the accused allured the prosecutrix, a married woman, to solemnize marriage with her and at that pretext subjected her to sexual intercourse. The Apex Court has held that in the case of an unmarried woman one can understand that she fell prey to the allurement so given to her by the accused. However, there is no question of a married woman to fall prey to any such allurement given to her knowing fully well that she was married and could have not solemnized the second marriage till subsistence of her first marriage. Similar were the facts of Manoj Bajpai's case supra.

11. In view of legal as well as factual aspect of the matter discussed hereinabove in the light of the arguments addressed on both sides, this court is satisfied that the evidence available at this stage even if taken as it is no findings of conviction under Section 376 of the Indian Penal Code can be recorded against the accused-petitioner. Allowing the criminal proceedings to continue would rather amount to abuse of the process of law, besides wastage of the precious court time which can be utilized to decide the genuine cases pending in large number in the Court.

12. The petition is accordingly allowed. Consequently, FIR No. 48 of 2015 registered against the accused-petitioner in Police Station, Chintpurni District Una is quashed and further proceedings pending in the Court of learned Additional Sessions Judge-II, Una shall also stand quashed. The petition is accordingly disposed of.

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

Sh. Kanshi Ram. .....Appellant.

Versus

Shri Saju alias Roop Lal & anr. .....Respondents.

RSA No. 195 of 2003.
Reserved on : 27.9.2016.
Decided on : 21.12.2016.

Specific Relief Act, 1963- Section 34- Plaintiff is the son of deceased R, who was the tenant over the suit land on the payment of ¼th of the produce – plaintiff claimed that he inherited the suit land on the death of R and name of D, his step mother, was wrongly recorded- plaintiff had become owner on the commencement of H.P. Tenancy and Land Reforms Act- suit was decreed by the Trial Court – an appeal was filed, which was allowed and defendant was declared to be the owner in possession of the suit land – held in second appeal that D being a widow could not have inherited the tenancy rights of R, in view of Section 45 of H.P. Tenancy and Land Reforms Act- she could not have bequeathed the suit land to defendant No.1 and another by executing a Will – defendant No.1 is in possession and plaintiff has to file a suit for possession- appeal allowed – judgment passed by Appellate Court set aside and judgment passed by Trial Court restored.

(Para- 11 to 15)

Cases referred:
Namo Devi V. Rattan Chand and others, AIR 1990 HP 47
Pyare Lal v. State of Himachal Pradesh, 2012(3) Him. L.R. 1855

For the appellant : Mr. B.C. Verma, Advocate.
For the respondents : Ms. Pratima Malhotra, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

Plaintiff is in second appeal before this Court. He is aggrieved by the common judgment dated 19.2.2003 whereby the appeal he preferred against judgment and decree dated 21.6.1995 passed by learned Sub Judge Ist Class, Bilaspur in Civil Suit No. 16/1 of 1991 has been dismissed and the cross appeal filed by Saju alias Roop Lal (hereinafter referred to as defendant No. 1) allowed and the suit dismissed.

2. The suit land entered in Khasra No. 19, Khewat No. 1min, Khatauni No. 4min, measuring 5-2 bighas situate in village Rampur, Pargana and Tehsil Sadar, District Bilaspur admittedly is part of land entered in Khewat No. 1/3min, Khatauni No. 4, Khasra Nos. 48, 49, 57, 83/52, 54, 74min, measuring 15-13 bighas situate in Mauja Rampur, Tehsil Sadar, District Blaspur. As per entries in the jamabandi for the year 1972-73 Ext.PC Smt. Dropti (since dead) was owner thereof whereas Shri Ram Dittu, father of the plaintiff was in possession thereof in the capacity of non-occupancy tenant on payment of rent i.e. 1/4th of the produce. Shri Ram Dittu died on 6.1.1979. In terms of Section 45 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 (hereinafter referred to as 'Tenancy Act' in short) on the death of a tenant the tenancy rights devolved upon the following:

(a) on his male linear descendants, if any, in the male line of descent;

(b) failing such descendant, on his widow, if any, until she died or remarries or abandons the land or is under the provisions of this Act ejected there from; and

(c) failing such descendants and widow, on his widowed mother, if any, until she died or remarries or abandons the land or is under the provisions of this Act ejected therefrom; and

(d) failing such descendant and widow, or widowed mother or, if the deceased tenant left widow or widowed mother, then when her interest terminates under clause (b) or (c) of this section, on his male collateral relatives in the male line or descent from the common ancestor of the deceased tenant and those relatives.

3. The plaintiff is admittedly the son of deceased tenant Ram Dittu. Therefore, his claim is that on his death the entire land measuring 15-13 bighas as aforesaid came to be occupied by him as tenant on payment of rent i.e. 1/4th of the produce. However, the suit land measuring 5-2 bighas was wrongly recorded in the name of his step mother Smt. Dalumbhi (since dead) in the capacity of non-occupancy tenant. The same according to the plaintiff could have not been inherited by said Smt. Dalumbhi the widow of original tenant Shri Ram Dittu and rather by his male linear descendant which in the present case is the plaintiff the only son of said Shri Ram Dittu. Smt. Daropti has expired on 1.1.1989. She was succeeded by defendant No. 2. The said defendant being major did not make any application for redemption of the suit land and as such lost his right, title or interest over the suit land. The plaintiff, therefore, had acquired proprietary rights in the suit land and became exclusive owner in possession thereof. The defendants were sought to be restrained permanently from causing any interference in the suit land and the revenue entries showing them to be in possession of the suit land were sought to be declared illegal, null and void and not binding on the plaintiff. In the event of the plaintiff found to be not in possession of the suit land or is dispossessed during the pendency of the suit, in the alternative the decree for possession thereof was also sought to be passed.

4. Defendant No. 1 when put to notice had contested the suit. In preliminary, he had set up the plea of 'Will' allegedly executed by deceased Smt. Dalumbhi in his favour. The plaintiff was stated to be not entitled to file the present suit, hence the maintainability thereof was also disputed. In view of the compromise of the plaintiff arrived at with the deceased Smt. Dalumbhi the suit was stated to be not maintainable. Smt. Dalumbhi was non-occupancy tenant under Smt. Daropti the owner thereof. After the death of said Smt. Daropti said Smt. Dalumbhi acquired proprietary rights over the suit land. The plaintiff as such was stated to have no right, title or interest in the suit land and the suit was also stated to be barred by the principle of res-judicata. In view of the compromise arrived at between the plaintiff and said Smt. Dalumbhi and also the order dated 23.11.1983 passed by Consolidation Officer consequent upon the compromise so arrived at. On merits, it is submitted that Smt. Dalumbhi was owner in possession of the suit land. She was maternal grant mother of defendant No. 1. It is he who used to look after her. Plaintiff allegedly never maintained said Smt. Dalumbhi, therefore, the Will was rightly executed by her in favour of defendant No. 1.

5. In replication, the contentions to the contrary were denied being wrong and those in the plaint reiterated. It was further pointed out that the Consolidation Officer had no jurisdiction to decide the issue of tenancy involved either inter-se the tenants or between the tenants and landlord having not conferred with any power of Land Reforms Officer. The Consolidation Officer was also not vested with the power of Assistant Collector Ist Grade. The order dated 23.11.1983 was, therefore, claimed to be illegal, null and void.

6. On such pleadings of the parties, the following issues were framed:

1. Whether the plaintiff is owner in possession of the suit land as alleged? OPP
2. Whether the suit is not maintainable? OPD
3. Whether the suit has not been properly valued for the purpose of court fee? OPD
4. Whether the deceased Dalumbi had executed a valid will in favour of defendant No. 1 of the suit land as alleged? If so its effect? OPD
5. Relief.

7. On behalf of the plaintiff, learned Counsel representing him had tendered in evidence jamabandi for the years 1972-73 Ext.PC, 1979-80 Ext.PD, Copy of Khasra Girdawari for the period 1979 to 1980 Ext.PE, Khasra Girdawari for the period 1980 to 1984 Ext.PF, copy of order dated 23.11.1983 Ext.PG, copy of order passed by Director, Consolidation of Holdings Ext. PH, Misal Hakiyat Isatmal Ex.PI, Jamabandi for the year 1986-87 Ext.PJ, Khasra Girdawari during the period 1981 to 1989 Ext.PK and had closed the evidence.

8. On the other hand, defendant No. 1 had appeared in the witness box as DW1 and examined Shri Ram Prakash DW2, Kundu Ram DW3, Tulsi Ram DW4 and Amar Nath DW5. The reliance on behalf of defendant No. 1 has also been placed on the copy of mutation No. 38 Ext.D1, jamabandis for the year 1991-92 Ext.DM, 1986-87 Ext.DN, 1984-85 Ext.DO, 1983-84 Ext.DP, copy of mutation No. 39 Ext.DQ that of 38 and 29 Ext.DR and DS. He has also produced copy of Will Ext.DX, the application for correction of revenue entries filed by the plaintiff Ext.D1, the report Ext. DB, order dated 23.11.1983 Ext.DC, statement of deceased Smt. Dalumbhi Ext.DE, statement of the plaintiff Ext.DF, application for demarcation along with the proceedings Ext.DH, the report of patwari and Field Kanungo Ext.DI, copy of resolution Ext.DK, copy of mode of partition during consolidation Ext.DL and copy of jamabandi for the year 1986-87 Ext.PA, copy of Khasra Girdawari for the period 1987 to 1990 Ext.PB.

9. Learned trial Court on appreciation of the evidence available on record has decreed the suit for the declaration that the plaintiff is owner of the suit land. The revenue entries showing deceased Smt. Dalumbhi or defendant No. 1 as owner were declared illegal, null and void. The suit land, however, was held to be in possession of the defendants. The opportunity was granted to the plaintiff to file the suit for decree of possession thereof.

10. The plaintiff aggrieved by the findings to the extent of holding the defendant No. 1 Saju alias Roop Lal in possession of the suit land has assailed the judgment and decree passed by the trial Court in Civil Appeal No. 108 of 1995 whereas defendant Saju aggrieved by that part of the judgment and decree whereby the plaintiff was held owner of the suit land and declaring the entries showing deceased Dalumbhi to be owner in possession of the suit land had assailed the same in Civil Appeal No. 119 of 1995 in the lower Appellate Court. Learned Lower Appellate Court has dismissed the appeal filed by the plaintiff and allowed that filed by defendant No. 1 and declared the said defendant as owner in possession of the suit land vide judgment and decree under challenge in this appeal.

11. The legality and validity of the impugned judgment and decree has been challenged on the grounds, inter alia, that the same is neither supported by the evidence available on record nor by the provisions of law. The evidence available record has not been appreciated in its right perspective. The findings as recorded are stated to be in complete departure to the provisions mandatory in nature contained under Section 45 of the Tenancy Act. Since the provisions *ibid* extend a right of succession in favour of a male linear in descent, therefore, Smt. Dalumbhi could have not succeeded to the tenancy rights nor she ever came in possession of the suit land. In the jamabandi for the year 1979-80, the suit land was found to be in the joint possession of the plaintiff and Smt. Dalumbhi. The name of the plaintiff, however, came to be deleted in subsequent revenue record unlawfully. The defendant has neither pleaded nor proved that deceased Smt. Dalumbhi was inducted as tenant by the owner i.e. late Smt. Daropti. The tenancy is stated to be creation of an agreement and in the absence of any plea of creation of tenancy Smt. Dalumbhi could have not been held to be a tenant over the suit land. For want of pleadings and proof no findings could have been recorded that on the death of Smt. Daropti Smt. Dalumbhi had acquired proprietary rights over the suit land. The conferment of proprietary rights is not automatic but can only be conferred after resorting to the proceedings in accordance with law. The father of the plaintiff was recorded a tenant over the entire land measuring 15-13 bighas. The plaintiff was shown to have succeeded to the suit land along with Smt. Dalumbhi as per entries in the jamabandi for the year 1979-80. Smt. Dalumbhi was erroneously recorded as sole tenant of the suit land during the consolidation of holdings having taken place in the area vide Misal Hakiyat Isatmal Ext.PJ. The name of the plaintiff erroneously deleted from the record. The alleged compromise between the plaintiff and said Smt. Dalumbhi being contrary to the legal provisions was otherwise void abinitio. The deed of confirmation Ext.DC, the statements of the parties Ext.DN to Ext. DR are contrary to the provision of law, hence inadmissible. Smt. Dalumbhi could have not executed a legal and valid Will in favour of defendant No. 1 as she never acquired right, title or interest in the suit land. Therefore, the title of the suit land cannot be passed on defendant No. 1. Learned Lower Appellate Court is stated to have carved out a case in favour of the plaintiff without there being any pleadings or proof available on record. Defendant No. 1 has no where sated while in the witness box qua the creation of tenancy in favour of Smt. Dalumbhi or acquiring tenancy rights by her over the suit land. The statement of DW Ram Parkash produced by defendant No. 1 himself that he had never seen deceased Smt. Dalumbhi to be in possession of the suit land has not been taken into consideration. Neither of the witnesses examined by defendant No. 1 has stated that deceased Smt. Dalumbhi was inducted as tenant over the suit land by the owner thereof. The judgment and decree under challenge as such has been sought to be quashed and set aside.

12. The appeal has been admitted on the following substantial question of law:

1. Whether under the provisions of H.P. Tenancy and Land Reforms Act, Smt. Dalumbi Devi could not have succeeded to the tenancy rights of the father of the appellant and her husband?

13. On hearing learned Counsel representing the parties at length and going through the evidence available on record as well as the provisions contained under Section 45 of the H.P. Tenancy and Land Reforms Act, referred to hereinabove, it would not be improper to conclude that Smt. Dalumbhi could have not succeeded to the tenancy rights on the death of Shri Ram

Dittu who had been inducted as tenant over the entire land measuring 15-13 bighas by the owner Smt. Dropati as is apparent from jamabandi for the year 1972-73 Ext.PC. As per the provisions *ibid* it is the plaintiff left behind as male linear descendant in the line of descent on the death of his father Shri Ram Dittu could have only succeeded to the tenancy rights qua the entire land measuring 15-13 bighas. Said Shri Ram Dittu has expired on 6.1.1979. On his death since it is the plaintiff alone who would have succeeded to tenancy rights over the land in question, therefore, it is he who alone should have been shown as such in the revenue record. However, the entries in the jamabandi for the year 1979-80 Ext.PD reveal that Smt. Dalumbhi the widow of Shri Ram Dittu and step mother of the plaintiff was also shown to be in possession of the land measuring 15-13 bighas in the capacity of non-occupancy tenant. What is the basis of recording deceased Smt. Dalumbhi to be a co-tenant in the land in question, no evidence has come on record. Therefore, very foundation of the entries showing said Smt. Dalumbhi to be a co-tenant is not legally sustainable. True it is, that in the application Ext.D1 filed for correction of revenue entries qua the suit land before Assistant Collector IInd Grade, Tehsil Sadar District BIlaspur the plaintiff had entered upon a compromise with deceased Smt. Dalumbhi and agreed to part with the tenancy rights over the suit land measuring 5-2 bighas in favour of his step mother Smt. Dalumbhi. The statement of Smt. Dalumbhi is Ext.DE whereas that of the plaintiff Ext.DF. The owner Smt. Daropti was also present before the Assistant Collector and in her statement Ext.DG had not objected to the arrangement arrived at mutually between the plaintiff and said Smt. Dalumbhi. Consequently, on the basis of the compromise order Ext.DC came to be passed on 23.11.1983 by Assistant Collector Ist Grade, Sadar District Bilaspur in application Ext. D1. However, in view of express provisions made under the Tenancy Act any such compromise could have been legally arrived at qua succeeding tenancy rights by the widow along with a male linear descendant i.e. the plaintiff in the case in hand is highly doubtful. The answer to this poser in all fairness and in the ends of justice would be in negative for the reasons that there being specific provisions in Tenancy Act, referred to hereinabove, neither general law of succession could have been made applicable in the matter of succession of tenancy rights over the suit land nor any settlement contrary to the provisions under the Act was legally permissible. It is not the case of the defendant that the plaintiff parted with the possession of the suit land in lieu of the maintenance in favour of deceased Smt. Dalumbhi. Therefore, the findings recorded by learned Lower Appellate Court that he may have given the land in question to Smt. Dalumbhi towards her maintenance being beyond the pleadings and proof are not legally sustainable. True it is, that the owner Smt. Daropti in her statement Ext.DG recorded by learned Assistant Collector Ist Grade, Sadar Bilaspur had not objected to the arrangement i.e. giving of suit land by the plaintiff in favour of Smt. Dalumbhi. However, since Smt. Dalumbhi could have not succeeded to the tenancy rights under Section 45 of the Tenancy Act and there being no evidence that the plaintiff neglected to maintain her or that land was given by him to her for maintenance, the settlement so arrived at is neither legally nor factually sustainable. Therefore, the order Ext.DC passed by Assistant Collector Ist Grade on the basis of statements of Smt. Dalumbhi Ext.DE and that of the plaintiff Ext.DF is illegal, null and void. Even if it is believed that the land in question was given by the plaintiff for maintenance of deceased Smt. Dalumbhi such right should have ceased to exist on her death. True it is, that the mutation of the suit land was sanctioned and attested in favour of Smt. Dalumbhi and she came to be recorded as non-occupancy tenant in the record of rights i.e. jamabandi Ext.PA and Khasra Girdawari Ext.PB. She was also recorded so in jamabandi Isatmal Ext.DJ. However, for the reasons recorded hereinabove such entries are not legally sustainable. On the execution of the Will Ext.DA mutation D1 of the suit land was attested in the name of defendant No. 1, he came to be recorded owner in possession thereof in the jamabandi for the year 1991-92 Ext.DM. However, since Smt. Dalumbhi neither could have succeeded tenancy rights on the death of her husband Ram Dittu the original tenant nor acquired any right, title or interest in the suit land could have not execute Will thereof in favour of defendant No. 1. Therefore, the order of mutation Ext.D1 and the entries in the jamabandi Ext.DM create no right, title or interest qua the suit land in his favour. These documents are, therefore, also illegal, null and void, hence not binding on the plaintiff. Therefore, Smt.

Dalumbhi could have not at all succeeded tenancy rights over the suit land on the death of her husband Ram Dittu. The question of law formulated in this appeal is decided accordingly.

14. It is however, defendant No. 1 who as per the evidence available on record is in possession of the suit land. Even the evidence produced by the plaintiff also reveals that the suit land is in possession of defendant No. 1. Learned trial Court had thus rightly declared the plaintiff to be owner of the suit land. He, however, being out of possession of the suit land can only seek possession thereof by filing a separate suit. There is no force in the arguments addressed on behalf of the plaintiff that he has been dispossessed from the suit land during the pendency of the suit. Learned trial Court has, therefore, rightly decreed the suit on proper appreciation of the evidence available on record. The contentions raised by learned Counsel representing defendant No. 1 that Smt. Dalumbhi had right to maintain herself out of the estate left behind by her deceased husband Ram Dittu are without any substance for the reasons that no case to this effect was made out. Such was even not the case of Smt. Dalumbhi when compromise was arrived at between her and the plaintiff. Therefore, the law laid down by a Co-ordinate Bench of this Court in ***Smt. Namo Devi V. Rattan Chand and others, AIR 1990 HP 47*** is not applicable in this case. The judgment of this Court in ***Pyare Lal v. State of Himachal Pradesh, 2012(3) Him. L.R. 1855*** is also distinguishable on facts.

15. Having said so, this appeal succeeds and the same is accordingly allowed. Consequently, the judgment and decree passed by the learned Lower Appellate Court is quashed and set aside and the judgment and decree passed by learned trial Court is affirmed. No order so as to costs. The appeal stands disposed of accordingly.

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

Diwan Chand .....Petitioner.

Versus

State of Himachal Pradesh ....Respondent.

Cr. R No. 164 of 2011
Decided on : 22.12.2016

Indian Penal Code, 1860- Section 279, 337, 304-A and 338- Accused was driving a truck in a rash and negligent manner on the wrong side of the road – the truck hit the bus- one passenger died and other passengers suffered injuries- the accused was tried and convicted by the Trial Court- an appeal was filed, which was dismissed- held in revision that it was found in the mechanical report that steering wheel, clutch and brake of the truck were locked – the possibility of accident having been caused by the mechanical defect cannot be ruled out – the prosecution version that accident was caused by the rashness and negligence of the accused has not been proved beyond reasonable doubt- revision allowed and accused acquitted. (Para-9 to 20)

For the Petitioner: Mr. N.S Chandel, Advocate.
For the Respondent-State: Mr. Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant revision petition stands directed against the judgment of 28.5.2011 rendered by the learned Sessions Judge, Shimla in Cr. Appeal No. 63-S/10 of 2008, whereby he affirmed the findings of conviction recorded against the Revisionist (for short "the accused") by the learned C.J.M Shimla on 30.9.2008 in criminal case No. 62/2 of 06/02.

2. The brief facts of the case are that PW-2 Nakshter Singh and PW-1 Tarsem Singh had been working as driver and conductor, respectively in Punjab Roadways Jalandhar Depot. On 31.7.2002, PWs aforesaid had been detailed on duty on bus bearing No. PB-12C-9620 catering to Shimla-Jalandhar route. There were 10-15 passengers in the bus. When the bus had crossed Tara Devi and had been at a distance of about 200 meters towards Shoghi at about 6.45 a.m. truck bearing registration No. HP-11/1781 was noticed coming from the opposite direction. The accused had been on the wheel of the truck. He had been driving rashly and negligently and had even crossed the mid line. Finding the truck coming on wrong side from opposite direction, PW-2 had slowed down and had taken the bus to extreme left side. The accused had not been able to control the truck and had struck against front right side of the bus. As a result of the impact of the truck, one passenger Sh. Putani Lal Gupta of the bus had fallen down and had suffered fatal injuries. Some other passengers had also suffered multiple injuries. The police stood informed about the accident. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused, the Investigating Officer prepared challan and filed the same in the Court.

3. The accused stood charged by the learned trial Court for his committing offence(s) punishable under Sections 279, 337, 304-A and 338 of I.P.C, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 13 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded in which he pleaded innocence and claimed false implication. However, he did not choose to lead any evidence in his defence.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of conviction upon the accused. The learned Appellate Court in affirmation to the judgment of the learned trial Court also convicted the accused.

6. The learned counsel for the accused/revisionist has concertedly and vigorously contended qua the findings of conviction recorded by the learned trial Court, findings whereof stood affirmed by the learned Appellate Court, standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of conviction being reversed by this Court in the exercise of its revisional jurisdiction and theirs being replaced by findings of acquittal.

7. The learned Deputy Advocate General for the respondent-State has with considerable force and vigor contended qua the concurrent findings of conviction recorded upon the accused by both the Courts below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

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

9. In sequel to a collision which occurred inter-se the vehicle bearing Number HP-11-1781 driven by the accused vis-à-vis the bus bearing No. PB-12C-9620, a passenger occupying the bus aforesaid suffered demise. The apposite post mortem report borne on Ex. PW-9/C unveils qua the demise of one Putani Lal Gupta ensuing from hemorrhagic shock in sequel to multiple injuries as stood entailed upon his body. PW-9 in his deposition held in his examination-in-chief underscores therein qua 4-8 hours elapsing since the begetting of the fatal injury noticed by him on his subjecting the deceased aforesaid to post mortem examination wherefrom the prosecution attains success qua its propagation qua the deceased suffering his demise in sequel to injuries standing entailed upon his person at the relevant time whereat a collision occurred inter-se the vehicle driven by the accused vis-à-vis the bus occupied by the deceased.

10. Also the prosecution in sustaining the charge against the accused had depended upon the testimonies of ocular witnesses to the occurrence who testified as PW-1 and PW-2 before the learned Magistrate. Since the testifications of both the aforesaid PWs who therein

unveil a credible ocular account qua the occurrence stand un-ingrained with any gross or stark contradictions occurring in their respective testifications held in their respective examinations-in-chief vis-à-vis the communications respectively made by them in their respective cross-examinations, as also when their respective testifications qua the ill-fated occurrence are bereft of any taint of any fatal intra-se contradictions thereupon also the prosecution attains success in proving the charge against the accused.

11. The learned Sessions Judge had discarded the efficacy of the apposite testification of PW-6 who in sequel to his holding the apposite vehicle driven by the accused to a thorough mechanical examination prepared Ex. PW-6/A wherein he voiced qua there being a possibility of the offending vehicle prior to the occurrence begetting locking of its steering whereupon the defence had concerted to attribute the relevant collision inter-se the relevant vehicles to stand aroused from the aforesaid mechanical defect preceding the ill-fated occurrence erupting therein on the trite reason qua with the accused for obviating the relevant collision/accident holding the apposite capacity to apply the brakes of the apposite vehicle, whereas his not applying the brakes of the offending vehicle hence generating an inference qua with the accused evidently plying his vehicle on the inappropriate side of the road, his, thereupon evidently holding the necessary mens rea of deviating from the standards of due care and caution. Also the learned Sessions Judge did not impute any apt gravity to the factum of the steering wheel of the vehicle driven by the accused standing pronounced in the testification of PW-6 to beget locking nor he imputed any gravity to the factum articulated by PW-6 qua even the brakes besides the clutches of the offending vehicle standing locked whereupon obviously the accused stood precluded to for thwarting the relevant collision apply the brakes of the offending vehicle nor obviously the assignment of a reason by the learned Sessions Judge qua the relevant collision being obviable by application of brakes of the offending vehicle by the accused whereas the accused not applying brakes of the offending vehicle evidently thereupon his holding a penally inculpable mens rea of negligence, whereupon the verdict impugned hereat recorded by the learned Sessions Judge would for reasons ascribed hereinafter suffer reversal.

12. Visibly as consistently deposed by the ocular witnesses besides as unraveled by the site plan, the truck driven by the accused wantonly wandered astray from the appropriate side of the road whereat a collision occurred inter-se the vehicle driven by the accused vis-à-vis the bus. However PW-6 in his testification borne in his examination-in-chief communicates therein qua on his examining the truck driven by the accused, his noticing qua its brake, clutch and steering all standing locked obviously reiteratedly thereupon the reason assigned by the learned Sessions Judge qua the accident which occurred inter-se the truck driven by the accused vis-à-vis the bus being obviable by application by the accused of the brakes of the offending vehicle falters. Despite this Court dispelling the vigour aforesaid of the reason assigned by the learned Sessions Judge for disimputing credence to the espousal of the defence, would not beget any inference from this Court qua with the vehicle driven by the accused evidently wandering astray from the appropriate portion of the road thereupon the aforestated evident factum yet also not constituting any firm evidence against the accused qua his holding the penally inculpable mens rea of negligently driving his vehicle. Moreso when credible un-tainted ocular testifications of eye witnesses to the occurrence make open and candid communications therein qua the accused negligently driving his vehicle at the relevant site of occurrence.

13. Nowat, the factum of the accused intentionally negotiating his vehicle to the inappropriate site of the road or his standing disabled by eruption of a sudden mechanical defect in the offending vehicle to maneuver it to the appropriate portion of the road warrants pronouncement of a just adjudication, whereupon the efficacy of the testification occurring in the examination-in-chief of PW-6 who therein proved his mechanical report borne on Ex.PW-6/A warrants allusion. PW-6 in his examination-in-chief has with lack of firmness besides with stark want of formidability echoed therein qua the locking of the steering of the vehicle occurring prior to the accident or in contemporanity vis-à-vis it or subsequent thereto. His aforesaid nebulous testification qua the aforesaid trite factum occurring in his examination-in-chief does groom a lingering doubt qua the relevant sudden mechanical defect(s) aforesaid noticed by him in the

offending vehicle arising prior to the accident or in contemporanity therewith or subsequent thereto, whereupon an inference stands sustained qua the inability of the accused to maneuver his vehicle to the appropriate side of the road standing spurred by prior to the ill-fated collision which occurred inter-se the vehicle driven by the accused vis-à-vis the bus aforesaid, the offending vehicle driven by the accused suddenly developing a mechanical defect qua its brakes, clutch and steering standing locked. The vagueness qua the aforesaid relevant factum probandum propounded by PW-6 in his testification occurring in his examination-in-chief does hold immense leverage to purvey this Court strength to conclude qua PW-6 not firmly with an unshaken commitment displaying nor negating qua the relevant defects noticed by him to occur in the relevant offending vehicle which stood inspected by him not occurring prior to the occurrence wherefrom the aforesaid factum probandum whereupon the accused rests his defence stands shrouded in deep doubt, benefit whereof ought to be meted to the accused.

14. In aftermath, the occupation of the inappropriate side of the road by the vehicle driven by the accused stood generated by eruption therein of the aforesaid mechanical defect, eruption whereof thereon occurred prior to the ill-fated collision whereby his inability to maneuver his vehicle to the appropriate side of the road cannot engender any inference qua the accused holding any penally inculpable mens rea of negligence also thereupon it is befitting to conclude qua the defence succeeding in infecting the prosecution story with a pervasive aura of doubt also thereupon the prosecution has unveiled its inability to firmly negate the efficacy of the aforesaid defence reared in exculpation of the guilt of the accused.

15. The learned Deputy Advocate General has with utmost vigour and vehemence contended before this Court qua the aforesaid lingering doubt generated by PW-6 echoing in his examination-in-chief qua the relevant defects erupting in the vehicle prior to the accident standing evaporated by the factum of photographs existing on record with a disclosure therein qua the tyres of the vehicle standing tilted towards the appropriate side of the road whereupon the occurrence of mechanical defects thereon as noticed by PW-6 on his examining the offending vehicle driven by the accused being ascribable to their eruption therein occurring subsequent to the mishap whereupon he contends qua the prosecution succeeding in proving the charge against the accused. He contends with force qua the aforesaid espousal holding absolute tandem with the credible depositions of the ocular witnesses, thereupon any leverage as concerted to be derived by the learned counsel for the accused upon the apposite doubt un-raveled in the examination-in-chief of PW-6 standing stripped of its merit besides legal worth.

16. The learned Deputy Advocate General while making the aforesaid submission before this Court, has not borne in mind the trite tenet of criminal jurisprudence qua the prosecution standing enjoined with a solemn obligation to prove the charge against the accused. In discharge of the aforesaid onus, though the prosecution led PW-6 into the witness box, yet the learned A.P.P. while holding him to examination-in-chief though therein had unearthed from him echoings displaying a lingering doubt qua the locking of the steering of the vehicle driven by the accused occurring prior to the accident whereupon this Court stands prodded to conclude qua hence it precluding the accused to even when the bus driven by the PW-2 occupied the apposite site of occurrence, to maneuver the offending vehicle to the appropriate side of the road, yet the learned A.P.P. concerned while eliciting the aforesaid echoings from PW-6 while holding him to examination-in-chief has hence throttled the prosecution case, rather he has given immense sinew to the espousal of the defence qua the accident which occurred at the relevant side of occurrence being unavoidable significantly with the steering of the vehicle standing prior to the mishap entailed with a sudden defect of its standing locked. Moreover, when the benefit of the aforesaid lingering doubt qua the relevant eruption in the offending vehicle of defects, defects whereof stand articulated by PW-6 to may be arise therein prior to the collision has to be accorded to the accused. Conspicuously the learned P.P. concerned while eliciting the aforesaid relevant doubt from PW-6 qua the factum probandum while holding him to examination-in-chief did not proceed to seek any clarification from PW-6 qua the locking of the steering of the vehicle besides the locking of its brake besides clutch erupting subsequent to the occurrence or in contemporanity vis-à-vis it whereupon his omission in the aforesaid regard gives redoubled fervor

to the doubt qua the relevant facet echoed by PW-6 in his examination-in-chief thereupon the benefit of the relevant doubt has to stand afforded to the accused.

17. The existence of any display in photographs qua the wheel of the truck tilting towards the appropriate side of the road whereupon the learned Deputy Advocate General contends qua with prior to the accident no mechanical defect standing spelt out in PW-6/A to occur in the offending vehicle also does not impute any tenacity to the relevant testifications embodied in the examination-in-chief of PW-6 rather hence relieves the lingering doubt qua the factum probandum grooved in the examination-in-chief of PW-6 nor also the testification occurring in the examination-in-chief of PW-6 qua the eruption of mechanical defect(s) pronounced in PW-6/A to stand on the inspection of the relevant vehicle noticed thereon by him to may be arise thereon prior to the accident taking place inter se the vehicle driven by the accused vis-à-vis the bus occupied by the deceased holds any tenacity. However when the photographs of the truck making the aforesaid disclosure for hence thereupon theirs succoring the propagation of the prosecution stood not shown to PW-6 by the APP concerned during the course of his holding him to examination-in-chief nor they stood shown to him subsequently on his standing granted the apposite permission by the learned trial Court whereas only when the learned A.P.P confronted PW-6 with the relevant photographs holding the aforesaid display, he would hence have evinced a firm opinion from PW-6, an expert, qua the display in the photographs of the tyres of the relevant vehicle tilting towards the appropriate side of the road facilitating hence an inference of the relevant mechanical defect(s) occurring subsequent to the occurrence not prior thereto, whereas with PW-6 evidently remaining unconfronted with the relevant photographs wherewithin the aforesaid display occurs, does constrain this Court to discountenance the submission of the learned Deputy Advocate General also his submission qua this Court in the manner espoused by him read the photographs of the truck holds no legal worth, significantly when there is no provision in the Evidence Act for this Court excepting the one engrafted in Section 73 of the Indian Evidence Act to analyse the testimony of PW-6 an expert vis-à-vis photographs whereupon no opinion stood elicited from him also when the realm of or the domain of the aforesaid relevant analysis falls squarely within the ambit of the apposite skills besides the expertise possessed solitarily by the expert(s) concerned, expertise whereof standing not possessed either by the learned Deputy Advocate General or by this Court reiteratedly renders both incapacitated to pronounce any opinion thereon.

18. The summom bonum of the above discussion is that the credible testification(s) of the ocular witnesses to the occurrence for the reasons aforestated suffering erosion also when with this Court erecting an inference for reasons aforestated qua the relevant defects in the vehicle driven by the accused occurring therein prior to the accident, thereupon a firm conclusion stands generated from this Court qua the occupation of the appropriate site of the road by the vehicle driven by the accused standing reared by the aforesaid sudden eruption of defects in the apposite vehicle also when PW-1 in his cross-examination acquiesces to the suggestion qua the accident being obviable if the driver applying the brakes of the bus does also hence exculpate the guilt of the accused.

19. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by the learned Court below suffers from perversity and absurdity or it can be said that the learned Court below in recording findings of conviction have committed a grave legal misdemeanor, in as much, as, theirs mis-appreciating the evidence on record or theirs omitting to appreciate the relevant and admissible evidence. In aftermath this Court deems it fit and appropriate that the findings of conviction recorded by the learned Courts below merit interference.

20. In view of above, the present petition is accepted. The impugned judgment(s) are quashed and set aside. The accused is acquitted of the offences charged. Fine amount, if any, deposited by the accused be refunded to him. Pending applications stand disposed of accordingly. Personal and surety bonds if furnished by the accused be cancelled. Records be sent back.

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

Oriental Insurance Company .....Appellant.
Versus
Smt. Piplo and others .....Respondents.

FAO No. 392 of 2009
Judgment reserved on: 13.12.2016
Decided on : 23.12.2016

Employees Compensation Act, 1923-Section 4- Deceased was employed by respondent No. 5- he sustained multiple injuries during the course of employment causing his death – an application seeking compensation was filed, which was allowed and a compensation of Rs.4,26,132/- was awarded – held in appeal that deceased was drawing wages of Rs.4,000/- per month and he was also being paid Rs.150/- per day as daily allowance- the travelling allowance has been excluded from the wages but the amount was being paid to the deceased as daily remuneration and cannot be excluded – cover note shows that three persons were covered and the insurer is liable to indemnify the employer –insurance company is not liable to pay penalty – award modified and employer directed to pay the penalty. (Para-7 to 11)

For the appellant: Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.
For respondents: Mr. R.K. Sharma, Senior Advocate, with Mr. Mohan Sharma, Advocate, for respondents No. 1 to 4.
Mr. Manish Thakur, vice counsel for respondent No. 5.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed against the impugned order of 30.05.2009, rendered by the learned Commissioner Workmen's Compensation, Chamba, whereby it awarded compensation comprised in a sum of Rs. 4,26,132/- to the claimants-respondents No. 1 to 4.

2. The brief facts of the case are that Gajinder Singh @ Bhindro was a workman employed by Naved Ali Shah, respondent No. 5 herein. On 24.03.2008 at 4.30 p.m. while working under instruction from respondent No. 5, he received head injuries owing to accident owing to which he died. The accident occurred at Village Mehla at Lakara-Bandla Road, District Chamba, H.P. during the course of his employment of late Gajinder Singh @ Bhindro, who received multiple injuries due to accident which resulted in his death. The petitioners-respondents No. 1 to 4 herein are mother and children of late Gajinder Singh @ Bhindro who were totally dependent on him.

3. On filing the petition, both the parties were summoned. Respondents No. 1 to 4 herein have alleged that late Sh. Gajnder Singh @ Bhindro received multiple injuries during the course of his employment when he was working at the site near Village Mehla on Mehla-Lakara-Bandla Road under instruction from respondent No. 5 herein when he met with an accident on 24.3.2008 and died due to the head injuries caused because of the accident. The cause of death was head injury leading to cardiovascular failure as mentioned in the postmortem report attached with the petition. The respondents No. 1 to 4 herein were totally dependent upon the income of the deceased workman. The deceased was getting a salary of Rs.4500/- per month from his employer, respondent No. 5 herein The deceased was 40 years old at the time of death. The petitioners-respondents No. 1 to 4 herein prayed that respondent No. 5 and the appellant herein be ordered to pay a sum of Rs. 8 lacs as compensation to the petitioners-respondent No. 1 to 4 herein.

4. On the pleadings of the parties, the learned Commissioner struck the following issues inter-se the parties at contest:-

1. Whether the petition is maintainable in the present form ?...OPP

2. Whether the deceased died during the course of employment with respondent No. 1 ?

3. Relief, if any.

5. On an appraisal of evidence, adduced before the learned Commissioner, the latter awarded compensation comprised in a sum of Rs. 4,26,132/- vis-à-vis the petitioners-claimants-respondents No. 1 to 4 herein.

6. Now the Insurance Company, appellant herein has instituted the instant appeal before this Court wherein it assails the findings recorded by the learned Commissioner in his impugned order. When the appeal came up for admission on 21.10.2009, this Court, admitted the appeal instituted herebefore by the appellant Insurance Company against the order of the learned Commissioner on the hereinafter extracted substantial questions of law:-

i) Whether the learned Commissioner below has rightly taken the salary of the deceased to be Rs. 4,500/- p.m. + Rs. 150/- per day as allowance in the absence of any evidence regarding the same and ignoring the reply filed on behalf of respondent No. 5 ?

ii) Whether the policy of insurance issued by the appellant covered the risk of the deceased and the findings to that effect recorded by the ld. Commissioner below are correct ?

iii) Whether the ld. Commissioner below has rightly made the appellant liable to pay interest in view of the specific exclusion of the same in the policy issued by the appellant ?

iv) Whether the findings of the learned Commissioner below regarding payment of penalty by the appellant on its failure to assign the amount of compensation within 30 days are correct in view of the fact that the learned Commissioner has already awarded interest @ 12% per annum from the date of accident till the deposit of the amount ?

Substantial questions of law:-

7. The learned counsel appearing for the appellant has with vigour contended before this Court qua the legal frailty qua adding by the learned Commissioner to a sum of Rs 4,000/- drawn as wages per mensem by the deceased workman from his relevant employment under his employer, a further sum of Rs. 150/- per day, sum whereof purportedly stood paid as daily allowance to the deceased workman by his employer especially when it stands statutorily ousted besides when the aforesaid sum of daily allowance does not fall within the purview of "wages" defined in Section 2(m) of the Workmen's Compensation Act, provisions whereof stand extracted hereinafter, whereupon he contends qua the impugned order warranting interference.

"2(m) "Wages" includes any privilege or benefit which is capable of being estimated in money, other than a traveling allowance or the value of any traveling concession or a contribution paid by the employer of a workman towards any pension or provident fund or a sum paid to a workman to cover any special expenses entailed on him by the nature of his employment."

8. Significantly apparently with "a traveling allowance" standing therewithin statutorily excluded from the statutorily parlance borne by "wages" drawn by a workman from his relevant employment under his employer, thereupon he with much vigor carries forward his submission by espousing qua with "daily allowance" constituted in a sum of Rs. 150/- per day also falling within the ambit of "traveling allowance" whereupon though the amount aforesaid stood statutorily mandated to stand excluded from a sum of Rs. 4,000/- drawn as wages per mensem by the deceased workman from his relevant employment under his employer whereas

the learned Commissioner adding Rs. 150/- per day to the sum of Rs. 4,000/- per mensem hence has committed a gross illegality. However, the aforesaid contention warrants its standing not accepted, as an incisive perusal of the award pronounced by the learned Commissioner qua the facet aforestated stands anvilled upon the credible testification of PW-1 holding therewithin an articulation qua the deceased workman from his relevant employment under his employer drawing wages in a sum of Rs. 4,500/- per mensem whereto the learned Commissioner meted an apt deference to the relevant germane statutory principle(s) for arriving at the sum of compensation payable to the claimants. Be that as it may with the employer not adducing cogent evidence for belying the factum aforesaid occurring in the testification embodied in the examination in chief of PW-1 wherefrom it is to stand concluded qua the employer acquiescing to the aforesaid relevant trite factum besides with the insurer also not adducing before the learned Commissioner the relevant germane evidence holding therewithin pronouncements contrary to the one unraveled by PW-1 warrants rejuvenated imputation of credence thereto arousable from the respondents in making the relevant omissions theirs hence acquiescing to the efficacy of the aforesaid trite factum. An incisive perusal of the award omits to make any display qua the learned Commissioner while his proceeding to compute the compensation amount payable to the claimants his therein adding to the sum of Rs. 4,500/- per mensem, a sum of Rs. 150/- per day purportedly received as a daily allowance by the deceased workman from his relevant employment under his employer. It appears qua the learned counsel for the appellant in proceeding to make the aforesaid submission whereupon this Court stood enjoined to formulate substantial question of law at Sr. No.1, his anvilling it upon PW-1 on standing held to cross examination by the learned counsel for respondent No. 1 she while denying the apposite suggestion put thereat to her qua the deceased workman drawing a sum of Rs. 80/- per day as wages, hers deposing qua the deceased drawing a sum of Rs. 150/- per day, as wages from his relevant employment under his employer deposition whereof holds sinew arising from no apposite evidence for belying it standing adduced by the employer besides by the insurer. Significantly when reiteratedly the aforesaid communication makes a graphic visible display qua the per day wages drawn by the deceased workman from his relevant employment under his employer standing constituted in a sum of Rs. 150/- thereupon the learned Commissioner aptly computed the quantum of wages per mensem drawn by the deceased workman from his relevant employment under his employer whereupon he on meteing an apt deference thereon to the relevant statutory principle(s) assessed a just and fair compensation amount payable to the claimants. Naturally thereupon, there is no addition of any sum of Rs. 150/- per day to a sum of Rs. 4,500/- per mensem nor also the sum of Rs. 150/- per day purportedly drawn as a daily allowance by the deceased workman from his relevant employment under his employer is unamenable to any construction qua it not constituting the wages per day drawn by the deceased workman significantly when thereupon the credible testification of PW(s) would suffer erosion besides also would lead to a fallacious inference not borne from any evidence qua a sum of Rs. 150/- per day not standing reared by the deceased workman for each day of work performed by him under his relevant employer. In sequel thereto, it was neither a traveling allowance nor a daily allowance nor hence it is construable for its standing excluded from the statutory definition of "wages" held in the apposite statutory provision engrafted in Section 2(m) of the Workmen's Compensation Act, rather it was the remuneration per day received by the deceased workman from his relevant employment under his employer rather it than any daily allowance reared by the deceased workman from his relevant employment under his employer. Conspicuously, question No.1 is accordingly answered against the insurer.

9. The insurance cover executed by the deceaseds' employer with his insurer stood un-adduced into evidence by the insurer before the learned Commissioner, rather only a cover note comprised in Ex. R-1 with a disclosure therein qua it encompassing the contractual liability of the insurer for indemnifying the insured qua the judicially determined compensation amount qua three labourers engaged by him in blasting work/road cutting at Mehla Road, PWD Division, stood adduced by the insurer before the learned Commissioner. Since at the relevant time uncontrovertedly the deceased was under the employment of respondent No. 5 necessarily hence, for the insurer holding a deft legal capacity for exculpating its apposite liability it stood enjoined

to place before the learned Commissioner a comprehensive insurance cover making a disclosure therein qua the deceased workman not standing named therein to be a workman employed by his employer besides stood enjoined to therefrom made unveilings qua the insurer not executing with his employer any contract of insurance whereupon the insurer also stood not contractually enjoined to indemnify the insurer the compensation amount determined vis-à-vis the claimants in the event of the demise of their predecessor-in-interest occurring during the course of his performing duty under his employer. Since the comprehensive cover note with apposite unfoldments aforesaid occurring therein stood unadduced by the insurer before the learned Commissioner no conclusion can stand formed qua the insurer not contracting to cover the risk of the deceased whereupon nor also it can stand concluded qua the learned Commissioner committing any gross illegality in fastening upon the insurer the apposite liability qua the compensation amount determined by him.

10. Likewise, the insurer for exculpating its determined liability to pay interest on the compensation amount pronounced in his impugned award by the learned Commissioner stood enjoined to place on record a comprehensive insurance cover executed by it vis-à-vis the employer of the deceased workman/insured, with a display occurring therewithin qua the apposite liability of interest levied by the learned Commissioner on the relevant compensation amount assessed by it being unfastenable upon it. However, the aforesaid comprehensive insurance cover executed inter-se the insurer and the insured employer of the deceased workman, remained unadduced into evidence by the insured before the learned Commissioner. Its non adduction therebefore obviously precluded the learned Commissioner to aptly make therefrom the apposite aforestated pronounced conclusion also its non adduction forbids this Court to exculpate the insurer from its judicially pronounced liability of it being amenable to pay interest upon the judicially determined compensation amount vis-à-vis the claimants.

11. Be that as it may, given the trite expostulation of law held in a catena of judicial verdicts qua the liability of penalty being unfastenable upon the insurer, rather the liability of penalty arising from non compliance with the mandate of sub section (1) of Section 10 of the Workmen's Compensation Act by the employer of the deceased workman being fastenable upon the employer, constrains this Court to reverse that portion of the impugned award whereupon the liability of statutory penalty for evident infraction of the mandate sub section (1) of Section 10 of the Act stands fastened upon the insurer. Consequently, the liability of statutory penalty as stands determined by the learned Commissioner in his impugned award stands fastened upon the employer of the deceased workman. The impugned award stands modified to the extent aforesaid.

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

Prem Lal .....Appellant.

Versus

The Associated Cement Company Ltd. and others .....Respondents.

FAO No. 457 of 2016
Judgment reserved on: 13.12.2016
Decided on : 23.12.2016

Employees Compensation Act, 1923- Section 4- Claimant received an injury on his right eye during the course of employment- he filed an application seeking compensation, which was allowed- held, that Commissioner had assessed income of the claimant as Rs.8,000/- per month – however, the income has to be assessed as Rs.4,000/- even if it is more than the same in view of Section 4 – claimant had suffered 30% permanent disability – Commissioner had assessed loss

of earning capacity as 30%, which is contrary to Section 4(1)(c)- appeal allowed and the case remanded to the Commissioner to decide the same afresh in accordance with law. (Para-3 to 8)

For the appellant:	Ms. Neha Thakur, vice counsel.
For respondents:	Mr. K.D. Sood, Senior Advocate, with Mr. Ankit Aggarwal, Advocate, for respondent No. 1 Mr. Raman Sethi, counsel for respondent No. 3.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed against the impugned order of 29.10.2015 rendered by the learned Commissioner, Bilaspur, District Bilaspur, H.P in Case number 11/2 of 2011, whereby the learned Commissioner assessed compensation qua the claimant in the quantum reflected therein, liability qua defrayment whereof stood fastened upon respondent No.3.

2. The factum of the claimant rendering employment under respondent No.2 is evincible from employment certificate borne on Ex.PA also the factum of his during the course of his performing employment receiving upon his person an injury reflected in Ex. P-6 stands unflinchingly proven by Ex. RW-1/C. The effect of the aforesaid inference erected by this Court qua the claimant while performing his relevant employment under his employer his receiving an injury on his right eye entails upon this Court to fathom from the evidence existing herebefore qua the determination under the impugned award of compensation qua him standing vitiated with any vice of the learned Commissioner mis-appraising the relevant evidence on record or his omitting to appraise the relevant and germane evidence.

3. Initially for determining the relevant factum of the claimant standing entitled to compensation in the sum assessed qua him under the impugned order, an allusion is enjoined to be made qua the learned Commissioner in computing a sum of Rs.8,000/- as his apposite wages per mensem whereon the relevant statutory principle(s) stood applied his hence moving astray from the evidence apposite qua it. The petitioner had testified qua his drawing wages in a sum of Rs.8,000/- per mensem from his relevant employment under his employer. The aforesaid pronouncement made by the claimant in his testification occurring in his examination-in-chief stood unshred of its efficacy during the exacting ordeal of a rigorous cross examination to which he stood subjected to by the learned counsel for the respondents nor also the employer adduced any evidence for denuding the worth of his testification qua the aforesaid facet besides omitted to adduce evidence in portrayal of the workman concerned drawing wages in a sum lesser than Rs.8,000/-per mensem from his relevant employment under him. With this Court concluding qua the learned Commissioner while computing the aforesaid sum to constitute the wages per mensem drawn by the claimant from his relevant employment under his employer his hence not committing any gross error nor his by applying thereupon the mandate of explanation II of Section 4 of the Workmen's Compensation Act,1923 (for short "the Act") provisions whereof stand extracted hereinafter wherewithin a dictate stands fastened upon the learned Commissioner qua with the evident wages per mensem drawn by the workman from his relevant employment exceeding Rs.4,000/-, thereupon his monthly wages for the purpose of application thereon the relevant statutory principle(s) for computing compensation amount assessable qua him standing statutorily pegged in a sum of Rs.4,000/-, his hence not committing any gross illegality. Nowat reiteratedly with uncontrovertedly the wages per mensem drawn by the claimant from his relevant employment under his employer palpably exceeding Rs.4000/- thereupon in consonance with the aforesaid mandate held in explanation II of Section 4 of the Act, his monthly wages stand enjoined to be pegged in a sum of Rs.4000/- per mensem whereon the relevant statutory principles are enjoined to be applied for arriving at the compensation amount determinable qua him.

"*Explanation II- Where the monthly wages of a workman exceed {Four thousand rupees}, his monthly wages for the purposes of clause (a) and Clause (b) shall be deemed to be {four thousand rupees} only;*

© Where permanent partial disablement results from the injury

(i) in the case of an injury specified in part II of Schedule I, such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury, and

(ii) in the case of an injury not specified in Schedule I, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury."

4. Before proceeding to apply thereon the other relevant statutory principle(s) an allusion to Ex.P-6 stands enjoined to be made wherewithin a recital occurs qua the claimant in sequel to his sustaining an injury on his right eye, injury whereon evidently stood sustained thereon during the course of his performing employment under his relevant employer, his concomitantly standing entailed with a 30% permanent disability of the afflicted eye also Ex.P-6 holds a communication therein of the apposite eye of the claimant standing afflicted with a partial loss of its vision. The aforesaid reflection(s) occurring in Ex.P-6 entail this Court to obviously also allude to the relevant statutory mandate engrafted in clause (1) (c) of Section 4 of the Act provisions whereof stand extracted hereinafter wherewithin a mandate stands echoed qua wherewith an injury specified in part II of schedule I of the Act standing entailed upon the workman conspicuously where the injury suffered by the workman sequels permanent partial disablement, compensation amount assessable qua the workman standing enjoined to be computed in consonance therewith.

© Where permanent partial disablement results from the injury

(iii) in the case of an injury specified in part II of Schedule I, such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury, and"

5. Nowat evidently with the afore-referred reflections occurring in Ex.P-6 unveiling qua the injury suffered by the claimant during the course of his performing employment under his employer entailing upon him permanent partial disablement of his right eye thereupon the learned Commissioner stood enjoined to mete deference to the apposite clause © of sub Section (1) of Section 4 of the Act whereas with the learned Commissioner proceeding to inappositely mete deference to the inapposite clause Section borne on 4(1) (b) of the Act, provisions whereof stand extracted hereinafter significantly when the latter clause is applicable only where in sequel to the injury sustained by the workman during the course of his performing his relevant employment under his employer he stands entailed with a permanent total disablement of the afflicted portion of his body reiteratedly with evidently hereat the apposite injury sustained by the claimant during the course of his performing duties under his employer entailing upon him permanent partial disablement of the apposite eye thereupon the Commissioner stood enjoined to mete reverence to clause ©(1) of Section 4 of the Act. However, his omitting to mete deference thereto contrarily his meting deference to Section 4 (1) (b) of the Act, he has hence committed a gross error in determining compensation amount payable vis-à-vis the workman.

"(b) whether permanent total disablement results from the injury

An amount equal to {sixty per cent} of the monthly wages of the injured workman multiplied by the relevant factor,

Or

An amount of {ninety thousand rupees} whichever is more."

6. Even though the insurer under policy of insurance comprised in Ex.RW-1/A covered the risk of the relevant category of workman whereupon the employer holds an empowerment to seek indemnification from the insurer qua the compensation amount assessed qua the workman also when in consonance therewith under the impugned order the relevant liability qua defrayment of compensation determined vis-à-vis the workman stood fastened upon the insurer yet the insurer has not assailed the award, nonetheless any want on its part to assail the award would yet not constrain this Court to interfere with the impugned rendition, as any validation of the impugned award would beget gross injustice hence whereupon dehors the appellant alone instituting an appeal herebefore whereupon an onslaught is constituted qua the impugned rendition for mitigating injustice also for solitarily mitigating the afore-stated gross inherent statutory errors committed by the learned Commissioner also for begetting rectification thereof by the learned Commissioner besides when in an appeal instituted herebefore by the appellant against the impugned award, it would be inexpedient besides unjust to when the insurer has not assailed herebefore the impugned rendition recorded by the learned Commissioner wherein gross statutory errors as stand committed by the learned Commissioner rather for redemption whereof it is deemed fit and just to quash the impugned award thereupon remand it to the learned Commissioner for enabling him to render a fresh adjudication upon the claim petition significantly when thereupon alone latitude would stand reserved to the learned Commissioner to apply the apt statutory principle(s) qua a sum of Rs.4,000/- per mensem evidently derived as wages per mensem by the claimant from his relevant employer under his employment.

7. Be that as it may further more with Ex.P-6 evidently pronouncing qua a 30% permanent disability standing entailed upon the workman, thereupon the learned Commissioner proceeded to conclude qua 30% concomitant loss of earning capacity standing entailed upon the workman wherefrom it reckoned qua the compensation amount payable to him standing constituted in a sum of Rs.1,38,340/-. The aforesaid manner of reckoning by the learned Commissioner on anvil of Ex.P-6 qua a 30% loss of earning capacity in commensuration to a 30% permanent disability standing entailed upon the workman also besmirches the impugned award with an inherent fallacy arising from her misapplying the relevant provisions of clause © of sub section 1 of Section 4 of the Act whereupon she proceeded to mis-conclude qua the quantum of earning capacity entailed upon the workman being consumerate vis-à-vis a 30% permanent disability standing entailed upon his right eye, conspicuously also when the factor of 30% as stood applied by the learned Commissioner on the statutory wages drawn by the workman for thereupon its holding statutory validation it stood enjoined to be peremptorily applied evidently where permanent total disablement stands entailed on the relevant portion of the body of the workman whereon an injury stands sustained by him during the course of his performing his relevant employment under his relevant employer whereas when for the reasons afore-stated this Court concludes qua the learned Commissioner misapplying the provisions of clause (b) of sub section (1) of section 4 of the Act wherefrom it is enjoined to be concluded qua her also not applying the apposite applicable clause (c) of sub Section (1) of Section 4 of the Act mis-application whereof also led her to misapply Sr. No. 26 of Part II of Schedule I of the Act corollary whereof is qua the learned Commissioner while determining the compensation amount his falling into gross error. Also with a 30% permanent disability standing as pronounced in Ex.P-6 entailed upon the workman on his right eye whereupon loss of its partial vision stood seqeuelled whereon Sr. No.26-A stood enjoined to be applied. Moreso when clause (c) of Sub Section (1) of Section 4 of the Act holds a mandate qua where a workman stands entailed with a permanent partial disablement in sequel to the apposite injury sustained by him during the course of his performing his relevant employment under his employer the apposite relevant Sr. No. 26A existing in part II of Schedule 1 of the Act stood evidently enjoined to be applied to the figure of Rs.4000/- evidently drawn as wages per mensem by the workman. However the apposite Sr. No. 26-A part II of Schedule I of the Act stood not applied whereas it encompassed therewithin the statutory compensation assessable qua the workman arising from loss of earning capacity in sequel to the disability incurred by him standing entailed upon him.

8. In view of the above, the impugned award is quashed and set aside. Also the matter is remanded to the learned Commissioner to within three months pronounce a fresh adjudication thereon bearing in mind the aforesaid discussion. The parties are directed to appear before the learned Commissioner concerned on 1.3.2017. Pending applications stand disposed of accordingly. Records be sent back.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

NTPC Limited, Kol Dam. ...Appellant.

Versus

Shri Krishan Chand Sharma & others. ...Respondents.

RFA No. 481 of 2012 along with others
Date of Decision: December 26, 2016.

Land Acquisition Act, 1894- Section 18- Parcels of the land of the claimants were acquired for the construction of Kol dam- the Collector determined the market value on the basis of classification ranging from Rs.87,376/- toRs.3,93,170/- - reference was filed and the market value was enhanced to Rs.4.5 lacs per bigha and Rs.3,93,170/- per bigha, irrespective of classification- held, that award of the Collector is a mere offer and the Court is bound to determine just fair and reasonable market value on the basis of material placed on record –when the purpose of acquisition is common and no developmental activity is required to be carried out, compensation can be awarded on uniform basis – in the present case, the purpose of acquisition was construction of Kol dam and payment of compensation on uniform basis cannot be faulted – no exemplar sale deed was placed on record and only an exemplar award granting compensation of Rs.5 lacs was proved– the exemplar award pertained to the land situated in Tehsil Arki, which has commercial potential – hence, the market value was scaled down to Rs.4.5 lacs- beneficiary had placed the sale deed on record but had not examined any witness to prove the similarity of the land shown in the exemplar sale deed with the acquired land – the market value enhanced to Rs.4.5 lacs uniformly irrespective of classification.(Para-10 to 38)

Cases referred:

Chimanlal Hargonvinddas Versus Special Land Acquisition Officer, Poona and another, AIR 1988 SC 1652; (1988) 3 SCC 751

Special Land Acquisition Officer Versus Karigowda and others, (2010) 5 SCC 708

Viluben Jhalejar Contractor (Dead) by LRs Vs State of Gujarat, (2005) 4 SCC 789 (paras 22 & 23)

Himmat Singh and others Vs State of Madhya Pradesh and another, (2013) 16 SCC 392 (para 34)

Peerappa Hanmantha Harijan (Dead) By Legal Representatives and others Versus State of Karnataka and another, (2015) 10 SCC 469 (paras 80 and 81)

Haridwar Development Authority vs. Raghubir Singh & others, (2010) 11 SCC 581

Union of India vs. Harinder Pal Singh and others 2005(12) SCC 564

Nelson Fernades vs. Special Land Acquisition Officer 2007(9) SCC 447

Gulabi and etc. Vs. State of H.P., AIR 1998 HP 9

H.P. Housing Board vs. Ram Lal & Ors. 2003(3) Shim. L.C. 64

Executive Engineer & Anr. vs. Dilla Ram {Latest HLJ 2008 HP 1007}

Subh Ram & others, vs. State of Haryana & another, (2010) 1 SCC 444

For the Appellant: Mr. Neeraj Gupta, Advocate, for the appellant-NTPC.

For the Respondents: Mr.Dinesh Kumar, Advocate, for private respondents.
Mr. Shrawan Dogra, AG with Mr.Puneet Rajta, Dy. AG., for respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J (oral).

In all these appeals, both the claimants as also the beneficiary are aggrieved of the various awards passed by the Reference Courts. It is not in dispute that reference petitions arise out of the very same award i.e. Award No.36 of 2005, dated 23.09.2005, passed by the Collector Land Acquisition. In these appeals, following awards passed by the Reference Court and which are subject matter of the present appeals are as follows:-

RFA No.	**Land Reference Award No.**	**Title**	**Date of award of the Reference Court**
481/2012	15-S/4 of 2008/06, passed by District Judge (F), Shimla, H.P.	Krishan Chand v. NTPC	30.10.2009
482/2012	26-S/4 of 2008/06, passed by District Judge (F), Shimla, H.P.	Hari Ram v. NTPC	05.06.2010
586/2011	2-S/4 of 2007, passed by Additional District Judge, FTC, Shimla, H.P.	Jai Chand Sagar v. NTPC	14.07.2011
561/2011	4-S/4 of 2007, passed by Additional District Judge, FTC, Shimla, H.P.	Gulab Devi v. NTPC	12.07.2011
585/2011	5-S/4 of 2007, passed by Additional District Judge, FTC, Shimla, H.P.	Duli Chand v. NTPC	13.07.2011
60/2010	15-S/4 of 2008/06, passed by District Judge (F), Shimla, H.P.	Krishan Chand v. NTPC	30.10.2009
618/2011	4-S/4 of 2007, passed by Additional District Judge, FTC, Shimla, H.P.	Gulab Devi v. NTPC	12.07.2011
619/2011	5-S/4 of 2007, passed by Additional District Judge, FTC, Shimla, H.P.	Duli Chand v. NTPC	13.07.2011
620/2011	2-S/4 of 2007, passed by Additional District Judge, FTC, Shimla, H.P.	Jai Chand Sagar v. NTPC	14.07.2011
621/2011	18-S/4 of 2006, passed by Additional District Judge, FTC, Shimla, H.P.	Kishori Lal v. NTPC	14.07.2011
210/2013	47-S/4 of 2012/07, passed by District Judge (F), Shimla, H.P.	Prabhawati v. NTPC	02.11.2012
211/2013	52-S/4 of 2012/06, passed by District Judge (F), Shimla, H.P.	Gandhbru v. NTPC	02.11.2012

212/2013	48-S/4 of 2012/07, passed by District Judge (F), Shimla, H.P.	Pyare Lal v. NTPC	02.11.2012

2. The Collector had determined the market value of the acquired land, classification wise, ranging from Rs. 87,376/- to Rs. 3,93,170/-. In terms of the impugned awards, in the cases of Krishan Chand Sharma and Hari Ram, market value stands re-determined, regardless of classification @ Rs. 4.5 lacs per bigha, whereas, in the cases of Gulab Devi, Jai Chand and Duli Chand, the same stands re-determined @ Rs. 3,93,170/- per bigha. With respect to Prabhawati, Gandhrbu and Pyare Lal, the reference petitions came to be dismissed.

3. The acquisition proceedings pertain to the Collector's award No.36 of 2005 dated 23.09.2005, pertaining to village Palyad Dom, Tehsil Sunni, District Shimla, H.P. In terms of the said award, the market value of the acquired land stands determined, classification wise from Rs. 87,376/- to Rs. 3,93,170/-. In the impugned land reference petition, the same stands re-determined by the Reference Court @ Rs. 4.5 lacs per bigha, on uniform basis, for the reason that: (a) The observations made by the Collector in its award itself justified such enhancement; and (b) Award (Ex.PA) passed by the Reference Court in reference petition No.22-S/4 of 2007/06, titled as *Brij Lal Versus The Land Acquisition Collector, NTPC (Kol Dam), Bilaspur and others,* decided on 31.03.2009.

4. If the claimant(s) are held legally entitled for rates, on uniform basis, irrespective of classification and category, then the increase in the amount of re-determination of the market value of the acquired land is only marginal. The rates stand increased from Rs. 3,93,170/- to Rs. 4.5 lacs per bigha.

5. It is a matter of record that several claimants filed several land reference petitions, some of which could not be clubbed and as such were disposed of by different Courts on different dates. Noticeably, some of the Courts have dismissed the petitions by relying upon the Collector's award and some of the petitions stand allowed by enhancing the amount up to Rs. 4.5 lacs per bigha. For determination of all these appeals, facts of land reference petition No. 15-S/4 of 2008/06, titled as *Krishan Chand Sharma and others Versus NTPC and another,* subject matter in RFA No. 581 of 2012, are being referred to.

6. In terms of award No.36 of 2005, dated 23.09.2005, Collector Land Acquisition, determined the market value of the acquired land awarding different rates, classification/category wise, ranging from Rs. 87,376/- to Rs. 3,93,170/- per bigha.

7. In terms of the impugned award dated 30.10.2009, passed by District Judge (F), Shimla, H.P., in Reference Petition No.15-S/4 of 2008/06, titled as *Krishan Chand Sharma and others Versus NTPC and another,* the Reference Court re-determined the market value of the entire acquired land, irrespective of its category/classification, by uniformly awarding a sum of Rs. 4.5 lacs per bigha.

8. Certain facts are not in dispute: (i) 11.18.57 hectares (reduced from original area 12.21.82 hectares) of land came to be acquired in village Palyad Dom (1st File), Tehsil Sunni, District Shimla, H.P., with the publication of notification in the official gazette on 23.12.2000, so issued under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act); (ii) The acquisition proceedings concluded with the passing of Collector's award No.36 of 2005, dated 23.09.2005, under Section 11 of the Act and the State taking over possession of the land; (iii) The purpose of acquisition being construction of Dam, commonly known as Kol Dam; (iv) Dissatisfied with the offer made by the Collector, claimants filed petitions under Section 18 of the Act, which came to be clubbed and on the basis of common evidence led by the parties, disposed of in terms of impugned award; (v) It is the common case of parties that the entire acquired land came to be submerged with the construction of Dam by the beneficiary. Also there is no evidence on record of either any requirement or any developmental activity carried out on the spot.

9. With these admitted/undisputed facts, material placed on record by the parties is being appreciated for just decision of the case.

10. It is a settled principle of law that onus of establishing true market value of the acquired land, higher than the one which stands determined by the Collector, is always upon the claimants.

11. Perusal of the Collector's award reveals that claimants themselves claimed compensation @ Rs.30,00,000/- per bigha. But then it was category/classification wise.

12. It is a settled principle of law that Collector's award is a mere offer and in the proceedings under Section 18 of the Act, Court is duty bound to determine the market value, which is just, fair and reasonable, on the basis of material placed on record by the parties. The conclusion with respect to re-determination of the market value, in the instant case, is clearly based on the evidence led by the claimants, which cannot be said to have been appreciated erroneously. Material, in its entirety, stands considered by the Court below.

13. With vehemence, Mr. Neeraj Gupta, learned counsel, contends that Reference Court erred in considering the fact that before the Collector, claimants had themselves elected for award of compensation on the basis of classification/category, hence they were precluded from seeking re-determination of the market value of the acquired land on uniform basis.

14. To rebut the same, Mr. Dinesh Kumar, learned counsel, seeks reliance on the decision rendered by the Apex Court in *Chimanlal Hargonvinddas Versus Special Land Acquisition Officer, Poona and another,* AIR 1988 SC 1652; (1988) 3 SCC 751, wherein the Court made the following observations:-

> "4 The following factors must be etched on the mental screen :
>
> (1) A reference under Section 18 of the Land Acquisition Act is not an appeal against the award and the Court cannot take into account the material relied upon by the Land Acquisition Officer in his Award unless the same material is produced and proved before the Court.
>
> (2) So also the Award of the Land Acquisition Officer is not to be treated as a judgment of the trial Court open or exposed to challenge before the court hearing the Reference. It is merely an offer made by the Land Acquisition Officer and the material utilised by him for making his valuation cannot be utilised by the Court unless produced and proved before it. It is not the function of the court to sit in appeal against the Award, approve or disapprove its reasoning, or correct its error or affirm, modify or reverse the conclusion reached by the Land Acquisition Officer, as if it were an appellate Court.
>
> (3) The Court has to treat the reference as an original proceeding before it and determine the market value afresh on the basis of the material produced before it.
>
> (4) The claimant is in the position of a plaintiff who has to show that the price offered for his land in the award is inadequate on the basis of the materials produced in the Court. Of course the materials placed and proved by the other side can also be taken into account for this purpose.
>
> (5) <u>The market value of land under acquisition has to be determined as on the crucial date of publication of the notification under S. 4 of the Land Acquisition Act (dates of Notifications under Ss. 6 and 9 are irrelevant)</u>.
>
> (6) <u>The determination has to be made standing on the date line of valuation (date of publication of notification under S. 4) as if the valuer is a hypothetical purchaser willing to purchase land</u> from the open market and is prepared to pay a reasonable price as on that day. It has also to be assumed that the vendor is willing to sell the land at a reasonable price.

(7) In doing so by the instances method, the Court has to correlate the market value reflected in the most comparable instance which provides the index of market value.

(8) Only genuine instances have to be taken into account. (Sometimes instances are rigged up in anticipation of Acquisition of land.)

(9) Even post-notification instances can be taken into account (1) if they are very proximate, (2) genuine and (3) the acquisition itself has not motivated the purchaser to pay a higher price on account of the resultant improvement in development prospects.

(10) The most comparable instances out of the genuine instances have to be identified on the following considerations :

(i) proximity from time angle

(ii) proximity from situation angle.

(11) Having identified the instances which provide the index of market value the price reflected therein may be taken as the norm and the market value of the land under acquisition may be deduced by making suitable adjustments for the plus and minus factors vis-a-vis land under acquisition by placing the two in juxtaposition.

(12) A balance-sheet of plus and minus factors may be drawn for this purpose and the relevant factors may beevaluated interms of price variation as a prudent purchaser would do.

(13) The market value of the land under acquisition has thereafter to be deduced by loading the price reflected in the instance taken as norm for plus factors and unloading it for minus factors.

(14) The exercise indicated in clauses (11) to (13) has to be undertaken in a common sense manner as a prudent man of the world of business would do. We may illustrate some such illustrative (not exhaustive) factors :-

(For table see below)

Plus factors	Minus factors
1. Smallness of size.	1. largeness of area.
2. Proximity to a road.	2. situation in the interior at a distance from the road.
3. frontage on a road.	3. narrow strip of land with very small frontage compared to depth.
4. nearness to developed area.	4. lower level requiring the depressed portion to be filled up.
5. regular shape.	5. remoteness from developed locality.
6. level vis-a-vis land under acquisition.	6. some special disadvantageous factor which would deter a purchaser.
7. special value for an owner of an adjoining property to whom it may have some very special advantage.	

(15) The evaluation of these factors of course depends on the facts of each case. There cannot be any hard and fast or rigid rule. Common sense is the best and most reliable guide. For instance, take the factor regarding the size. A building

> plot of land say 500 to 1000 sq. yds cannot be compared with a large tract or block of land of say 10000 eq. yds. or more. Firstly while a smaller plot is within the reach of many, a large block of land will have to be developed by preparing a lay out, carving out roads, leaving open space, plotting out smaller plots, waiting for purchasers (meanwhile the invested money will be blocked up) and the hazards of an entrepreneur. The factor can be discounted by making a deduction byway of an allowance at an appropriate rate ranging approx. between 20% to 50% to account for land required to be set apart for carving out lands and plotting out small plots. The discounting will to some extent also depend on whether it is a rural area or urban area, whether building activity is picking up, and whether waiting period during which the capital of the entrepreneur would be locked up, will be longer or shorter and the attendant hazards.
>
> (16) Every case must be dealt with on its own fact pattern bearing in mind all these factors as a prudent purchaser of land in which position the Judge must place himself.
>
> (17) These are general guidelines to be applied with understanding informed with common sense." (Emphasis supplied)

Reliance is also sought on the decision rendered by the Apex Court in *Special Land Acquisition Officer Versus Karigowda and others,* (2010) 5 SCC 708.

15. Significantly while responding to the reference petition or at the time of recording evidence, such objection never came to be taken by the beneficiary. Even before this Court, it is not a pleaded ground in the memo of appeal. In fact, as is evident from the reference petition, claimants had claimed rates @ Rs. 30,00,000/- per bigha, on uniform basis.

16. In any event, Reference Court is duty bound to determine such market value, which is just, fair and reasonable.

17. The law for award of compensation at uniform rates, when the purpose of acquisition is common and no developmental activity is required to be carried out is no longer *res integra* and stands settled by Hon'ble the Supreme Court in *Viluben Jhalejar Contractor (Dead) by LRs Versus State of Gujarat,* (2005) 4 SCC 789 (paras 22 and 23); *Himmat Singh and others Versus State of Madhya Pradesh and another,* (2013) 16 SCC 392 (para 34); *Peerappa Hanmantha Harijan (Dead) By Legal Representatives and others Versus State of Karnataka and another,* (2015) 10 SCC 469 (paras 80 and 81); as also this Court in RFA No. 953 of 2012, titled as *Land Acquisition Collector & another Versus Jatinder Singh,* decided on 01.06.2016 and other connected matters. As such, at this point in time, in view of admitted/undisputed factual matrix, as noticed earlier, it would not be permissible for the beneficiary to raise such objections.

18. Now it is a settled principle of law that if the entire land is put for a public use and no area is left out for carrying out any developmental activity, then the claimants are entitled for compensation for the entire acquired land, at uniform rates, regardless of its categorization.

19. The apex Court in *Haridwar Development Authority vs. Raghubir Singh & others,* (2010) 11 SCC 581 has upheld the award of compensation on uniform rates. Also it has acknowledged the principle of providing increase in the market value up to 10% to 12% per year for the land situated near urban areas having potential for non-agricultural development.

20. In *Union of India vs. Harinder Pal Singh and others* 2005(12) SCC 564, while determining the compensation for acquisition of land pertaining to five different villages, the apex Court uniformly awarded a sum of Rs. 40,000/- per acre, irrespective of the classification and the category of land.

21. Further, in *Nelson Fernades vs. Special Land Acquisition Officer* 2007(9) SCC 447 while dealing with the case where the land was acquired for laying a Railway line, the Court held that no deduction by way of development charges was permissible as there was no question of any development thereof.

22. Similar view stands taken by this Court in *Gulabi and etc. Vs. State of H.P.,* AIR 1998 HP 9 and later on in *H.P. Housing oard vs. Ram Lal & Ors.* 2003(3) Shim. L.C. 64, which judgment has attained finality as SLP (Civil) No. 15674-15675 of 2004 titled as Himachal Pradesh Housing Board vs. Ram Lal (D) by LRs & Others, filed by the H.P. Housing Board came to be dismissed by the Apex Court on 16.8.2004.

23. This judgment was subsequently referred to and relied upon by this Court in *Executive Engineer & Anr. vs. Dilla Ram* {Latest HLJ 2008 HP 1007} and relying upon the decision of the Apex Court in *Harinder Pal Singh (supra)*, wherein the market value of the land under acquisition situated in five different villages was assessed uniformly irrespective of its nature and quality, also awarded compensation on uniform rates.

24. It is a matter of fact that the entire land was put to public purpose. Dam stood constructed thereupon. It was used for only one purpose and as such there cannot be any error in uniform determination of the market value of the acquired land.

25. From the Award (Ex.PA), it is evident that land situate in village Padyar Dom, Pargana Mangal, Tehsil Arki, District Solan, H.P., came to be acquired for the very same public purpose and the claimants were awarded market value @ Rs. 5,00,000/- per bigha. Accepting the said award to be the basis for the re-determination of the market value, the Reference court, by taking into consideration the evidence led by the claimants and by examining witnesses, namely, Brij Mohan (PW.1), Bhom Prakash (PW.2) and Jial Lal (PW.3), found the true market value of the acquired land to be Rs. 4.5 lacs and not Rs. 5 lacs per bigha.

26. It be also observed that the no exemplar sale deeds were placed on record by the claimants. However, from the ocular evidence of the aforesaid witnesses, it is quite evident that the acquired land is just at a distance of 2 kms from Tatapani, a famous tourist spot. Also close by there is township by the name of Sunni, having all modern facilities and convenience and more particularly that of Government Hospital, Government College and several other Government and Semi-Government establishments. The similarity of the acquired land with that of the exemplar award, with regard to its user and potentiality also stands established on record. However, only distinction being the Tehsil in which the lands are situate. Exemplar land is situate in Tehsil Arki, having better and greater potential of development and being put to industrial use, in view of the establishment of a Cement Factory, in close vicinity. But then, the land situate in Tehsil Sunni, also has potential of being put to some commercial use. Hence it is for this reason that the Reference Court scaled down the market value, in comparison to that of the exemplar award, from Rs. 5 lacs to Rs. 4.5 lacs. The reasoning adopted by the Reference Court cannot be said to be illogical, unreasonable or illegal, for after all judicial notice can be taken of the fact that Tatapani is a famous tourist spot having historical value and significance and is just at a distance of 35 kms from Shimla. In any event, land of the petitioners was being used for agricultural purposes.

27. It is a matter of record that beneficiary placed on record sale deeds (Ex.RW.1/A to Ex.RW.1/M, excluding Ex.RW.1/I and Ex.RW.1/N), but then none of the three witnesses was examined by them have established the similarity of the acquired land with that of these exemplar sale deeds.

28. Quite evidently, claimants did not make any claim with respect to the superstructures or trees existing on the acquired land. As such, no enhancement was made with regard to the same. It is a matter of record that exemplar Award (Ex.PA), stands affirmed by this Court in RFA No.267/2011, titled as *NTPC Limited vs. Briju alias Brij Lal and others,* on 19.12.2016.

29. If one were to peruse the evidence led by the claimants in RFA No. 482 of 2012, one finds similar evidence with regard to the potential to which the land could be put to. Lal Chand in his unrebutted testimony clarified that the land is between Sunni and Tatapani, a fast developing area. Thus the land having great potential of being put to commercial use sands established.

30. Even in this case, beneficiary did place on record sale deeds which for the very same reason as mentioned supra, cannot be looked into for determination of the market value of the acquired land.

31. On the other hand, in the said reference petition, claimants have produced on record Collector's Award No. 79 of 2008, dated 8.3.2008 (Ext. PX) with respect to village Tatapani, as also award dated 30.10.2009(Ext. A-1), so passed by the reference Court in Ref. Petition No. 15-S/4 of 2008/06, titled as *Krishan Chand Sharma vs. NTPC & another,* and Award dated 30.10.2009 (Ext. A-2), passed by the Reference Court in Ref. Petition No. 45-S/4 of 2008/06, titled as *Jagdish Chand vs. LAC (NTPC) & others.* These awards stand proved on record and similarity with that of the acquired land established through witnesses Lal Chand (PW-1) and Ramesh Kumar (PW-2).

32. Noticeably, award (Ext. PX) pertains to village Tatapani and the award passed in the Reference Petition arising out of this award, stands affirmed by this Court in RFA No. 425 of 2012, decided on 15.12.2016. Noticeably, in terms of Awards (Ext. A-1 and Ext. A-2), market value stands re-determined @ 4.5 lacs. This Court in RFA No. 425 of 2012 has affirmed the re-determination of the market value on similar base. The entire land covered by Collector's Award No. 79 of 2008 and Award No. 36 of 2005 is situate in village Palyad Dom, Teshil Sunni, Distt. Shimla, H.P. As noticed above, land situate in Tehsil Arki was also acquired for the very same public purpose for which amount higher than the one awarded by the Reference Court, subject matter of the present appeals, stand awarded to various claimants.

33. It be only observed that while outrightly dismissing the Reference Petitions, Reference Court refereed to and relied upon the decision rendered by the Apex Court in *Subh Ram & others, vs. State of Haryana & another,* (2010) 1 SCC 444. Noticeably the Reference Court lost sight of the fact that not only the decision was rendered in the given facts and circumstances but also similarly situated claimants already stood awarded amount @ Rs. 4.5 lacs per bigha. Before the Reference Court, claimants were claiming market value of the acquired land @30,00,000/- per bigha. In awarding rates @ Rs. 4.5 lacs, beneficiary had no objection, as is evident from the pleadings and the evidence led on record. As such, Reference Court seriously erred in completely ignoring the material so placed by the parties on record, as also not considering the fact that land reference petitions pertaining to the claimants, with respect to the very same acquisition proceedings – covered by the Collector's Award, came to be decided previously by the very same Court, enhancing the market value from Rs. 3,93,170/- to 4.5 lacs per bigha on uniform basis.

34. Considering the material so placed on record by the parties and the submissions made, this Court is of the view that re-determination of the market value of the enquire acquired land, covered by the very same Collector's Award cannot be said to be on the higher side and as such, all the claimants are entitled to award of similar compensation.

35. Learned counsel for the claimants contend that they shall be content if they are uniformly awarded rates at Rs. 4.5 lacs per bigha.

36. As such, appeals filed by the beneficiary are dismissed and that of the claimants, insofar as their claim, restricted to Rs. 4.5 lacs is concerned, are allowed. It stands clarified that the market value of the acquired land stands re-determined at Rs. 4.5 lacs per bigha regardless of its classification and category. This is with respect to all the claimants before this Court.

37. No other point urged or proved.

38. Cross-objection, if any, shall also stand disposed of.

39. Learned counsel for the parties jointly submit that decision rendered in the present appeals would have an automatic bearing on the other connected appeals/cross-objections, arising out of Collector's award No.36 of 2005, which are pending before this Court. Registrar (Judicial) to take appropriate instructions from Hon'ble the Chief Justice for listing of such connected appeals, before the appropriate Court, particulars whereof shall also be supplied by learned counsel for the parties.

In view of the aforesaid, all the appeals stand disposed of, so also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Sat Paul ... Appellant
Versus
State of H.P. and another ... Respondents

RSA No. 102 of 2008
Reserved on: 15.12.2016
Date of decision: 30.12.2016

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that suit land was recorded in the ownership of defendant No.1- it was "Rafai-am Gair Mumkin Talab" and was being used by plaintiff and other inhabitants of the village – cattle used to drink water from the talab and talab was being used for ancillary purposes by inhabitants of the area – defendants have no right to change the nature of the same- the defendants pleaded that plaintiff had no locus standi and the jurisdiction of the Court was barred – the suit land was a barren land and not a talab– the suit was decreed by the Trial Court – an appeal was preferred, which was allowed – held in second appeal that nature of suit land was recorded to be Gair Mumkin Toba in the revenue record – Rafai-am is recorded to be in possession – it was proved that the suit land was pond/talab/toba and was being used for the purpose of drinking water by inhabitants and cattle – Local Commissioner had also found remains of talab at the spot – the community resources cannot be used for construction purposes- the father of the petitioner possessed the land in the Village and therefore, petitioner had locus standi to file the suit- appeal allowed- judgment of Trial Court set aside and judgment of Trial Court restored.(Para-14 to 22)

Cases referred:
Hinch Lal Tiwari v. Kamala Devi and others, AIR 2001 Supreme Court 3215
Meghwal Samaj Shiksha Samiti Vs. Lakh Singh and others, (2011) 11 Supreme Court Cases 800

For the appellant: Mr. Anil Kumar, Advocate vice Mr. Anup Rattan, Advocate.
For the respondents: Mr. Vikram Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of this appeal, appellant has challenged the judgment and decree passed by the Court of learned Additional District Judge, Fast Track Court, Una, in Civil Appeal No. 12/03 RBT 296/05/03 dated 01.02.2008, vide which, learned Appellate Court while allowing the appeal filed by the present respondent/defendant, set aside the judgment and decree passed by the Court of learned Sub Judge Ist Class, Court No. II, Amb, District Una, in Civil Suit No. 30/97 dated 10.01.2003, whereby learned trial Court had decreed the suit of the appellant/plaintiff for permanent injunction restraining the defendants from raising any construction, changing user, nature and character of the suit land and had also decreed the appellant/plaintiff for mandatory injunction ordering the defendants to restore the suit land to its original position by demolition of super structure raised thereon by the respondents/defendants.

2. Brief facts necessary for adjudication of the present case are that the appellant/plaintiff (hereinafter referred to as the plaintiff), filed a suit for issuance of permanent injunction restraining the defendants from raising any construction or change user nature and

character of land measuring 0-02-10 Hectares comprised of Kehwat No. 40 min, Khatauni No. 166 min, Khasra No. 31 as entered in the Jamabandi for the year 1993-94, situated in village Amokla Sadu, Tehsil Amb, District Una, H.P. and also for a decree of mandatory injunction ordering the defendants to restore the suit land to its original position and in the alternative, for demolition of super structure raised by the defendants over the suit land if any raised during the pendency of the suit. As per the plaintiff, he was owner in possession of land in village Moen, Tehsil Dehra and Amokla Sadu in Tehsil Amb, though mutation of inheritance had not yet been sanctioned in his favour to the estate in Amokla Sadu. As per him, the suit land though was recorded in ownership of defendant No. 1, yet the same was a "Rafai-am Gair Mumkin" Talab and was used by the plaintiff and other inhabitants of the village as well as surrounding villages and cattle also used to drink water from the said Talab while grazing and Talab was also used for other ancillary purposes by the inhabitants of the villagers of Amokla, Moen and Chhaproh. It was further mentioned in the plaint that the water remained stored in the Talab for about 8-9 months in a year and defendants had no right to change the user, nature and character of the said Talab. As per the plaintiff, defendants about two weeks back had started digging foundation in the suit land without any rhyme or reason and on inquiry it was revealed that defendant No. 1 through defendants No. 2 and 3 were raising construction over the suit land thereby changing the very nature and character of the same. It was further mentioned in the plaint that there was no other Talai in the surrounding vicinity. In this background suit was filed by the plaintiff praying for the relief already mentioned above.

3. The suit so filed by the plaintiff was contested by the defendants who by way of preliminary objections took the stand that neither the plaintiff was having any locus standi to file the suit and nor the Civil Court was having jurisdiction to adjudicate upon the matter in lieu of the provisions of Section 10 of H.P. Village Common Land (Vesting & Utilization) Act, 1974. It was mentioned in the written statement that the plaintiff was not a resident of village Duhal Bhatwalan, Tehsil Amb, District Una and that the suit land though was Talai many years ago but presently it was vacant barren land and no water was stored in the suit land and none of the inhabitants of the surrounding villages used it as a source of irrigation. It was mentioned in the written statement that had the same been used by the inhabitants of the area, then other inhabitants would have had come to the Court and filed the suit with the plaintiff and in fact suit land was barren land and defendants were not going to change the nature of the suit land and Government had constructed Patwarkhana Bhawan with the assistance of local Panchayat as the suit land was situated in the middle of the Patwar Circle and construction work of the said Patwarkhana was in fact being carried out for the benefit of the locality. It was further mentioned in the written statement that the construction work was being carried out with the assistance of local Panchayat and in fact, Panchayat had also passed a resolution for the construction of Patwarkhana in consultation with the inhabitants of the area. It was further mentioned in the written statement that the Government took decision to construct Patwarkhana after it received resolution from the Panchayat. It was further mentioned that the plaintiff was not a resident of Patwar Circle Duhal Bhatwalan and was in fact a resident of village Moen, District Kangra and he had no right, title and interest whatsoever on the suit land. It was further mentioned in the written statement that State of Himachal Pradesh was owner in possession of the suit land and an amount of Rs.80,000/- already stood spent on the said construction of the Patwarkhana. It was denied that the suit land was serving as Talab and providing drinking water to the cattle, birds or passers by. On these grounds, defendants contested the claim of the plaintiff.

4. By way of replication, plaintiff reiterated the averments made in the plaint and also reiterated that he had landed property in the village in question.

5. On the basis of the pleadings of the parties, learned trial Court framed the following issues on 02.09.1998:-

1. Whether the plaintiff is entitled to the relief of permanent injunction as prayed for? ... OPP

2. Whether the suit is not maintainable? ... OPD

3. Whether the plaintiff has not complied with the provision of section 80 CPC? ... OPD

4. Whether the suit is barred by law of limitation? .... OPD

5. Whether this court has no jurisdiction to try this suit? ... OPD

6. Whether the suit is not properly valued? ... OPD

7. Whether the plaintiff has no locus-standi to file this suit? .... OPD

8. Relief.

6. Learned trial Court also framed the following additional issues on 19.08.2000:-

1A Whether the defendants have made construction during the pendency of the suit over the suit land as alleged? ... OPP

1B Whether the plaintiff is entitled to the relief of mandatory injunction as alleged? ... OPP

7. On the basis of the evidence led by the respective parties before learned trial Court, the following findings were returned to the issues so framed by it:-

Issue No. 1:	Yes.
Issue No. 1A:	Yes.
Issue No. 1B:	Yes.
Issue No. 2:	No.
Issue No. 3:	No.
Issue No. 4:	No.
Issue No. 5:	No.
Issue No. 6:	No.
Issue No. 7:	No.
Relief :	Suit decreed as per operative portion of the judgment.

8. Learned trial Court vide its judgment and decree dated 10.01.2003, decreed the suit for permanent injunction as well as for mandatory injunction. Learned trial Court held that oral as well as documentary evidence demonstrated that there was a Talab in existence over the suit land and the same was so recorded till date. Learned trial Court held that plaintiff's contention that he was having land in adjoining villages Amokla Sadu and Chhaproh in Tehsil Amb, District Una and that he was also having land in village Amokla Sadu and this fact stood proved from copy of Misal Hakiat Bandobast for the year 1985-86 Ext. P-6, wherein his father Shanker Dass was shown in the column of ownership alongwith other co-sharers. Learned trial Court also held that while plaintiff had alleged that defendants had raised construction over the suit land during the pendency of the suit, however defendants had not placed on record anything to show exact time of completion of construction i.e. whether the construction was completed before filing of the suit or thereafter. Learned trial Court allowed the suit by holding that defendants had not denied the existence of Talab (Pond) over the suit land but the case of the defendants was that the suit land was in fact a Talab many years ago but presently it was a barren land. Learned trial Court took note of the fact that plaintiff had placed on record copy of record of rights pertaining to the suit land since 1970-71 onwards as well as jamabandi of the same and also Missal Hakiat Bandobast Zadid Sani, which demonstrated that the suit land as per the revenue records was recorded in the ownership of Gram Panchayat Deh and in the column of possession it was recorded as "Rafai-am" and the nature of the suit land was shown as" Gair Mumkin (Toba)". Learned trial Court further held that said position continued in documents upto the year 1981-82 and in the jamabandi for the year 1981-82 under the column

of remarks, it was reflected that the suit land stood vested in the State of Himachal Pradesh and as such, the State of Himachal Pradesh came into picture in its capacity as owner of the suit land with entry of "Rafai-am" in the column of possession, whereas nature of suit land continued to be "Gair Mumkin Talab". Learned trial Court also held that for the first time entry of "Gair Mumkin Talab" and "Rafai-am" were changed as "Gair Mumkin" Patwarkhana with possession of revenue department vide order dated 13.01.1987 passed by Deputy Commissioner, Una, on the basis of which mutation No. 37 was attested on 11.02.1997. Learned trial Court held that the said mutation was apparently attested during the pendency of the suit. Learned trial Court also held that during the pendency of the civil suit, H.S. Jassal, Advocate, visited the spot on an application so filed by the plaintiff and submitted his report Ext.PW1/A and as per the said report, H.S. Jassal, who entered the witness box as PW-1 found construction being carried out on the spot upto the level of three feet and he also found remains of Talab visible on the spot. Learned trial Court also took note of the fact that presence memo Ext. PW1/B submitted by H.S. Jassal, Local Commissioner also contained signatures of President as well as Vice President of village Duhal Bhatwalan alongwith other residents of surrounding area. Learned trial Court also took note of the fact that PW-2 Moti Ram aged 76 years, who was resident of Amokla Sadu, had deposed in the Court that there was a pond over the suit land and it used to contain water for 10-12 months which was being used by the inhabitants of the surrounding villages as well as by cattle and birds. Learned trial Court also relied upon the statement of PW-3 Ruldu Ram, another 77 years senior citizen, resident of village Amokla Sadu, who also deposed that the suit land was pond and which was used for the purpose of drinking of water by the local residents as well as cattle etc. Learned trial Court also took note of the fact that PW-4 Kewal Krishan, President of Gram Panchayat Chhaproh, also stated that since the time he gained consciousness, he was seeing the suit land as pond and water used to be in the same for 10-11 months and the same was used by cattle etc. On these basis, it was concluded by learned trial Court that the evidence led by the plaintiff supported the fact that there existed Talab over the suit land. Learned trial Court also held that DW-1 Satish Kumar only exhibited resolutions and there was nothing in his statement to support the fact that the suit land was a barren land. It also held that this witness joined service much after change of character of suit land. Learned trial Court also held that DW-2 Abhinash Sharma, Naib Tehsildar, Bharwain, had stated that he was posted at Bharwain only in July, 1998 and in his cross-examination, he categorically stated that he was not aware of the position of the suit land prior to the date of his posting. On these basis, it was held by learned trial Court that the evidence led by defendants to support the fact that the suit land was lying barren and Talab if any over the suit land was many-many years ago did not appear to be cogent and convincing. Learned trial Court also held that to prove his locus, plaintiff had placed on record copy of Missal Hakiat Bandobast for the year 1985-86 wherein his father was reflected in the column of ownership alongwith other co-sharers. It further held that in the column of possession his father Shanker Dass and one Amar Nath were shown in possession of some of the land recorded in the said document as Hissadaran. Learned trial Court held that it had come in the evidence that villages Amokla Sadu, Moen, Rehi and Chhaproh, were adjoining each others and this fact was supported by all the witnesses of the plaintiff as well as DW-1 and DW-2 also, who admitted in their statements that on three sides of the suit land there was land of plaintiff and on 4th it was a road. On these basis, learned trial Court held that plaintiff had locus to file and maintain the suit. Learned trial Court also held that report of Local Commissioner H.S. Jassal PW-1, who visited spot during the pednency of the case on the application so filed by the plaintiff, demonstrated that the defendants had carried out construction during the pendency of the suit, demonstrated that large scale construction was being carried out on the suit land during the pendency of the suit. Learned trial Court also held that the act of the defendants of carrying out construction during the pendency of the suit despite there being stay order showed their high handedness coupled with the fact that the attestation of mutation was done on 11.02.1997 on the basis of the order passed by Deputy Commissioner, Una dated 13.01.1997, which categorically proved that the construction at the site was not complete before filing of the suit. On these basis, learned trial Court decreed the suit.

9. Feeling aggrieved by the judgment so passed by learned trial Court, State filed an appeal.

10. In appeal, learned Appellate Court reversed the judgment and decree passed by learned trial Court vide its judgment dated 01.02.2008. While reversing the judgment and decree so passed by learned trial Court, learned Appellate Court held that plaintiff had not filed the suit in a representative capacity and, therefore, in order to succeed in the case the plaintiff was required to prove his individual right. Learned Appellate Court held that onus to prove his locus standi and cause of action against the defendants was upon the plaintiff. Learned Appellate Court further held that on the basis of evidence on record as well as arguments advanced by the parties, plaintiff was not able to prove his locus standi. Learned Appellate Court held that genesis of the case of the plaintiff was that he was owner in possession of land in village Moen, Tehsil Dehra, District Kangra and village Amokla Sadu, Tehsil Amb, District Una and that the suit land was situated in village Amokla Sadu. Learned Appellate Court held that to prove his ownership of land in village Amokla Sadu, plaintiff had relied upon copy of Misal Hakiat Bandobast Jadid for the year 1985-86 (Ext. P-6). Learned Appellate Court held that in the said document names of various persons were mentioned as owners in possession of the land in village Amokla Sadu but the name of plaintiff was not recorded therein. It further held that no doubt the name of the father of plaintiff was there in revenue record but simply because his father was having land in the village, the same was not sufficient to prove the ownership of plaintiff. On these basis, it was held by learned Appellate Court that there was no evidence on record to demonstrate that the plaintiff was a resident of village Amokla Sadu. Learned Appellate Court also held that in the plaint plaintiff had shown himself to be resident of village Moen, Tehsil Dehra, District Kangra and he had admitted this fact in his statement as PW-5. Learned Appellate Court further held that the plaintiff had not filed on record copy of Pariwar register to show that he was a resident of village Amokla Sadu in District Una. It also held that though the plaintiff had tried to establish that both the villages Moen in District Kangra and Amokla Sadu in District Una, were adjoining villages and inhabitants of these villages and that of other adjoining villages were using the Talab in question for the purpose of drinking water for their cattle etc. but evidence was lacking in this regard and neither any list of inhabitants or revenue record etc. was produced by the plaintiff to prove this fact. Learned Appellate Court also held that neither oral nor documentary evidence adduced by the plaintiff could establish that the plaintiff was having locus standi or cause of action to file and maintain the civil suit. It also held that though the plaintiff had stated that Talab in question was "prepared by his ancestors in their own land", however, this fact was beyond pleadings nor any evidence was led by the plaintiff to substantiate the same on record. Learned Appellate Court further held that the relief of injunction was a discretionary relief. Learned Appellate Court also held that there was substance in the plea of the State that earlier the suit land might have been used by the villagers as Talab but with the passage of time the purpose had lost its importance and existence of Patwarkhana was need of the day. On these basis, it was held by learned Appellate Court that though no case was made out for injunction in favour of the plaintiff when he was not a resident of village concerned and neither the suit had been filed in a representative capacity. On these basis, learned Appellate Court set aside the judgment and decree passed by learned trial Court and allowed the appeal thereby dismissing the suit so filed by the plaintiff.

11. Feeling aggrieved by the said judgment, plaintiff has filed the present appeal, which was admitted on 14.03.2008. The substantial questions of law arising out of the appeal are as under:-

"1. Whether the impugned judgment is a result of misinterpretation of law laid down in AIR 2001 Supreme Court 3215?

2. Whether the impugned judgment is a result of mis-appreciation of evidence and law on the question of locus standi?

3. Whether construction activities can be carried out on the land recorded as "Rafai-aam Gair Mumkin" Talab i.e. a source of water for public use?"

12. I have heard learned counsel for the parties and have gone through the records of the case as well as the judgments and decrees passed by learned Courts below.

13. I will deal with substantial questions of law No. 1 and 3 collectively.

Substantial Questions of Law No. 1 and 3:

14. I have mentioned in detail the reasons which were given by both the learned Courts below while arriving at their respective findings. Revenue records produced on the record by the plaintiff categorically demonstrate that the nature of the suit land in revenue records was reflected as "Gair Mumkin (Toba)" even in Ext. P-1 which is copy of jamabandi of the suit land pertaining to the year 1993-94 in which State of Himachal Pradesh was recorded as owner of the suit land and in the column of possession, entry recorded as "Rafai-am". The mode and manner in which the revenue entries qua the nature of the suit land were converted into "Gair Mumkin" Patwarkhana have been elaborately dealt with by learned trial Court which categorically demonstrate that these changes in the revenue records were effected during the pendency of the suit. Learned Deputy Advocate General was not able to point out to the contrary during the course of arguments. Besides this, the factum of suit land being pond/Talab/Toba and it being used for the purposes of drinking water for inhabitants of nearby villages as well as cattle also stands categorically proved by the ocular testimony produced on record by the plaintiff, which is cogent and reliable and credibility of which testimony could not be impeached in the course of cross-examination by the defendants.

15. Besides this, records reveal that plaintiff had exhibited record of rights pertaining to the suit land since 1970-71 onwards as well as jamabandi of the same and also Missal Hakiat Bandobast Zadid Sani, which prove that the suit land as per the revenue records was recorded in the ownership of Gram Panchayat Deh and in the column of possession it was recorded as "Rafai-am" and the nature of the suit land was shown as" Gair Mumkin (Toba)". These documents demonstrate that upto the year 1981-82 this position continued and even in the jamabandi for the year 1981-82 under the column of remarks, it was reflected that the suit land stood vested in the State of Himachal Pradesh and as such, the State of Himachal Pradesh came into picture in its capacity as owner of the suit land with entry of "Rafai-am" in the column of possession, whereas nature of suit land continued to be "Gair Mumkin Talab". It is also a matter of record that for the first time entry of "Gair Mumkin Talab" and "Rafai-am" were changed as "Gair Mumkin" Patwarkhana with possession of revenue department vide order dated 13.01.1987 passed by Deputy Commissioner, Una, on the basis of which mutation No. 37 was attested on 11.02.1997. Records also reveal that Sh. H.S. Jassal, Advocate, visited the spot as Local Commissioner during the pendency of case before learned trial Court and submitted his report Ext. PW1/A and as per the said report, Sh. H.S. Jassal PW-1 found construction being carried out on the spot upto the level of three feet and he also found remains of Talab visible on the spot. The spot was visited by him in the presence of President as well as Vice President of village Duhal Bhatwalan alongwith other residents of surrounding area. PW-2 Moti Ram aged 76 years, who was resident of Amokla Sadu, deposed in the Court that there was a pond over the suit land and it used to contain water for 10-12 months which was being used by the inhabitants of the surrounding villages as well as by cattle and birds. PW-3 Ruldu Ram, another 77 years senior citizen, resident of village Amokla Sadu, also deposed that the suit land was pond and which was used for the purpose of drinking of water by the local residents as well as cattle etc. PW-4 Kewal Krishan, President of Gram Panchayat Chhaproh, also stated that since the time he gained consciousness, he was seeing the suit land as pond and water used to be in the same for 10-11 months and the same was used by cattle etc. All these aspects of the matter have not been appreciated by learned Appellate Court at all.

16. In fact, a perusal of the judgment passed by learned Appellate Court demonstrates that primarily what weighed with learned Appellate Court while allowing the appeal and setting aside the judgment and decree passed by learned trial Court was that the plaintiff had not been able to demonstrate that he was having any land in the village concerned adjacent to which the suit land was situated and, therefore, he was not having any locus standi

to file the suit as the suit was not filed in a representative capacity. No adjudication was done by learned Appellate Court on the findings returned by learned trial Court to the effect that the suit land was a "Gairmumkin Toba" and the same could not have been allotted for construction of any allied purpose in view of the law declared by the Supreme Court ***AIR 2001 Supreme Court 3215***. Learned Appellate Court while holding that there was substance in the plea of the State that earlier suit land might have been used by the villagers as Talab but with the passage of time that purpose had lost importance and the existence of Patwarkhana was need of the day, did not return any findings as to whether the findings returned by learned trial Court to the effect that the suit land in fact was recorded as Talab in revenue records and, therefore, it could not have been used for any other purpose, were correct findings or incorrect findings. Not only this, judgment of the Hon'ble Supreme Court which was relied upon by learned trial Court while allowing the suit was dealt with in cursory manner by learned Appellate Court in the following terms:-

> "The plaintiff has relied upon the case law as laid down in AIR 2001 S.C. 3115 titled Hinch Lal Tiwari v. Kamala Devi and others. But the same is not applicable in this case as factually it is on different footing."

No reasoning exists in the Appellate Court judgment as to how the judgment of Hon'ble Supreme Court was on a different footing.

17. The Hon'ble Supreme Court in the above mentioned judgment (also reported in ***(2001) 6 Supreme Court Cases 496)***, has held that the material resources of community like forests, tanks, ponds, hillocks, mountain etc., are nature's bounty and they maintain ecological balance. They need to be protected for a proper and healthy environment which enables people to enjoy a quality life which is the essence of the right guaranteed under Article 21 of the Constitution. The Hon'ble Supreme Court in the above mentioned judgment wherein also the issue involved was as to whether part of land subject matter of the case therein which was in the character of pond could be allotted for construction purpose or not, held:

> "11. Reverting to the first part of the question, from the report of the Tahsildar dated 18-4-1990 which is termed as the first report, it is clear that in the said Survey No. 774-KA, there is a pond (talab). The same is the substance of the report of the SDO dated 20-4-1990. Two more reports were called for by the orders of the High Court. They are dated 12-9-1999 and 3-4-2000. We do not find any substantial difference between these reports and the reports prepared by the Tahsildar and the SDO. We may also mention here that in khasra khatauni for the years 1387 to 1392 Fasli (corresponding to years 1980 to 1985) and 1393 to 1398 Fasli (1986-92) the description of the said survey number is given as pond. Consistent with those entries the Additional Collector found it to be a pond (talab) and cancelled the allotment of plots in favour of the said respondents. The Commissioner rightly confirmed the order of the Additional Collector. In writ petition, the High Court, in the impugned order, noted :
>
> > "From the report of the Sub-Divisional Officer dated 3-4-2000 it is clear that the land had the character of a pond but due to passage of time most of its part became levelled. But some of the portion had still the character of a pond and during the rainy season it is covered by water. The area which is covered by water or may be covered by water in the rainy season could not be allotted as abadi site to any person."
>
> 12. On this finding, in our view, the High Court ought to have confirmed the order of the Commissioner. However, it proceeded to hold that considering the said report the area of 10 biswas could only be allotted and the remaining five biswas of land which have still the character of a pond, could not be allotted. In our view, it is difficult to sustain the impugned order of the High Court. There is concurrent finding that a pond exists and the area covered by it varies in the

rainy season. In such a case no part of it could have been allotted to anybody for construction of house building or any allied purposes."

18. Though, this Court is not oblivious to the fact that the Hon'ble Supreme Court has delivered the above judgment in a matter which arose out of judgment and order of High Court of Judicature at Allahabad in a writ petition but the law so declared by the Hon'ble Supreme Court that the pond area cannot be allotted to anybody for construction of house, building or any allied purposes and that it is the duty of the State to develop the same which would on one hand prevent ecological disaster and on the other hand provide better environment for the benefit of the public at large and that vigil is the best protection against knavish attempts to seek allotment of non-abadi sites, is the law declared by the Hon'ble Supreme Court for all to follow. However, learned Appellate Court has miserably failed to appreciate, understand and follow the law so declared by Hon'ble Supreme Court and that also without assigning any reason as to how the judgment of Supreme Court was on a different footing.

19. In my considered view, the above mentioned judgment of Hon'ble Supreme Court is applicable to the facts of this case on all counts and whereas, learned trial Court rightly relied upon the said judgment passed by Hon'ble Supreme Court, learned Appellate Court erred in not appreciating the law so declared by Hon'ble Supreme Court. It is pertinent to mention here that thereafter while reiterating the above judgment, a three-Judge Bench of the Hon'ble Supreme Court in ***Meghwal Samaj Shiksha Samiti Vs. Lakh Singh and others***, ***(2011) 11 Supreme Court Cases 800***, has held:

> "1. A village pond in Village Raniwara Kalan, District Jalore, was shown as "gair mumkin nada", in the revenue records. The said pond fell into disuse and after sometime the District Collector, Jalore allotted 0.48 ha out of the said area, on a 99 year lease to Meghwal Samaj Shiksha Samiti ("the Samiti", for short), the appellant in CA No. 821 of 2004, vide order dated 6-8-2001 for the purpose of construction of a students' hostel.
>
> 2. One of the villagers (the first respondent in the two appeals) challenged the allotment of land in a public interest litigation on the ground that the village pond cannot be allotted for construction. The High Court, by the impugned order dated 20-11-2002, allowed the said petition. It recorded a finding that the land records clearly showed that the disputed plot allotted to the Samiti was part of the village pond. It held that such land which formed part of a pond could not have been allotted for the purpose of making any construction. Therefore, the High Court allowed the petition and set aside the allotment dated 6-8-2001 in favour of the Samiti. However, having noted the fact that the land had been allotted to the Samiti for the purpose of a students' hostel for the benefit of backward classes, the High Court directed the State Government to allot a suitable alternative land for the said hostel purpose to the Samiti within three months. The said order is challenged in these two appeals by the Samiti and by the State Government.
>
> 3. As noticed above, the High Court, after examining the revenue records, has recorded a finding of fact that the land which was allotted, was a pond. The learned counsel for the Appellants in the two appeals contended that the land though described in the revenue records as a "gair mumkin nada" was neither a pond nor a channel leading to a water body and there is no water in the said land; and that the Patwari had given a report that the land was fit for allotment and therefore there was no irregularity in the allotment.
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> 4. This Court, in Hinch Lal Tiwari v. Kamala Devi observed thus: (SCC p. 501, paras 12-13,
>
> > "12. ... There is concurrent finding that a pond exists and the area covered by it varies in the rainy season. In such a case no

part of it could have been allotted to anybody for construction of house building or any allied purposes.

13. It is important to notice that the material resources of the community like forests, tanks, ponds, hillock, mountain etc. are nature's bounty. They maintain delicate ecological balance. They need to be protected for a proper and healthy environment which enables people to enjoy a quality life which is the essence of the guaranteed right under Article 21 of the Constitution. The Government, including the Revenue Authorities i.e. Respondents 11 to 13, having noticed that a pond is falling in disuse, should have bestowed their attention to develop the same which would, on one hand, have prevented ecological disaster and on the other provided better environment for the benefit of the public at large. Such vigil is the best protection against knavish attempts to seek allotment in non-abadi sites."

5. We find that after examining the entire facts, the High Court has recorded a finding that the land allotted was part of a village pond. The report of the Patwari regarding suitability of land for allotment cannot supersede the revenue entries. Therefore, we do not propose to interfere with the impugned order of the High Court.

6. The appellants contended that a civil suit filed by the villagers for a similar relief is pending and in view of it, the public interest litigation ought not to have been entertained. Mere pendency of a suit by others, will not affect the maintainability of the writ petition in public interest.

7. In view of the above, we dismiss these appeals making it clear that if no alternative land has been allotted by the State to the Samiti (the appellant in CA No. 821 of 2004) for the purpose of the students' hostel, it shall do so within a period of four months from today as directed by the High Court."

20. Therefore, the judgment and decree passed by learned Appellate Court is in fact a result of misinterpretation of law laid down by Hon'ble Supreme Court in ***AIR 2001 Supreme Court 3215*** and in fact, no construction activity can be claimed in the "Rafai-am Gair Mumkin" in view of the pronouncement of law laid down by the Hon'ble Supreme Court as mentioned above. These two substantial questions of law are answered accordingly.

Substantial Question of Law No. 2:

21. In my considered view, findings arrived at by learned Appellate Court to the effect that the plaintiff was not having any locus standi to file and maintain the suit, are perverse and not sustainable in law. Learned Appellate Court while arriving at the said conclusion erred in not appreciating the material on record in its correct perspective. Learned Appellate Court failed to appreciate that plaintiff had placed on record copy of Missal Hakiat Bandobast for the year 1985-86 wherein his father was reflected in the column of ownership alongwith other co-sharers. It further failed to appreciate that in the column of possession his father Shanker Dass and one Amar Nath were shown in possession of some of the land recorded in the said document as Hissadaran. It further failed to appreciate that it had come in the evidence that villages Amokla Sadu, Moen, Rehi and Chhaproh, were adjoining each others and this fact was proved by all the witnesses of the plaintiff as well as by DW-1 and DW-2 also, who admitted in their statements that on three sides of the suit land there was land of plaintiff and on 4th there was a road. In addition, in my considered view, even otherwise as it stands proved on record that father of the plaintiff was one of the co-sharers of property in the village where the suit land was situated, the plaintiff was having locus standi to file and maintain the suit as it could not be denied that plaintiff was having interest over the property which was owned by his father and this alone conferred plaintiff the locus standi to file and maintain the suit. This relevant aspect of the matter has also been ignored by the learned Appellate Court. Therefore, the findings returned by learned

Appellate Court that the plaintiff had no locus standi to file and maintain the suit are not sustainable and are accordingly set aside. This Substantial question of law is answered accordingly.

22. In view of the above discussion, this appeal is allowed and the judgment and decree passed by learned Appellate Court in Civil Appeal No. 12/03 RBT 296/05/03 dated 01.02.2008, are set aside, whereas the judgment and decree passed by the Court of learned Sub Judge Ist Class, Court No. II, Amb, District Una, H.P., in Case No. 30/97 dated 10.01.2003, are upheld. No order as to costs. Miscellaneous applications pending, if any, stand disposed of. Interim order, if any, also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Deepika Vaishnav. .....Petitioners.

Versus

Institute of Banking Personnel Selection & others. .....Respondents.

CWP No. 2234 of 2015
Reserved on: 28.11.2016
Decided on: 02.01.2017

Constitution of India, 1950- Article 226- Respondent No.1, institute of Banking Personnel Selection (IBPS) announced a common written examination for selection of Officers and Clerks in Indian Banks – the petitioner applied for the post of clerk in OBC category – she secured 57.20 marks and was allotted Punjab National Bank – she received an email informing her that there was deficiency qua caste certificate – she submitted fresh caste certificate – however, her candidature was cancelled on the ground that she had not submitted caste certificate as per prescribed norms – petitioner challenged the cancellation- respondents stated that the caste certificate should have been issued between 1.4.2013 to 31.3.2014 and the petitioner had submitted the caste certificates issued on 23.2.2012, 5.5.2014 and 7.6.2014 - held, thatthe certificate dated 5.5.2014 shows that the petitioner belongs to Bairagi community, which is recognized as a backward class – the petitioner produced the certificate showing that prior to 11.6.2014, the parents of the petitioner were having an annual income of less than Rs.5 lacs and the petitioner belongs to OBC category – the petitioner was entitled to the benefit of OBC category- the act of the respondents in denying the benefit of OBC category was arbitrary - a clarification was issued that petitioner belongs to OBC category since 2011 and appointment letter should have been issued to the petitioner – petition allowed with a cost of Rs. 10,000/.

(Para-9 to 17)

Case referred:

Ram Kumar Gijroya vs. Delhi Subordinate Services Selection Board and another, (2016) 4 Supreme Court Cases 754

For the petitioner: Mr. Dilip Sharma, Sr. Advocate, with Mr. Bhupinder Singh Ahuja, Advocate.

For the respondent: Mr. G.S. Rathour, Advocate, for respondents No. 1 to 3.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The petitioner has preferred the instant writ petition laying challenge to cancellation of her candidature for the Clerk-3 CWE Exam, 2013, which was advertised in E mployment News, Weekly Magazine, issue dated 24th August to 30th August, 2013.

2. As per the petitioner, succinctly the facts giving rise to the present writ petition are that respondent No. 1, Institute of Banking Personnel Selection (hereinafter referred to as "IBPS") being autonomous body working as Personnel Selection Services became an independent entity at the behest of Reserve Bank of India and Public Sector Banks. In 2011, IBPS announced a Common written Examination (CWE) for selection of officers and Clerks in Indian banks. IBPS CWE has now been made mandatory for candidates seeking employment in 20 Public Sector and Regional Rural Banks. IBPS accepts online exam applications. Recruitment through IBPS is done through three stages, viz., Common Written Examination (CWE), interview and final placement. In 2013 the basic eligibility for appearing in IBPS was university degree. The age condition was variable, depending upon the category of the candidate. The knowledge of computers was mandatory for the posts other than specialist officers. Thus, as per the petitioner, graduation and computer literacy was the eligibility for the post of Clerk. IBPS CWE is most competitive examination having select ratio 1:1000 and it is objective type examination having negative marking. After 2012, IBPS CWE has common interview recruitment method at different locations. A final merit list is drawn to fill existing and future vacancies in the participating banks for a period of one year from the date of announcement of the final results.

3. The petitioner has further averred that consequent upon advertisement (Annexure P-1) she has applied for the post of Clerk, in OBC category. She had participated in the examination under registration No. 1251608927 (Roll No. 1750501320) and was called for interview in the month of February, 2014. The petitioner was also called for interview and she participated in the same. She, being at Serial No. 15, was selected, as she secured 57.20 (out of 100), which was consolidated score of CWE and interview. The petitioner was allotted Punjab National Bank (respondent No. 2 herein). On 25.04.2014, the petitioner received an e-mail of respondent No. 2, whereby she was informed that there is deficiency qua *"caste certificate should have been issued between 01.04.2013 and 31.03.2014".* The petitioner submitted her fresh caste certificate to respondent No. 2 by e-mail. The petitioner, through representation, made to respondent No. 2 via e-mail highlighted that the candidates, who have scored less marks than the petitioner, as per the second merit list, were offered appointment. She e-mailed respondent No. 2 her documents, viz., list of selected candidates, caste certificate etc. On 18.10.2014, she represented to the Chairman of respondent No. 2. The petitioner has further contended that, respondent No. 2 issued three lists offering appointments to the selected candidates and persons below in merit to the petitioner were appointed. As per the petitioner, the candidature of the petitioner was ultimately cancelled by respondent No. 2 vide letter dated 23.12.2014, relevant text thereof is as under:

> *"In this context, we may inform that you failed to submit OBC Certificate as per norms/period prescribed in Para E (vi) (List of Documents to be submitted-OBC Certificate) of IBPS notification dated 12.08.2013 for post. As such, you are not eligible to get benefit of reservation for OBC in terms of IBPS Notification and your candidature has been accordingly cancelled".*

Therefore, the candidature of the petitioner was precisely cancelled on the premise that the caste certificate was not issued between 01.04.2013 to 31.03.2014, however, as per the petitioner she was under Non Creamy Layer during 01.04.2013 to 31.03.2014 and she had also submitted her caste certificate(s). Thus, she belongs to OBC category under Non Creamy Layer.

4. The petitioner, in the present petition, has also highlighted Clause (vi), which is an intimation issued by IBPS, the same is extracted below:

> *"(vi) Caste Certificate issued by competent authority in the prescribed format as stipulated by Government of India in case of SC/ST/OBC category candidates. In case of candidates belonging to OBC category, certificate should specifically contain a clause that the candidate does not belong to creamy layer section excluded from the benefits of reservation for Other Backward Classes in Civil post & services under Government of India. OBC caste certificate containing the 'Non-creamy layer' clause should be issued on or after 01.04.2013.* ***Caste Name***

mentioned in certificate should tally <u>letter by letter</u> with Central Government list/notification. Candidates belonging to OBC category but coming under creamy layer are not entitled to OBC reservation.

Thus, as per the petitioner, the cancellation of her candidature on the basis of Clause (vi) of Annexure P-3 is illegal and arbitrary, as her case is wholly covered by the instructions issued by respondent No. 1 (IBPS). The petitioner has further contended that her status remained constant as OBC belonging to Non Creamy Layer on or after 01.04.2013. As per the petitioner, the candidates lower in merit were appointed and despite having vacant post she has not been given appointment by respondent No. 3. Lastly, the petitioner prayed that communication (Annexure P-25) whereby her candidature was cancelled by respondent No. 2 may be quashed and set aside, she may be declared candidate belonging in OBC Non Creamy Layer and may also be directed to be appointed as Clerk as per the merit list.

5. Respondent No. 1 (IBPS), by filing reply to the writ petition, raised the preliminary objections that IBPS does not fall within the definition of "the State" as provided under Article 12 of the Constitution of India, as it is an autonomous body and it does no "public function", hence not amenable to writ jurisdiction of this Court. Secondly, respondent No. 1 highlighted that notification dated 12.08.2013 Clause I (7), provided that *"Any resulting dispute arising out of this advertisement including the recruitment process shall be subject to the sole jurisdiction of the Court situated at Mumbai".* Thus, jurisdiction of this Court has also been questioned by respondent No.1. As per IBPS, as the petitioner failed to produce her OBC certificate well in time, viz., 01.04.2013 to 31.03.2014, as provided by the advertisement notification dated 12.08.2013, and the certificate she produced was dated 23.03.2012 and not issued during 01.04.2013 to 31.03.2014, hence her claim is erroneous and not justified. As per respondent No. 1, participating originations have no right to deviate from the prescribed advertisement notification. The OBC certificate having "Non Creamy Layer" clause must have been issued during 01.04.2013 to 31.03.2014 and the caste name mentioned in the certificate must necessarily tally with Central Government list/notification. As per the observation of respondent No. 2, the petitioner's certificate was not in consonance with IBPS notification, as the same was issued on 23.02.2012, 05.05.2014 and 07.06.2014, which essentially must be between 01.04.2013 to 31.03.2014. Therefore, her candidature was rightly cancelled. Respondent No. 1 (IBPS) has further contended that it is only test conducting agency and eligibility criteria, viz., age, educational qualifications etc. are prescribed as per the discussions with the participating organizations and as per the requirement. On the basis of merit, candidates are being allotted participating organizations, which depends upon the vacancies notified by them to IBPS. However, the same cannot be construed as an offer of employment and the decision of the allottee bank would be deemed to be final and binding on candidates.

6. On merits, respondent No. 1 has submitted that the candidature of the petitioner was rightly cancelled as she was ineligible as per Clause E(vi) of notification/advertisement dated 12.08.2013. As per the replying respondent, the petitioner was to submit her OBC certificate strictly within the four corners of notification/advertisement dated 12.08.2013 and as she failed to do so, her candidature has rightly been cancelled. It is clearly mentioned in Clauses (5) to (8) of Notice dated 01.04.2014 that the provisional allotment is subject to the candidate fulfilling the criteria for Participating Organizations and identity verification to the satisfaction of the allotted organization. The same does not constitute an offer of employment, in case it is found during the recruitment process that the candidate does not satisfy the eligibility criteria then the candidature of the concerned candidate shall be forfeited. As per the replying respondent, recruitment process/appointment is solely within the ambit of participating organizations and shall be final and binding. The whole provisional allotment process for CWE Clerk-III was over on 01.04.2014 and even the provisional allotment from 10% wait list was also completed on 31.03.2015.

7. Respondents No. 2 and 3 have filed separate consolidated reply, wherein they have raised preliminary objections. They have contended that respondent No. 1 (IBPS) does not

fall within the definition of "the State" as provided under Article 12 of the Constitution of India. The replying respondents, likewise respondent No. 1, have contended that IBPS does no "public function", thus not amenable to writ jurisdiction of this Court. The jurisdiction of this Court has also been questioned. Precisely, the contention of the replying respondents is entirely akin to that of the stand taken by respondent No. 1 and being repetitive in nature deliberately left. However, succinctly, the replying respondents contend that as the petitioner had submitted OBC certificate dated 06.05.2014, which could not be considered as the same was not for the period between 01.04.2013 to 31.03.2014, thus the same is against the confines of notification/advertisement dated 12.08.2013.

8. I have heard the learned counsel for the petitioner and for respondents No. 1 to 3.

9. The learned counsel for the petitioner has argued that the OBC certificate tendered on 06.12.2012 was old one and the petitioner was declared pass and allotted Punjab National Bank in OBC category and her name was as serial No. 15. He has further argued that as per the deficiency conveyed to the petitioner, again certificate dated 05.05.2014, depicting that the petitioner in OBC category, was submitted. On the other hand, the learned counsel for respondents No. 1 to 3 has argued that the OBC certificate was not given for the relevant period, i.e., at the time of application, so the petitioner cannot be given appointment against the OBC category. In rebuttal, the learned counsel for the petitioner has argued that as the petitioner belongs to OBC category she is entitled for appointment, as a right has accrued to her after her selection and allotment to the Punjab National Bank.

10. In order to appreciate the arguments of the learned counsel for the parties, this Court has gone through the record in detail.

11. At the outset, it is observed that respondents No. 1 and 2 fall within the definition of 'State', as they are discharging the functions of the State and are also amenable to the jurisdiction of this Court. It is also observed that as the cause of action also accrued within the jurisdiction of this Hon'ble Court, so this Court has jurisdiction to entertain the present *lis*.

12. From the record, it is clear that the petitioner participated in the examination, which was held in the month of December, 2013. On the basis of marks scored in the written examination, the petitioner was called for the interview in the month of February, 2014. The petitioner appeared in the interview alongwith her testimonials regarding educational qualifications and caste certificate, that is, OBC certificate. The petitioner was selected as she secured 57.20 marks out of 100 marks, as a combined score and the petitioner figured at serial No.15. Thereafter, on 25th April, 2014, the petitioner was intimated qua the discrepancy/deficiency of caste certificate, as it was required to be issued between 01.04.2013 to 31.03.2014. Subsequently, the petitioner submitted another certificate issued in her favour on 11th June, 2014, demonstrating that she belongs to OBC category. The instructions issued, vide Annexure P-3m, while appearing in the interview, which have already been quoted, are extracted for convenience as under:

> *"(vi) Caste Certificate issued by competent authority in the prescribed format as stipulated by Government of India in case of SC/ST/OBC category candidates. In case of candidates belonging to OBC category, certificate should specifically contain a clause that the candidate does not belong to creamy layer section excluded from the benefits of reservation for Other Backward Classes in Civil post & services under Government of India. OBC caste certificate containing the 'Non-creamy layer' clause should be issued on or after 01.04.2013.* ***Caste Name mentioned in certificate should tally <u>letter by letter</u> with Central Government list/notification. Candidates belonging to OBC category but coming under creamy layer are not entitled to OBC reservation."***

The certificate dated 05.05.2014 issued to the petitioner (Annexure P-15) demonstrates that the petitioner belongs to *'Bairagi'* community, which is recognized as a backward class and she does

not belong to Creamy Layer. The petitioner, again through Annexure P-20, produced a certificate issued by the competent authority showing that prior to three years from 11.06.2014, i.e. the date of issuance of the certificate, the parents of the petitioner were having less than five lac rupees gross annual income and thus the petitioner belongs to OBC category from 11.06.2011 to 11.06.2014. A copy of Annexure P-20 was also supplied by the petitioner to the respondents.

13. In these circumstances, there is no doubt that the petitioner belongs to OBC category and she was entitled for the benefit of OBC category, but the action of the respondents in not giving her benefit of OBC category is arbitrary, malicious, beyond the confines of legitimacy and against the rules and thus appropriate writ is required to be issued against respondents No. 1 to 3.

14. This Hon'ble High Court in ***CWP No. 3139 of 2009-G,*** titled as ***Smt. Neetu vs. The State of H.P. & others,*** decided on 19.06.2014, has held as under:

> *"17. As discussed hereinabove, the writ petitioner was having the OBC certificate at the relevant point of time but was asked to furnish latest one, which was not issued by respondent No. 4 at the relevant point of time, thus failed to discharge his duties and rather misused his official position. Thereafter, the latest OBC certificate, dated 16th January, 2014, was issued in favour of the writ petitioner.*
>
> *… … … … … … …*
>
> *28. Keeping in view the ratio laid down by the Apex Court in the said judgment, we deem it proper to direct the respondents that the writ petitioner shall be entitled to seniority as per the merit from the date when other persons, have been appointed pursuant to the advertisement notice, dated 28th August, 2008 (Annexure P-2), but without monetary benefits. Viewed thus, the writ petitioner is held entitled to grant of notional seniority as per the order of merit."*

15. The Hon'ble Supreme Court of India in ***Ram Kumar Gijroya vs. Delhi Subordinate Services Selection Board and another, (2016) 4 Supreme Court Cases 754,*** has held as under:

> 4. The necessary relevant facts required to appreciate the rival legal contentions advanced on behalf of the parties are stated in brief hereunder: the respondent Delhi Subordinate Services Selection Board (hereinafter referred to as "the DSSB") invited applications for selection to the post of Staff Nurse in the Department of Health and Family Welfare, Government of NCT of Delhi by way of publishing Advertisement No. 09/2007 in the newspaper. The last date of submission of the application form in the advertisement for the said post was 21-1-2008. The appellant submitted his application from before the due date and was subsequently issued the admit card to appear in the examination. Having appeared in the examination, he was shortlisted for selection. However, his name did not appear in the final list of selected candidates. On enquiry, he was informed by the official concerned that he was not selected to the post for the reason that he had failed to submit the OBC certificate issued by the appropriate authority along with application form before the last date of submission of application form.
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> … … … … … … …
>
> 6. The learned Single Judge disposed of the writ petition vide judgment and order dated 24-11-2010, placing reliance on the judgment in *Pushpa, wherein the controversy centred around the same advertisement/notification issued by the same respondent. The learned Single Judge observed that the only ground for declining the applications filed by the appellants was that the OBC certificates had been issued and submitted after the cut-off date and therefore they were not eligible for appointment to the post. The learned Single Judge further held that the*

respondent did not cite any other authority to distinguish the decision in Pushpa case (2009 SCC OnLine Del 281) from the facts of the present case. Consequently, the learned Single Judge disposed of the writ petition and directed the respondent to reconsider the application of the appellant and the other aggrieved candidates against the OBC category within a period of one month.

… … … … … … …

18. *In our considered view, the decision rendered in* Pushpa *is in conformity with the position of law laid down by this Court, which have been referred to supra. The devision Bench of the High Court erred in reversing the judgment and order passed by the learned Single Judge, without noticing the binding precedent on the question laid down by the Constitution Benches of this Court in* Indra Sawhney vs. Union of India, 1992 Supp (3) SCC 217 and *Valsamma Paul vs. Cochin University, (1996) 3 SCC 545, wherein this Court after interpretation of Articles 14, 15, 16 and 39-A of the directive principles of State policy held that the object of providing reservation to the SCs/STs and educationally and socially backward classes of the society is to remove inequality in public employment, as candidates belonging to these categories are unable to compete with the candidates belonging to the general category as a result of facing centuries of oppression and deprivation of opportunity. The constitutional concept of reservation envisaged in the Preamble of the Constitution as well as Articles 14, 15, 16 and 39-A of the directive principles of State policy is to achieve the concept of giving equal opportunity to all sections of the society. The Division Bench, thus, erred in reversing the judgment and order passed by the learned Single Judge. Hence, the impugned judgment and order5 passed by the Division Bench in Letters Patent Appeal No. 562 of 2011 is not only erroneous but also suffers from error in law as it has failed to follow the binding precedent of the judgments of this Court in* Indra Sawhney *and* Valsamma Paul. *Therefore, the impugned judgment and order passed by the Division Bench of the High Court is liable to be set aside and accordingly set aside. The judgment and order dated 24-11-2010 passed by the learned Single Judge in* Ram Kumar Gijroya vs. Govt. (NCT of Delhi) is hereby restored."

16. Applying the above law to the facts of the case in hand, in the present case the petitioner has submitted her OBC certificate thereafter new deficiency was pointed out, when she submitted the OBC certificate after the deficiency was pointed out and when again she was not given appointment, she submitted OBC certificate clarifying that she was OBC from the year 2011 and entitled for the benefit from 2011. At last, despite the clarification given by the authorities, who issued the OBC certificate, respondents No. 1 to 3 did not appoint the petitioner, which action of the respondents is highly derogatory, illegal, unconstitutional, arbitrary and liable to be set aside by issuing a writ. Accordingly, the writ petition is allowed and letter dated 23.12.2014 of respondent No. 2, cancelling the candidature of the petitioner is quashed and respondents No. 1 to 3 are directed to appoint the petitioner on the post for which she was recommended with all consequential benefits, as had she been given appointment immediately after her selection, as per her seniority. It is further clarified that the petitioner is also entitled for seniority, back-wages and all other consequential benefits after offering her appointment from the date her immediate junior was given appointment by respondents No. 1 to 3.

17. In view of the above, the writ petition is allowed with costs of Rs.10,000/- which will be paid to the petitioner by respondents No. 1 to 3. Pending application(s), if any, shall also stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Mahanti Devi .....Petitioner

Versus

Union of India & Anr. .....Respondents

CWP No.10620 of 2011
Reserved on : 19.12.2016
Date of Decision : 02.01.2017

Constitution of India, 1950- Article 226- The husband of the petitioner was an active worker of Praja Mandal movement – he was externed under the verbal order of the Ruler in May, 1946- he could only return to his home in October, 1948 after the merger of Bilaspur State in Union of India – the husband of the petitioner applied for grant of pension as a freedom fighter but his claim was rejected on the ground of delay – he made representations but they were rejected – Supreme Court of India declared that the application for grant of pension could not have been rejected on the ground of delay – husband of the petitioner filed a writ petition, which was disposed of with a direction to decide the application in accordance with the judgment of Supreme Court of India - however, his case was rejected – aggrieved from the rejection, present writ petition has been filed – held, that as per the scheme of State Government, widows of the freedom fighter are entitled for the benefits – the petitioner is a widow of the freedom fighter and is entitled to the benefits as per the rules- respondents are delaying the matter on one ground or the other – record shows that husband of the petitioner had suffered externment – hence, the petition allowed- respondents directed to grant benefits to the petitioner.(Para-19 to 25)

For the petitioner Ms. Vandana Kuthiala, Advocate.
For the respondents Mr. Angrez Kapoor, vice Mr. Ashok Sharma, ASGI, for respondent No.1.
Mr. Pushpinder Jaswal, Dy. A.G. for respondent No.2.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present writ petition is maintained by the petitioner against the respondents praying therein for the following reliefs :-

"(a) for issuance of an appropriate writ in the nature of mandamus directing the respondents to declare the husband of the petitioner a freedom fighter and the petitioner be granted pension under the Swatantarta Saini Samman Pension Scheme, 1980 from the date of her application;

(b) to quash the order of rejection dated 11.4.2007 (Annexure-PK);

(c) to direct the respondents to pay arrears of pension to the petitioner alongwith interest @ 12% per annum from the date of application;

(d) to direct respondent No.2 to decide the application of the petitioner within a period of three months as per the guidelines laid down by the Apex Court in the matter of Mukund Lal Bhandari vs. Union of India, reported in AIR 1993 SC, 2127."

2. The petitioner has submitted that her husband was an active worker of the Praja Mandal Movement, and he earned the displeasure of the Ruler of Bilaspur State and he was externed under the verbal orders of the Ruler in May, 1946, and was threatened that he would be arrested and jailed, if he entered Bilaspur State. The Praja Mandal Movement was also banned by the Ruler of Bilaspur State and the husband of the petitioner could only return to his home in

October, 1948 after the merger of Bilaspur State in the Union of India. During this period of externment the petitioner's husband and his family suffered both physically and financially.

3. It has also been alleged that in the year 1972, the Government of India promulgated a Scheme known as ***"Freedom Fighters Pension Scheme 1972"*** with the intention of recognizing the sacrifices made by those, who had struggled for the freedom of the Country.

4. It has been contended that the Freedom Fighter's Pension Scheme was further liberalized in the year,1980 and re-named as the ***Swatantarta Sainani Samman Pension Scheme, 1980.*** Under this Scheme, the benefit of the pension was extended to all Freedom Fighters, as a token of Samman to them and the monthly pension was also increased. Further, it has been alleged that respondent No.1 later issued a clarification to the effect that certificates issued by the Freedom Fighters, who had suffered two years imprisonment, would be conclusive proof under the Scheme.

5. It has further been contended that the husband of the petitioner firstly applied to respondents No.1 and 2 for the grant of pension on 22.8.1975, but his claim was rejected, being time barred, on 29.9.1975. The petitioner's husband again represented to the respondents on 27.10.1995, but he did not receive any response from them. It has also been contended that the husband of the petitioner had resigned himself to his fate till the Hon'ble Supreme Court of India removed the restriction of limitation in the matter of freedom fighters. It has been stated that the husband of the petitioner came to know in the end of 1994, Hon'ble Supreme Court of India, had issued directions to the Union of India, in the matter of *Mukand Lal Bhandari* Vs. *Union of India*, AIR 1993, SC 2127, not to reject application form of the Freedom Fighters on the ground of delay and that it was the duty of the Union of India to identify the persons, who had worked for the freedom of the Country and accord them due recognition and pension in accordance with the Scheme. It has also been averred that the Hon'ble Apex Court has observed in the matter of Mukand Lal Bhandari (supra) that all the applications should be decided by respondent No.1 within a period of three months.

6. It has further been contended that in pursuance of the judgment of the Hon'ble Apex Court, mentioned above, the husband of the petitioner filed CWP No.987 of 1998, before this Court, wherein he prayed, inter-alia, that the respondents be directed to declare him to be the freedom fighter and to grant him pension under the Scheme from the date of his application.

7. In reply to the said writ petition, respondent No.2 stated that the husband of the petitioner had not applied for grant of pension under the Scheme promulgated by the State Government. However, respondent No.1 did not file any reply to the writ petition. In pursuance to the reply filed by respondent No.2, the petitioner made a prayer before this Court that he would submit a fresh application alongwith original supporting documents to respondent No.1. Vide order dated 28.10.1996, this Court had been pleased to direct respondent No.1 to decide the fresh application of the husband of the petitioner, in the light of the decision of the Hon'ble Apex Court rendered in Mukand Lal Bhandari's case. Further, it has been averred that the petitioner has applied under the State Scheme also on 21.9.2011. However, the husband of the petitioner did not receive the intimation sent by his counsel about the order passed by this Court on 28.10.1996 and due to that he could not apply to the respondents within the time laid down by the Court. Subsequently, the petitioner's husband visited the office of his counsel after the winter vacation of 1998 and on coming to know about the order passed by this Hon'ble Court, the petitioner's husband again applied to respondent No.1, on 20.3.1998, on the prescribed proforma. It has also been averred that alongwith the application, the petitioner appended a certificate issued by Sant Ram, Former Minister-cum-Superintendent of Police, Bilaspur State. According to the policy framed by respondent No.1, this certificate is sufficient proof under the Scheme of the sufferings undergone by Freedom Fighters. It has been submitted that the petitioner's husband also submitted an affidavit explaining the delay in submitting his application. In support of his claim the petitioner's husband also submitted certificates issued in his favour by Narottum Dutt Shastri, Vice-President, Bilaspur State Praja Mandal, Ganga Ram

Bhardwaj, Freedom Fighter and Jai Ram, Freedom Fighter, as corroboratory evidence of the sufferings undergone by him.

8. It has further been contended that the petitioner's husband sent reminders to the respondents, but to no avail. It has also been averred that vide letter dated 6.4.1998, respondent No.2 asked him to route his application through the Deputy Commissioner, Bilaspur. Finally, vide letter dated 26.11.1998, respondent No.1 wrote to respondent No.2 to verify the authenticity of the certificate submitted by the petitioner's husband and to furnish recommendations about the eligibility and entitlement of the grant of pension to the husband of the petitioner. It has also been contended that the Deputy Commissioner, Bilaspur, vide his letter, dated 1.12.1998, asked the petitioner's husband to submit the certificates and affidavit in his office, so that further action could be taken in the matter.

9. It has been contended that before the petitioner's husband could take further action in the matter, he was shocked to receive a letter dated 8.12.1998, from respondent No.1, whereby his case was rejected on the ground that the State Government had checked the records, but there was no indication that he had participated or suffered imprisonment in Praja Mandal Movement. It has also been contended that respondent No.1 requested, respondent No.2 to verify the claim of the petitioner's husband and vide letter, dated 1.12.1998, respondent No.2 asked the petitioner's husband to submit his documents in the office of the Deputy Commissioner, Bilaspur, for taking further action in the matter. It has been alleged that respondents did not apply their minds at all to the case of the petitioner's husband, since his case was rejected barely one week after the petitioner's husband was asked to submit his documents in the office of the Deputy Commissioner, Bilaspur. Further that respondent No.1 had rejected the case of the petitioner's husband on false and arbitrary grounds without even awaiting the report from respondent No.2, even though it is the policy of respondent No.1 to base its decision on the recommendation of respondent No.2, which shows that respondent No.1 had adopted a vindictive approach and had rejected the case of the petitioner without considering the same. So, it has been alleged that such action of respondent No.1 was in contravention of the law laid down by the Hon'ble High Court, as well as, the Hon'ble Supreme Court of India, which inter-alia amounts to willful disobedience of the judgments passed by the Courts.

10. It has also been contended that the order of rejection was harsh, arbitrary and oppressive and was based on non-application of mind. Further more, respondent No.1 had acted contrary to its own Policy, where by certification of sufferings by the then Superintendent of Police, is considered a sufficient evidence under the Scheme. Even otherwise, this Hon'ble Court has defined the term corroboratory evidence under the Scheme and has laid down that in the absence official records, certificates from fellow Freedom Fighters would be sufficient corroboratory evidence under the Scheme. It has been submitted that a number of similarly situated persons have been declared to be the Freedom Fighters and eligible for receiving benefits under the Scheme by the respondents, as well as, this Hon'ble Court on the basis of a certificate issued by the then Police authorities and thus the petitioner could not be discriminated. It has been submitted that the petitioner's case also fell fully within the ambit of the Scheme. It has also been submitted that CWP No.374 of 2000, which was filed before this Court was allowed on 2.1.2006, vide which the respondents were directed to consider the case of the petitioner afresh in the light of the observations made it and various decisions of the this Court in *Prabhu Ram* Vs. *Union of India and another* rendered in CWP No.539 of 1990, dated 29.12.2004, and other such petitions. It has also been submitted that respondent No.1 was directed to decide the same within six weeks from the date of receipt of the order by the learned counsel for the Union of India. However, the husband of the petitioner did not hear from the respondent No.1 till September, 2006 and he was forced to serve a legal notice on 23.9.2006 to respondent No.1. Thereafter, respondent No.1 replied to the counsel for Union of India on 13.10.2006, with a copy to the counsel for the petitioner's husband requesting him to send the copy of the judgment to them at the earliest.

11. It has been contended that the claim of the petitioner's husband was rejected by respondent No.1 on 11.4.2007. It has been submitted that after receiving the rejection letter, the petitioner's husband was thoroughly disillusioned and disappointed and thereafter his health started deteriorating day by day and finally he died on 23.1.2008. Thereafter, the petitioner discovered the record file kept by her late husband regarding his pension claim. It has been alleged that she is an illiterate and domesticated lady and her financial and health conditions are also not very sound. So, on the advice of her well-wishers, she contacted the counsel and wished to file the present writ petition. Therefore, the petitioner, being aggrieved and dissatisfied by the letter of rejection, dated 11.4.2007, she seeks for quashing of the same.

12. It has been submitted that the Hon'ble Apex Court has held that the freedom fighters cannot be expected to produce un-impeachable evidence at the fag of their lives and also the grounds of rejection are in contravention of their own policies. It has also been contended that respondent No.1 has not even bothered to apply its mind to the claim and that to reject the legitimate claim of the petitioner's husband on such ground is highly ridiculous and shows the callous, cursory and indifferent approach adopted by respondent No.1, despite the clear direction of the Hon'ble Court. It has also been contended that this Court had directed respondent No.1 to consider the case of the petitioner's husband in the light of the decisions, whereby it has been held that it is the Policy of respondent No.1 to accept the claims based on verbal orders issued by the then Raja of Bilaspur, if the claimant produces a certificate by the Home Minister/ Superintendent of Police/ Deputy Superintendent of Police of erstwhile State of Bilaspur. Respondent No.1 was also directed to consider the case of the petitioner's husband in the light of various decisions of this Hon'ble Court, however, the action of respondent No.1 is also highly contemptuous towards this Court as no reference much less consideration has been made to the various judgments passed by this Court. It has also been contended that the order of rejection is discriminatory and arbitrary besides being violative of the fundamental rights of the petitioner's husband, since he has submitted proof of his sufferings in accordance with the requirements of the Scheme, as well as, the law laid down by the Hon'ble Apex Court. It has been contended that respondent No.1, as well as, this Hon'ble Court has already granted pension to a number of similarly situated persons, as the petitioner's husband, on the basis of documentary proof like others and the order of rejection is, thus, liable to be quashed and the petitioner's husband becomes entitle to be declared as a freedom fighter.

13. Respondent No.1 filed its counter-affidavit and submitted that the Samman Pension to Freedom Fighters is regulated under the Swatantrata Sainik Samman (SSS) Pension Scheme, 1980. It has been submitted that initially a Freedom Fighters Pension Scheme, 1972, was started from 15.8.1972, which was provided for the grant of pension of living freedom fighters and their families. And to the families of the martyrs. Such Scheme was further liberalized in 1980 and was renamed as *"Swatantrata Sainik Samman Pension Scheme, 1980"* and under the above Scheme, a person is eligible for Swantantrata Sainik Samman Pension, if he had undergone at least one of the sufferings prescribed in the Scheme (Imprisonment/ detention against an executive order/ underground sufferings/ Externment/internment etc.) on account of his participation in the freedom struggle. Participation in the INA and in the Indian Independence League is also treated as participation in the National Liberation Movement. It has been submitted that, as per the provisions of the Pension Scheme, 1980, any application, who claims any of the above mentioned sufferings, is required to produce documentary evidence in support of his claimed sufferings. It has also been submitted that the claim of the petitioner's husband for grant of such Pension was examined in accordance with the directions dated 2.1.2006 of this Hon'ble Court, as per the provisions & eligible criteria of Swantantrata Sainik Samman Pension Scheme, 1980 and available documentary evidence, but the petitioner was not found eligible for grant of Samman Pension and his claim was rejected vide orders dated 8.12.1998, 11.4.2007 respectively.

14. Respondent No.2 in its reply, submitted that petitioner's husband had applied for the grant of Samman Pension under Swantantrata Sainik Samman Pension Scheme, 1972 to respondent No.1 in the year, 1975 (i.e. on 22.8.1975), which was rejected as the date of such

application had already been expired on 31.3.1974, as per the Scheme of that time. It has also been submitted that the petitioner's husband had to apply afresh on the prescribed performa for granting him pension under the Central Scheme, namely Swantantrata Sainik Samman Pension Scheme, 1980 for the grant of financial assistance under the State Scheme, namely Scheme for the grant of financial assistance by the Government of Himachal Pradesh to the Freedom Fighters of Himachal Pradesh in pursuance to the directions given by this High Court in CWP No.987/1996 on 28.10.1996. It has also been submitted that the husband of the petitioner did not apply for the grant of financial assistance/Samman Rashi under the State Scheme to respondent No.2 till date and respondent No.2 came to know the fact of making application only on receipt of the present petition.

15. It has been submitted that since the petitioner is a resident of District Bilaspur, H.P. and had to submit her claim through the SDM, Sadar, Bilaspur, who after verifying the contents of the claim, has to send it to the Deputy Commissioner, Bilaspur. On enquiry, it was found from the Deputy Commissioner/ SDM, Bilaspur that the petitioner had submitted her claim to the Sub Divisional Magistrate, Sadar, Bilaspur, under both the Schemes, who had made enquiry.

16. Respondent No.2 had also filed a supplementary-affidavit in compliance of the directions issued by this Court, dated 30.7.2012, in the present petition in reference to the application submitted by the petitioner for State freedom fighters pension. It has been submitted that the State Government had framed the Scheme in the year 1985 for the financial assistance to the eligible persons, who claim to be freedom fighter due to their participation in various freedom movements of the India. According to the procedure prescribed in the said Scheme, all eligible freedom fighters who are alive and in case of death their spouses who had not remarried after the death of freedom fighter would be eligible for financial assistance under the said Scheme. They have to apply on the prescribed form to the S.D.M. concerned indicating therein the sufferings faced by them. It has further been submitted that the State has come to know of this fact only when a copy of the petition was received from the Advocate General's office on 28.12.2011. It has been submitted that after coming into notice of the fact that the petitioner had applied for financial assistance under the State Scheme, 1985, the matter was taken up with the Deputy Commissioner, Bilaspur and Sub Divisional Officer, Sadar, Bilaspur to intimate the whereabouts of the application submitted by the petitioner, however, her case has not been recommended for grant of pension. It has also been submitted that the applicant/petitioner has not indicated the sufferings of her husband made while he participated in the Prajamandal Movement of the Bilaspur State against Col. No.12 of the Form meant for applying for declaring freedom fighter and sanctioning financial assistance under the State Scheme. Thereafter, the Form was sent back to the Deputy Commissioner, Bilaspur to get the same completed from the petitioner, but the Deputy Commissioner, instead of getting the form completed from the petitioner reiterated his stand taken in the earlier letter dated 7.3.2012, due to which the original application form was sent with a direction to the petitioner on 17.9.2012 and with a request to get the same completed by indicating the sufferings of her husband for taking decision to declare her husband, as freedom fighter, after his death and sanctioning Samman Rashi to the petitioner. However, the petitioner did not return the application form back after doing the needful therefore, it was not possible to take further action in the matter in the absence of the completed application form.

17. It has been submitted that after recommendation of the concerned Deputy Commissioner, such applications are placed before the Sub Committee of the Freedom Fighters Welfare Board whereafter, it will be placed before the State Level H.P. Freedom Fighter Welfare Board alongwith the recommendation of the Sub-Committee, for final decision and presently both the H.P. Freedom Fighter Welfare Board and Sub-Committee are under process for re-constitution, which may take some time and under the Scheme, no other authority is competent to take decision on such applications/claims. Therefore, respondent No.2-State prayed for the grant of 6 months to comply with the directions given by the High Court to decide the case of the petitioner in the interest of justice.

18. Heard learned counsel for the parties.

19. Learned counsel for the petitioner has argued that the petitioner is an old lady and is in her 80's and is being denied for the benefits under the Scheme by the respondents without any reasons on one pretext or the other.

20. On the other hand, the learned counsel appearing vice Additional Solicitor General of India has argued that the petitioner could not establish that her husband was Freedom Fighter, whereas the learned Additional Advocate General has argued that the petitioner has not completed Col. No.12 of the application form, which pertains to kinds of sufferings faced by the person claiming Freedom Fighter Samman Rashi and to indicate the sufferings faced by her husband and the name of the movement etc. and even by their last letter, which is annexed with the supplementary affidavit, dated 17.9.2012, the petitioner has been asked to send her application along with all other documents, which she has failed to produce, so her husband cannot be held entitled to be declared as a freedom fighter and eligible for such pension under the Scheme framed by the State Government.

21. The next question, which arises, is with regard to delay and latches. It has been alleged that the husband of the petitioner had first applied to respondents No.1 and 2 for the grant of pension on 22.8.1975, but his claim was rejected being time barred on 29.9.1975. He again represented on 27.10.1995, but he did not receive any response from them. Thereafter, he again filed CWP No.987 of 1996 for the grant of the pension under the Scheme and the Court directed the petitioner to apply for such relief which now the petitioner has applied under the State Scheme on 21.9.20011. However, stated that the petitioner's husband did not receive the intimation sent by his counsel about the order passed by this Court on 28.10.1996 and could not apply to the respondents within the time granted by the Court. Thereafter, the petitioner's husband again applied to respondent No.1 on 20.3.1998 on the prescribed performa. The husband of the expired on 23.1.2008. The State Government sent the application of the petitioner to the Deputy Commissioner, Bilaspur to get the same completed from the petitioner but the later returned the same as it to the State Government instead of getting the form completed from the petitioner and reiterated his stand taken in earlier dated 7.3.2012, which seems that the Deputy Commissioner, Bilaspur has not discharged duty cast upon him. As per the Scheme of the State Government, meant for the Freedom Fighters of the State, shows that the widows of the Freedom Fighters are entitled for the benefits. The Scheme, under reference, provides as under:-

> **"(ii) Spouses of such freedom fighters will also be eligible for this assistance under the scheme provided she/he has not re-married after the death of Freedom Fighter, and the freedom fighter would have been eligible for this financial assistance had he/she been alive."**

22. Now, the petitioner is alive and not re-married, so, she is entitled for the financial assistance, as per the rules and the action of the respondents in not granting financial assistance cannot be upheld, simply for the reason that she has not applied for the financial assistance till the year 2011.

23. The respondents are required to have taken into consideration the fact that the Scheme provides for financial assistance to the Freedom Fighters and the widow of the Freedom Fighters and it is a social obligation, as well as, the respect to those who have suffered to bring independence to the Country, but the respondents, on technical reasons, one reason or the other, are keeping pending the matter of the petitioner. The record shows that the petitioner has proved on record that her husband suffered externment. The record also shows that the respondents came to know about the fact latest by 01.1.2012, through the writ petition, maintained by the petitioner, but in spite of that, they had not acknowledged the right of the petitioner. In these circumstances, this Court finds that the writ is required to be issued to the respondents to provide financial assistance/pension to the petitioner as per the updated Scheme called

"SCHEME FOR THE GRANT OF FINANCIAL ASSISTANCE BY THE GOVERNMENT OF HIMACHAL PRADESH TO THE FREEDOM FIGHTERS OF HIMACHAL PRADESH."

24. Needless to notice that the application of the petitioner is pending with the Authorities for the simple reason that she has not mentioned with respect to the sufferings undergone by the husband of the petitioner. Though, it is clear from the writ petition, which is duly supported by the affidavit of the petitioner, that her husband was externed from Bilaspur State in the year 1946 and he returned only in the year 1948, when the Bilaspur State merged in the Union of India. The other documents on record also show that the husband of the petitioner has suffered in the *Praja Mandal Movement.* The petitioner cannot be expected to produce the evidence at this tangential stage to prove her case beyond all reasonable doubts. It is a beneficiary legislation and is in fact granting the respect to the Freedom Fighters and the widow(s) of the Freedom Fighters, who have not re-married. It has also come on record that the petitioner has not re-married and also that, as per the Scheme, which has been relaxed from time to time, the petitioner is entitled for the pension as per the relaxation, which has come from time to time, because her husband has suffered externment and sufferings and she has not remarried, at least from the date the last relaxation came i.e. from 1.1.2012.

25. In view of the above facts and circumstances, it is ordered that the respondents will provide financial assistance to the petitioner under the updated Scheme, called *"SCHEME FOR THE GRANT OF FINANCIAL ASSISTANCE BY THE GOVERNMENT OF HIMACHAL PRADESH TO THE FREEDOM FIGHTERS OF HIMACHAL PRADESH"* from 01.1.2012, when the respondents got knowledge through writ petition as averred in the reply. So, the respondents are required to be directed to consider and grant pension to the petitioner w.e.f. 01.01.2012 under the Central, as well as, State Scheme, as it has come on record by way of affidavits that her husband has undergone sufferings because of his externment and other affidavits of the Freedom Fighters.

26. In these circumstances also, it is directed that the respondents will grant pension/financial assistance to the petitioner under the Central, as well as, the State Scheme and the arrears will be granted to the petitioner with effect from 01.01.2012.

27. With the above directions, the writ petition is disposed of with no order as to costs.

28. All pending application(s) if any, also stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Rishabh Kharbanda. .....Petitioner.

Versus

State of Himachal Pradesh & Ors. .....Respondents.

Cr.MMO No. 320 of 2016
Reserved on: 26.12.2016
Decided on:_02.01.2017

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Section 279, 337 and 338 of I.P.C. – a petition for quashing the FIR filed on the ground that matter has been compromised between the parties and FIR be quashed- held, that if quashing of FIR becomes necessary for securing the ends of justice , Section 320 will not be a bar for the same - when the matter has been compromised amicably without any pressure, the FIR can be quashed – petition allowed, FIR and consequent proceedings ordered to be quashed. (Para-6 to 11)

Cases referred:
B.S. Joshi and others vs. State of Haryana and another, (2003) 4 SCC 675
Preeti Gupta and another vs. State of Jharkhand and another, (2010) 7 SCC 667
Jitendra Raghuvanshi and others vs. Babita Raghuvanshi and another, (2013) 4 SCC 58

For the petitioners:	Mr. Imran Khan, Advocate.
For the respondents:	Mr. Pushpinder Jaswal, Deputy Advocate General with Mr. Rajat Chauhan, Law Officer, for respondent No. 1. Ms. Seema K. Guleria, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition is maintained by the petitioner under Section 482 of the Code of Criminal Procedure (hereinafter to be called as "the Code") for quashing of F.I.R No. 54/16, dated 12.02.2016, under Sections 279, 337 and 338 of the Indian Penal code, registered at Police Station, West Shimla, H.P.

2. Briefly stating the facts, giving rise to the present petition are that on 12.02.2016 petitioner alongwith his batch-mate of B.Tech course in Chitkara University, Baddi, namely Manmeet Kaur Grewal, were going towards Shimla for attending the family function of their friend. When they reached Taradevi, all of a sudden, one stray dog came in front of the vehicle and the petitioner, who was driving the vehicle suddenly applied the brakes, as a result of which the vehicle skidded and fell down into a deep gorge about 150 feet down from the main road. Respondent No. 2, who was coming from the opposite side, on seeing the car rolling down into a deep gorge made phone calls to the concerned Police Station and the rescue team. His only anxiety was to protect the occupants of the vehicle by any means. The intention of respondent No. 2 was only to protect the occupants of the vehicle, whereas Police have treated his information as an eye witness, to lodge FIR. In this context, respondent No. 2 has executed an affidavit (Annexure P-2) stated therein that the occupants were young boy and a girl and they were driving safely. Respondent No. 2 specifically substantiate that he has only intimated the Police Officials to sent rescue team. Both the occupants of the said vehicle were received injuries, initially they were taken to Indira Gandhi Medical College, Shimla, wherefrom they were shifted to PGI, Chandigarh, where petitioner remained admitted for several days. Though, concerned Doctors of the PGI, Chandigarh have discharged the petitioner, but petitioner is still undergoing treatment. Apart from the occupants of the vehicle, there was no injury caused to any other person. Now, the parties have entered into a compromise, vide Compromise Deed **Annexure P-4**, and do not want to pursue the case against each other. Hence the present petition.

3. Learned counsel for the petitioner has argued that as the parties have compromised the matter, vide Compromise Deed **(Annexure P-4)**, no purpose will be served by keeping the proceedings against the petitioners and the FIR/Challan pending before the learned Court below may be quashed and set aside.

4. On the other hand, learned Deputy Advocate General has argued that the offence is not compoundable, so the petition be dismissed.

5. Learned counsel for respondent No.3 has argued that the parties have entered into compromise and so, the proceedings pending before the learned Court below be quashed.

6. To appreciate the arguments of learned counsel appearing on behalf of the parties, I have gone through the entire record in detail.

7. Their Lordships of the Hon'ble Supreme Court ***B.S. Joshi and others*** vs. ***State of Haryana and another***, (2003) 4 SCC 675, have held that if for the purpose of securing the

ends of justice, quashing of FIR becomes necessary, section 320 would not be a bar to the exercise of power of quashing. It is well settled that the powers under section 482 have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers. Their Lordships have held as under:

> [6] In Pepsi Food Ltd. and another v. Special Judicial Magistrate and others ((1998) 5 SCC 749), this Court with reference to Bhajan Lal's case observed that the guidelines laid therein as to where the Court will exercise jurisdiction under Section 482 of the Code could not be inflexible or laying rigid formulae to be followed by the Courts. Exercise of such power would depend upon the facts and circumstances of each case but with the sole purpose to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It is well settled that these powers have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers.
>
> [8] It is, thus, clear that Madhu Limaye's case does not lay down any general proposition limiting power of quashing the criminal proceedings or FIR or complaint as vested in Section 482 of the Code or extraordinary power under Article 226 of the Constitution of India. We are, therefore, of the view that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, Section 320 would not be a bar to the exercise of power of quashing. It is, however, a different matter depending upon the facts and circumstances of each case whether to exercise or not such a power.
>
> [15] In view of the above discussion, we hold that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code.

8. Their Lordships of the Hon'ble Supreme Court ***in Preeti Gupta and another*** vs. ***State of Jharkhand and another***, (2010) 7 SCC 667, have held that the ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. The tendency of implicating the husband and all his immediate relations is also not uncommon. At times, even after the conclusion of the criminal trial, it is difficult to ascertain the real truth. Experience reveals that long and protracted criminal trials lead to rancour, acrimony and bitterness in the relationship amongst the parties. The criminal trials lead to immense sufferings for all concerned. Their Lordships have further held that permitting complainant to pursue complaint would be abuse of process of law and the complaint against the appellants was quashed. Their Lordships have held as under:

> [27] A three-Judge Bench (of which one of us, Bhandari, J. was the author of the judgment) of this Court in Inder Mohan Goswami and Another v. State of Uttaranchal & Others, 2007 12 SCC 1 comprehensively examined the legal position. The court came to a definite conclusion and the relevant observations of the court are reproduced in para 24 of the said judgment as under:-
>
> "Inherent powers under section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute."
>
> [28] We have very carefully considered the averments of the complaint and the statements of all the witnesses recorded at the time of the filing of the

complaint. There are no specific allegations against the appellants in the complaint and none of the witnesses have alleged any role of both the appellants.

[35] The ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. To find out the truth is a herculean task in majority of these complaints. The tendency of implicating husband and all his immediate relations is also not uncommon. At times, even after the conclusion of criminal trial, it is difficult to ascertain the real truth. The courts have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realities into consideration while dealing with matrimonial cases. The allegations of harassment of husband's close relations who had been living in different cities and never visited or rarely visited the place where the complainant resided would have an entirely different complexion. The allegations of the complaint are required to be scrutinized with great care and circumspection.

36. Experience reveals that long and protracted criminal trials lead to rancour, acrimony and bitterness in the relationship amongst the parties. It is also a matter of common knowledge that in cases filed by the complainant if the husband or the husband's relations had to remain in jail even for a few days, it would ruin the chances of amicable settlement altogether. The process of suffering is extremely long and painful.

[38] The criminal trials lead to immense sufferings for all concerned. Even ultimate acquittal in the trial may also not be able to wipe out the deep scars of suffering of ignominy. Unfortunately a large number of these complaints have not only flooded the courts but also have led to enormous social unrest affecting peace, harmony and happiness of the society. It is high time that the legislature must take into consideration the pragmatic realities and make suitable changes in the existing law. It is imperative for the legislature to take into consideration the informed public opinion and the pragmatic realities in consideration and make necessary changes in the relevant provisions of law. We direct the Registry to send a copy of this judgment to the Law Commission and to the Union Law Secretary, Government of India who may place it before the Hon'ble Minister for Law & Justice to take appropriate steps in the larger interest of the society.

9. Their Lordships of the Hon'ble Supreme Court in ***Jitendra Raghuvanshi and others*** vs. ***Babita Raghuvanshi and another,*** (2013) 4 SCC 58, have held that criminal proceedings or FIR or complaint can be quashed under section 482 Cr.P.C. in appropriate cases in order to meet ends of justice. Even in non-compoundable offences pertaining to matrimonial disputes, if court is satisfied that parties have settled the disputes amicably and without any pressure, then for purpose of securing ends of justice, FIR or complaint or subsequent criminal proceedings in respect of offences can be quashed. Their Lordships have held as under:

[13] As stated earlier, it is not in dispute that after filing of a complaint in respect of the offences punishable under Sections 498A and 406 of IPC, the parties, in the instant case, arrived at a mutual settlement and the complainant also has sworn an affidavit supporting the stand of the appellants. That was the position before the trial Court as well as before the High Court in a petition filed under Section 482 of the Code. A perusal of the impugned order of the High Court shows that because the mutual settlement arrived at between the parties relate to non-compoundable offence, the court proceeded on a wrong premise that it cannot be compounded and dismissed the petition filed under Section 482. A perusal of the petition before the High Court shows that the application filed by the appellants was not for compounding of non-compoundable offences but for the purpose of quashing the criminal proceedings.

> [14] The inherent powers of the High Court under Section 482 of the Code are wide and unfettered. In B.S. Joshi , this Court has upheld the powers of the High Court under Section 482 to quash criminal proceedings where dispute is of a private nature and a compromise is entered into between the parties who are willing to settle their differences amicably. We are satisfied that the said decision is directly applicable to the case on hand and the High Court ought to have quashed the criminal proceedings by accepting the settlement arrived at.
>
> [15] In our view, it is the duty of the courts to encourage genuine settlements of matrimonial disputes, particularly, when the same are on considerable increase. Even if the offences are non-compoundable, if they relate to matrimonial disputes and the court is satisfied that the parties have settled the same amicably and without any pressure, we hold that for the purpose of securing ends of justice, Section 320 of the Code would not be a bar to the exercise of power of quashing of FIR, complaint or the subsequent criminal proceedings.
>
> [16] There has been an outburst of matrimonial disputes in recent times. The institution of marriage occupies an important place and it has an important role to play in the society. Therefore, every effort should be made in the interest of the individuals in order to enable them to settle down in life and live peacefully. If the parties ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law, in order to do complete justice in the matrimonial matters, the courts should be less hesitant in exercising its extraordinary jurisdiction. It is trite to state that the power under Section 482 should be exercised sparingly and with circumspection only when the court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice require that the proceedings ought to be quashed. We also make it clear that exercise of such power would depend upon the facts and circumstances of each case and it has to be exercised in appropriate cases in order to do real and substantial justice for the administration of which alone the courts exist. It is the duty of the courts to encourage genuine settlements of matrimonial disputes and Section 482 of the Code enables the High Court and Article 142 of the Constitution enables this Court to pass such orders.
>
> [17] In the light of the above discussion, we hold that the High Court in exercise of its inherent powers can quash the criminal proceedings or FIR or complaint in appropriate cases in order to meet the ends of justice and Section 320 of the Code does not limit or affect the powers of the High Court under Section 482 of the Code. Under these circumstances, we set aside the impugned judgment of the High Court dated 04.07.2012 passed in M.C.R.C. No. 2877 of 2012 and quash the proceedings in Criminal Case No. 4166 of 2011 pending on the file of Judicial Magistrate Class-I, Indore."

10. Thus, taking into consideration the law as discussed hereinabove, I find that the interest of justice will be met, in case, the proceedings are quashed, as the parties have already compromised the matter, as per compromise deed ***(Annexure P-4)***, placed on record.

11. Accordingly, looking into all attending facts and circumstances, I find this case to be a fit case to exercise powers under Section 482 of the Code and accordingly F.I.R No. 54 of 2016, dated 12.02.2016, under Sections 279, 337 & 338 of the Indian Penal Code, registered at Police Station, West Shimla, H.P., is ordered to be quashed. Since F.I.R No. 54 of 2016, dated 12.02.2016, under Sections 279, 337 & 338 of the Indian Penal Code, registered at Police Station, West Shimla, H.P., has been quashed, consequent proceedings/Challan pending before the learned Judicial Magistrate 1st Class, Court No. 6, Shimla, H.P. against the petitioners, are

thereby rendered infructuous. However, the same are expressly quashed so as to obviate any confusion.

12. The petition is accordingly disposed of alongwith pending applications, if any.

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

United India Insurance Company Ltd. ....Appellant

Versus

Raj Kumari & others. ....Respondents.

FAO No. 389 of 2016
Decided on : 3.1.2017

Employees Compensation Act, 1923- Section 10- Deceased was employed as driver on a truck – he died in an accident involving the truck – an application seeking compensation was filed, which was allowed – held, that dead body of the deceased was not recovered- legal heirs filed a civil suit for declaration regarding the death, which was decreed in the year 2013- the application was filed thereafter and is within time – however, the interest is to paid on the amount not from one month of the date of occurrence but from the date of filing of the claim petition. (Para-3 to 8)

For the Appellant: Mr. P.S Chandel, Advocate.
For the Respondents: Mr. Vinod Kumar Thakur, Advocate for respondents No. 1 and 2.
Ms. Nishi Goel, Advocate for respondent No.3.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

One Kashmir Singh, the predecessor-in-interest of the claimants while performing employment as a driver on truck bearing registration No. HIE-1065 under its registered owner , impleaded herein as respondent No.3, died in an ill-fated accident involving the afore-stated truck. The afore-stated truck on eruption of a sudden mechanical defect therein, slipped into the fast flowing water of river Chandra, in sequel whereto deceased Kashmir Singh drowned in the river alongwith the truck whereon he was aboard. One Parshotam, a co-occupant alongwith the deceased in the ill-fated vehicle was, however, able to survive. Despite concerted attempts being made to locate the body of deceased Kashmir Singh yet his body could not be located.

2. Upon hearing the learned counsel appearing for the parties, this Court admits the instant appeal on the following substantial questions of law:-

> " 1. Whether the liability for payment of compensation and interest could be foisted upon the appellant insurance company from 12.10.2000, when the application for compensation was filed on 15.05. 2014 and liability itself was determined on 17.09.2015?
>
> 2. Whether the learned Commissioner was justified in entertaining the petition and allowing the compensation with interest after the gap of 14 years after the date of accident and death of the workman when the petitioners ignored to file the petition within the period of two years as per Act?

Substantial questions of law No. 1 and 2

3. Deceased Kashmir Singh during the course of his performing employment as a driver on the aforesaid truck suffered his demise on 12.9.2000, in sequel to the vehicle whereon he stood borne slipping into the gushing fast flowing waters of River Chandra, whereinto it

drowned. Also thereat the claimants despite holding knowledge qua the factum aforesaid also their concert to locate the body of deceased Kashmir Singh bearing no fruition they yet proceeded to belatedly in the year 3.11.2012 institute a civil suit before the learned Civil Court seeking a declaratory decree qua with the aforesaid Kashmir Singh not being heard for 7 years since the ill-fated occurrence of 12.9.2000 thereupon his standing pronounced to be dead. The Civil Court concerned under its verdict comprised in Ex. PW-1/B rendered a decree pronouncing qua deceased Kashmir Singh suffering his demise in an accident which occurred on 12.9.2000 also it pronounced a decree qua his hence being presumed to be dead.

4. The aforesaid verdict pronounced by the Civil Court concerned embodied in Ex.PW-1/B though relieves the rigor of the mandate of Section 10 of the Workmen's Compensation Act, 1923 (for short "the Act") holding a trite mandate therein qua the claimants of the deceased workman standing enjoined to, within two years from the occurrence of his demise, prefer an apposite claim petition before the learned Commissioner concerned, contrarily the mandate of the relevant proviso engrafted therein permitting the learned Commissioner to, on his standing satisfied qua the sufficiency of cause which deterred the claimants to earlier within the apposite period of limitation engrafted in sub Section (1) of Section 10 of the Act, provisions whereof stand extracted hereinafter, institute an apposite application for compensation before him, visibly stands attracted hereat, attraction whereof stands awakened by the factum of a declaratory decree comprised in Ex. PW-1/B standing rendered on 24.10.2013 wherewithin a pronouncement stands embodied qua deceased Kashmir Singh suffering his demise in an accident which occurred on 12.9.2000, decree whereof has acquired conclusivity whereupon hence the uncertainty engulfing the cause of demise of deceased Kashmir Singh stood removed also when within a short time thereafter an apposite petition stood instituted before the learned Commissioner, does fillip an inference from this Court qua the claimants within the ambit of the relevant proviso to Section 10 of the Act succeeding in establishing qua theirs standing deterred by the aforesaid uncertainty gripping the cause of demise of deceased to immediately on occurrence of the ill-fated mishap involving the truck whereon the deceased was aboard, as its driver, to hence promptly therefrom institute an appropriate petition for compensation also thereupon a justifiable reason stands assigned by the learned Commissioner in his impugned award qua its constituting a sufficient cause for his within its ambit nullifying the effect of subsection (1) of Section 10 of the Act, wherewithin an obligation stands cast upon the claimants to within a period of two years since the occurrence, institute an apposite application for compensation before the learned Commissioner.

> *"(1) No claim for compensation shall be entertained by a commissioner unless notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof and unless the claim is preferred before him within (two years) of the occurrence of the accident or, in case of death, within {two years} from the date of death.*
>
> *Provided that, where the accident is the contracting of a disease in respect with the provisions of sub-section (s) of Section 3 are applicable, the accident shall be deemed to have occurred on the first of the days during which the workman was continuously absent from work n consequence of the disablement caused by the disease.*
>
> *{Provided further that in case of partial disablement due to the contracting of any such disease and which does not force the workman to absent himself from work, the period of two years shall be counted from the day the workman gives notice of the disablement of his employer.*
>
> *Provided further that if a workman who, having been employed in an employment for a continuous period, specified under sub-section (2) of Section 3 in respect of that employment, ceases to be so employed and developed symptoms of an occupational disease peculiar to that employment within two years of the cessation of employment, the accident shall be deemed to have occurred on the day on which the symptoms were first detected:}*

{Provided further that the want of or any defect of irregularity in a notice shall not be a bar to the {entertainment of a claim}

(a) If the claim is { preferred} in respect of the death of a workman resulting from an accident which occurred on the premises of the employer, or at any place where the workman at the time of the accident was working under the control of the employer or of any person employed by him and the workman died on such premises or at such place, or on any premises belonging to the employment, or die without having left the vicinity of the premises or place where the accident occurred, or

(b) If the employer { or any one of several employers or any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed} had knowledge of the accident from any other source at or about the time when it occurred:}

Provided further that the Commissioner may (entertain)and decide any claim to compensation in any case notwithstanding that the notice has not been given, or the claim has not been {preferred}, in due time as provided in this sub-section, if he is satisfied that the failure so to give the notice or {prefer} the claim, as he case may be, was due to sufficient cause."

5. Be that as it may the apposite petition for compensation constituted by the claimants before the learned Commissioner though may fall within the ambit of the relevant statutorily engrafted proviso vis-à-vis the mandate of sub Section (1) of Section 10 of the Act, whereupon the disabling effect of immensity of delay in the institution of the apposite claim petition before the learned Commissioner stands negated also thereupon the claim petition is rendered maintainable, yet the statutory liability of interest within the mandate of sub Section (3) of Section 4-A of the Act on the judicially determined compensation amount, as stands fastened upon the insurer, given its evidently executing a valid contract of insurance with the employer of the deceased wherewithin the insurer accepts its liability for indemnifying the employer qua the judicially determined compensation amount vis-à-vis the claimants on occurrence of demise of a workman during the course of his performing his relevant employment under his employer, may not stand tenably fastened upon the insurer by the commissioner. The reason for erecting the aforesaid conclusion rests upon the factum of the deceased at the relevant time standing evidently accompanied by one Parshottem, the lone survivor in the ill-fated mishap, yet the claimants immediately on the mishap taking place omitted to promptly therefrom file an appropriate claim petition before the learned Commissioner rather they waited up till 3.11.2012 whereat they filed a suit for a declaratory decree standing pronounced qua deceased Kashmir Singh standing declared to be dead also therein they claimed a decree qua his suffering his demise on 12.9.2000 in an accident involving the relevant vehicle, claim whereof projected by the claimants in their suit stood affirmatively countenanced, on anvil of the Civil Court concerned placing implicit reliance upon the testimony of one Parshottam. If so, the claimants could well have immediately besides promptly, at the relevant time qua the apposite vehicle slipping into the gushing waters of river Chandra whereon deceased Kashmir Singh was astride as its driver, instituted an apposite petition before the learned Commissioner wherein they could well have cited Purshotam as a witness for proving the cause of demise of Kashmir Singh occurring in the manner enumerated in the petition. However, they omitted to do so, rather they procrastinated upto 3.11.2012 for obtaining a declaration qua the cause of demise of Kashmir Singh arising from the aforesaid factum. Though the aforesaid decree rendered by the Civil Court concerned as stands embodied in Ex. PW-1/B does countenance the aforesaid plea espoused by the claimants also given its acquiring conclusivity, it hence does not warrant its standing interfered with, nonetheless as aforestated the imprompt institution of the claim petition by the claimants since 12.9.2000 uptill 2014, significantly after the pronouncement of a Civil Court embodied in Ex. PW-1/B, whereas they immediately on the vehicle slipping into the gushing waters of river Chandra whereon the deceased at the relevant time was astride as its driver, who alongwith the relevant vehicle drowned in the aforesaid river when stood facilitated to through Purshotam, the lone survivor in the mishap, project before the learned Commissioner qua the demise of deceased

Kashmir Singh arising from the aforesaid factum, yet they omitted to do so, apparently with theirs holding uncertainty qua the cause of demise of deceased Kashmir Singh standing sequelled in the manner as ultimately pronounced in Ex. PW-1/E.

> *"(1) Compensation under Section 4 shall be paid as soon as it falls due.*
>
> *(2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of the workman to make any further claim.*
>
> *(3) Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall-*
>
> *(a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent. Per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and*
>
> *(b) If, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per cent. Of such amount by way of penalty;*
>
> *Provided that an order for the payment of penalty shall not be passed under clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed."*

6. The afore-extracted mandate of sub Section (3) of Section 4 -A of the Act enjoining the insurer of the employer to bear the liability of interest levied on the compensation amount besides its levying thereon commencing on one month elapsing since the accident, graphically remains un-attracted vis-à-vis the insurer. The reason for erecting the aforesaid inference stands anchored upon the factum of the provisions preceding thereto standing enjoined to be read cumulatively besides conjointly alongwith its provisions, preceding provisions whereto hold a clear mandate qua the employer holding a statutory liability vis-à-vis the dependants of the deceased workman to pay compensation to them "as soon as it falls due" also he stands fastened with a statutory liability to immediately on occurrence of the mishap, make the relevant payment(s) to the dependents of the deceased workman. The obvious bespeakings which emanate from the aforesaid provisions occurring precedingly vis-à-vis Sub Section (3) rather are qua the dependants of the deceased workman holding a forthright firm opinion qua the demise of their predecessor-in-interest wherefrom they hold an indefeasible right to entail the relevant employer to comply with the mandate of the statutory provisions preceding thereto. Also theirs immediately on occurrence of the ill-fated mishap involving the vehicle whereon he stood astride as its driver stood enjoined to hold an invincible opinion qua the demise of the deceased workman standing seqeulled by a cause which stands belatedly enunciated in the claim petition instituted by the claimants subsequent to the rendition of a Civil Court embodied in Ex.PW-1/B. However, hereat the claimants nursed a deep ambiguity besides a pervasive uncertainty qua the cause of demise of deceased Kashmir Singh, concomitantly thereupon they held no empowerment thereat inasmuch as to on occurrence of the ill-fated mishap whereat within the mandate of sub Section (1) of Section 4-A of the Act, the employer stood obliged to defray compensation to them, to hence call upon the employer or the insurer, to make defrayment of compensation amount vis-à-vis them nor obviously the insurer or the relevant employer, stood enjoined to defray compensation amount to the claimants of deceased workman Kashmir Singh. The corollary of the aforesaid inference is with the claimants wavering besides theirs holding a dithering view qua the cause of demise of deceased upto 24.10.2013 whereon Ex. PW-1/B stood pronounced thereupon they cannot when for reasons aforestated, the provisions of Sub Section (1) and sub Section (2) preceding the apposite relevant provisions held in Sub Section (3) stand

un-attracted vis-à-vis the insurer also when all the aforesaid provisions are enjoined to be conjointly read, hence make any claim upon the insurer to defray to them the interest on the compensation amount on its levying thereon on one month elapsing since the ill fated mishap. Tritely, the aforesaid omission(s) of the claimants cannot render them to be befitting recipients of the benefit of sub section (3) of Section 4-A of the Act.

7. Further more, though the insurer has concerted to exculpate its liability to pay interest on compensation amount, yet the aforesaid concert is rudderless, as the insurer has only adduced into evidence the cover note, holding details of the contract of insurance executed by it with the employer of the deceased workman encompassing therein its liability to indemnify the employer the judicially determined compensation amount vis-à-vis the claimants, on occurrence of demise of the deceased workman, yet no disclosure exists therein qua the apposite liability of the insurer to pay interest on the compensation amount standing exculpated. The aforesaid pronouncement though may stand manifested in the comprehensive cover note, yet the latter has remained un-adduced into evidence, for its non-adduction into evidence, an adverse inference stands drawn against the insurer, thereupon it stands concluded qua its holding the relevant liability to pay interest on the compensation amount as stands hereinafter assessed by this Court vis-à-vis the claimants.

8. Consequently, the award of the Commissioner in levying interest on compensation amount assessed qua the claimants is modified to the extent that interest on the compensation amount shall accrue thereon not from one month elapsing since the occurrence rather shall accrue thereon since the filing of the claim petition.

9. In view of the above the appeal is partly allowed. Substantial question of law No. 1 stands answered in favour of the appellant and question No.2 is answered accordingly in favour of the respondents. Pending applications stands disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Rajinder Singh Cahuhan. .....Applicant/appellant.

Versus

State of H.P. & another. .....Non-applicants/respondents.

CMP No. 2774 of 2016 in RSA No. 314 of 2011
Reserved on: 06.12.2016
Decided on: 04.01.2017

Code of Civil Procedure, 1908- Order 41 Rule 27- An application was filed for leadingadditional evidence by placing the order of Settlement Collector on record – held, that the order of Settlement Collector is under challenge before the Appellate Court- the suit land was found in the ownership and possession of the State during demarcation and the evidence was within the knowledge of the applicant – no application was filed to plead that matter is pending before the Settlement Collector - additional evidence cannot be filed to fill up the lacuna – application dismissed. (Para-4 to 13)

Cases referred:

N. Kamalam (Dead) and another vs. Ayyasamy and another, (2001) 7 Supreme Court Cases 503

Malayalam Plantations Limited vs. State of Kerala and another, (2010) 13 Supreme Court Cases 487

Union of India vs. Ibrahim Uddin and another, (2012) 8 Supreme Court Cases 148

For the applicant. Mr. Y.P. Sood, Advocate.

For the respondents. Mr. Ankush Dass Sood, Sr. Advocate, with Mr. Virender K. Verma, Addl. AG, and Ms. Shweta Joolka, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present application has been maintained by the applicant/appellant (hereinafter referred to as 'the applicant') under Order 41, Rule 27 read with Section 151 CPC to lead additional evidence. As per the applicant, the regular second appeal is pending adjudication, which arose as both the Courts below have given findings against the applicant in a suit for permanent prohibitory injunction and the suit as well as the appeal stood dismissed. As per the applicant, he maintained a suit for permanent prohibitory injunction against the non-applicants/respondents (The State of Himachal Pradesh and another) (hereinafter referred to as 'the non-applicants') on the averments that non-applicants without any right, title and interest are interfering in the owner-ship and possession of the applicant over the suit land and trying to forcibly construct Theog-Kotkhai road through the suit land without acquiring the same in accordance with law. As per the applicant, earlier also, respondent No. 1 had constructed a road through the land owned and possessed by the applicant without acquiring the same and only after orders were passed by the Hon'ble High Court of Himachal Pradesh in CWP No. 937 of 1996, the land of the applicant, to the extent of 2 bighas and 2 biswas, was acquired. It is the case of the applicant/appellant that the road was constructed in the year 1955, but the land was acquired only when the writ petition was filed. As per the applicant, after the acquisition of the land, the settlement took place and wrong revenue record was prepared. A Guest House was constructed by the applicant, which is shown in the owner-ship of non-applicant No. 1, that is, on a portion of the road. He has further stated that thereafter correction was made and now he wants to place on record the order of the Settlement Collector, which is necessary for adjudication of the case in hand. The application is duly supported with an affidavit.

2. I have heard the learned counsel/Senior Counsel for the respective parties and gone through the record in detail.

3. The learned counsel for the applicant has argued that the order was passed during the pendency of the appeal and the same is relevant for adjudicating the present regular second appeal. On the other hand, Mr. Ankush Dass Sood, learned Senior Advocate, has argued that as per Order 41, Rule 27, the present application cannot be allowed, as it is only in exceptional circumstances that the additional evidence can be allowed to be produced in the Hon'ble Appellate Court. He has further argued that even the present appeal is not the first appeal where this Court has to appreciate the facts, but only this Court has to consider the appeal on the substantial questions of law. He has argued that there had already been three demarcations, which show that the applicant has encroached upon the land of the non-applicants and the encroachment is coming in between the road. He has argued that earlier the road existed on the spot since the year 1955, but the applicant filed a writ petition in the Hon'ble High Court and obtained directions for the non-applicants to acquire the suit land. The learned Senior Counsel has further argued that the proposal was to acquire the lesser land, but the applicant maintained objections and total 2 bighas and 2 biswas land was acquired and total amount of Rs. 22 lac was paid to the applicant. He has further argued that subsequently the applicant made encroachment upon the land acquired by the non-applicants and he was not at that time having any knowledge that the road will be widened at some point of time, but now when the road is being widened the applicant is coming up with different pleas. The learned Senior Counsel has also argued that the applicant has manipulated the order of the Settlement Officer and appeal is maintained by the State of Himachal Pradesh against that order. He has argued that in the learned Courts below the applicant has never moved any application for leading additional evidence nor he has produced any evidence to this effect that the settlement record is wrong and the applicant wanted to lead any evidence. The learned Senior Counsel has

further argued that the plea to lead additional evidence is without any basis, as the learned Courts below have already come to the conclusion after three demarcations, two carried-out by the revenue officers/Local Commissioners appointed at the instance of the applicant at different points of time and one by the Commissioner appointed by the Court, who was also a revenue officer, which have attained finality after the objections of the applicants were dismissed. The learned Senior Counsel has relied upon the following judicial pronouncements:

1. ***N. Kamal (Dead) and another vs. Ayyasamy and another, (2001) 7 Supreme Court Cases 503;***
2. ***Malayalam Plantations Limited vs. State of Kerala and another, (2010) 13 Supreme Court cases 487; &***
3. ***Union of India vs. Ibrahim Uddin and another, (2012) 8 Supreme Court Cases 148.***

4. So far as the present application is concerned, it is on record that the acquisition proceedings were started in this case after the directions were issued by this Hon'ble High Court and when lesser land was acquired it was the applicant who filed objections and thus land to the extent of 2 bighas and 2 biswas was acquired.

5. It is on record that the suit was filed 28.02.2005 and it was dismissed on 26.05.2010. The appeal qua dismissal was filed on 22.06.2010 and the same was dismissed on 20.06.2011. Thereafter, the present appeal was filed on 19.07.2011 and since then the same is pending adjudication. As per the applicant, the proceedings qua correction of settlement were pending. Now the Settlement Officer has passed the order in his favour showing the land to be in his ownership and possession. However, before passing of the said order the applicant did not move any application in the learned Courts below to bring on record the factum qua pendency of the correction application before the settlement authorities. At the same point of time, the order passed by the Settlement Officer is under appeal. Admittedly, three demarcations qua the suit land were conducted, two at the instance of the applicant and third at the instance of the learned Court, in all the three reports, which have attained finality, the suit land was found to be in the ownership of State Government (non-applicant No. 1). It has come on record that the applicant has encroached upon this land in the year 2000. As per the applicant, correction order is there, application under Order 41 Rule 27 is required to be allowed. This plea of the applicant is to be considered in the light of the provisions contained in Order 41 Rule 27 CPC. Order 41 deals with "Appeals from Original Decrees" and Rule 27 is extracted in *extenso* hereunder:

> ***"27. Production of additional evidence in Appellate Court.****-(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-*
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> *(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or*
>
> *(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]*
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> *(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,the Appellate Court may allow such evidence or document to be produced, or witness to be examined.*
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> *(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."*

6. The learned counsel for the applicant has mainly banked upon Clause (aa) *ibid* and argued that the appellant could not produce the evidence, which is now sought to be produced, even after exercising due diligence. This Court finds that the applicant was having

ample opportunity to approach the learned Courts below on earlier dates and produce the evidence with respect to pendency of the correction application, but the applicant had chosen to get the land demarcated, which was demarcated thrice and in all the three times it was found that the land is in the ownership of the State-respondent No. 1. Thus, it cannot be said that the applicant could not have produced the evidence earlier. The fact remains that earlier the applicant did not produce on record anything with regard to correction application and he was aware that the demarcations have conclusively proved that the land is in the ownership of non-applicant No. 1. Now whether any party can be allowed to improve upon his case at the belated stage, that is, at the stage of regular second appeal, which is only pending adjudication on substantial questions of law of general importance, the answer is that application under Order 41 Rule 27 cannot be allowed and the applicant can also not be allowed to improve upon his case and fill in the lacunae in the evidence.

7. The Hon'ble Apex Court in ***N. Kamalam (Dead) and another vs. Ayyasamy and another, (2001) 7 Supreme Court Cases 503,*** held as under:

> *"19. Incidentally, the provisions of Order 41 Rule 27 have not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the court of appeal – it does not authorize any lacunae or gaps in evidence to be filled up. The authority and jurisdiction as conferred on to the appellate court to let in fresh evidence is restricted to the purpose of pronouncement of judgment in a particular way. This Court in Municipal Corpn. Of Greater Bombay v. Lala Pancham, AIR 1965 SC 1008, has been candid enough to record that the requirement of the High Court must be limited to t5hose cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. In para 9 of the judgment, this Court observed:*
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> *"This provision does not entitle the High Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate court to let particular way. In other words, it is only for removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence. The High Court does not say that there is any such lacuna in this case. On the other hand what it says is that certain documentary evidence on record supports 'in a large measure' the plaintiffs' contention about fraud and mala fides. We shall deal with these documents presently but before that we must point out that the power under clause (b) of sub-rule (1) of Rule 27 cannot be exercised for adding to the evidence already on record except upon one of the grounds specified in the provision."*
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> *Further in Pramod Kumari Bhatia v. Om Prakash Bhatia, (1980) 1 SCC 412, this Court also in more or less an identical situation laid down that since an application to the High Court has been made very many years after the filing of the suit and also quite some years after the appeal had been filed before the High Court, question of interfering with the discretion exercised by the High Court in refusing to receive an additional evidence at that stage would not arise. The time-lag in the matter under consideration is also enormous and the additional evidence sought to be produced was as a matter of fact after a period of 10 years after the filing of the appeal. Presently, the suit was instituted in the year 1981 and the decree therein was passed in 1983. The first appeal was filed before the High Court in April 1983 but the application for permission to adduce additional evidence came to be made only in August 1993. Needless to record that the courts shall have to be cautious and must always act with great circumspection in dealing with the claims for letting in additional evidence particularly, in the form of oral evidence at the appellate stage and that too, after a long lapse of time.*

In our view, a plain reading of Order 41 Rule 27 would depict that the rejection of the claim for production of additional evidence after a period of 10 years from the date of filing of the appeal, as noticed above, cannot be termed to be erroneous or an illegal exercise of discretion. The three limbs of Rule 27 do not stand attracted. The learned trial Judge while dealing with the matter has, as a matter of fact, very strongly commented upon the lapse and failure on the part of the plaintiffs even to summon the attestors to the will and in our view contextually, the justice of the situation does not warrant any interference. The attempt, the High Court ascribed it to be a stage-managed affair in order to somehow defeat the claim of the respondents – and having had the privilege of perusal of record we lend our concurrence thereto and the finding of the High Court cannot be found fault with for rejecting the prayer of the appellants for additional evidence made in the belated application. In that view of the matter, the first issue is answered in the negative and thus against the plaintiffs, being the appellants herein."

8. Similarly, the Hon'ble Apex Court in ***Malayalam Plantations Limited vs. State of Kerala and another, (2010) 13 Supreme Court Cases 487,*** has held as under:

"16. If any petition is filed under Order 41 Rule 27 in an appeal, it is incumbent on the part of the appellate court to consider at the time of hearing the appeal on merits so as to find out whether the documents or evidence sought to be adduced have any relevance/bearing on the issues involved. It is trite to observe that under Order 41 Rule 27, additional evidence could be adduced in one of the three situations, namely, (a) whether the trial court has illegally refused the evidence although it ought to have been permitted; (b) whether the evidence sought to be adduced by the party was not available to it despite the exercise of due diligence; (c) whether additional evidence was necessary in order to enable the appellate court to pronounce the judgment or any other substantial cause of similar nature."

9. The Hon'ble Apex Court in ***Union of India vs. Ibrahim Uddin and another, (2012) 8 Supreme Court Cases 148,*** has held as under:

"42. Whenever the appellate court admits additional evidence it should record its reasons for doing so (sub-rule (2)). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the court of further appeal to see, if the discretion under this Rule has been properly exercised by the court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the Rule."

10. From the above it is clear that the applicant has no case in his favour to allow the production of additional evidence, as the factum with regard to pendency of the proceedings qua correction of the settlement record was within his knowledge and no application was ever filed in the learned Courts below, though the suit was pending adjudication since 2005. At the same point of time three demarcations were carried out by the expert revenue officials holding the land in the ownership of non-applicant No. 1 and at the same point of time the fact that the applicant got compensation for the said land, after the proceedings were concluded coupled with the fact that the application was moved after a long time, it cannot be said that the applicant was not in a position to lead such evidence in the learned courts below. Therefore, this Court finds no reasons in allowing the application, rather there are strong reasons to dismiss the application. It

has also come on record that the correction order was appealed against by the non-applicants/respondents before the appellate authority.

11. It is well settled that the additional evidence cannot be permitted to be produced so as to fill in the lacunae or weak points of the case. As far as the knowledge of the applicant with regard to correction application was concerned, it was within his knowledge from more than last ten years, but no application was ever moved by the applicant neither in the Appellate Court below nor any evidence was adduced by him at the time of producing any evidence and the application was moved after a lapse of more than ten years when the appeal before this Court was pending.

12. This Court again reiterate what has been held by Hon'ble Supreme Court in ***N. Kamalam's case*** (supra) is that the Courts must always be cautious and should act with utmost circumspection while dealing with prayers for letting in additional evidence at appellate stage, that too after a lapse of time.

13. In view of what has been discussed hereinabove, it is clear that there is no reason to allow the application and permit the applicant to adduce additional evidence. Resultantly, the application being without any merits deserves dismissal and is accordingly dismissed.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Rajinder Singh Cahuhan. .....Appellant.

Versus

State of H.P. & another. .....Respondents.

RSA No. 314 of 2011
Reserved on: 06.12.2016
Decided on: 04.01.2017

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit pleading that a road was constructed through his land without his permission – this fact was also verified in demarcation – plaintiff filed a writ petition, which was allowed and defendants were directed to acquire the land – an award was passed acquiring the land – plaintiff raised construction of guest house – it was found during settlement that guest house was constructed on the acquired land – a civil suit was filed for restraining the defendants from interfering with the land of the plaintiffs- the suit was dismissed by the Trial Court- an appeal was preferred, which was dismissed- held in second appeal that plaintiff had admitted that some other land besides the land in possession of the defendants was acquired – according to documents, the width of the road was 80 feet, whereas it was 16 feet at the spot – thus, the plaintiff had encroached upon the land, which was acquired by the defendants – Local Commissioner had also found that guest house was constructed on the acquired land – the Courts below had rightly dismissed the suit- appeal dismissed. (Para-9 to 16)

For the appellant. Mr. Y.P. Sood, Advocate.

For the respondents. Mr. Ankush Dass Sood, Sr. Advocate, with Mr. Virender K. Verma, Addl. AG, and Ms. Shweta Joolka, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present regular second appeal has been maintained by the appellant/plaintiff (hereinafter referred to as 'the plaintiff') assailing the judgment and decree,

dated 20.06.2011, of the learned District Judge, Shimla, H.P. passed in Civil Appeal No. 47-S/13 of 2010, upholding the judgment and decree, dated 26.05.2010, passed by learned Civil Judge (Senior Division) Theog, District Shimla, H.P., in Civil Suit No. 15/1 of 2005, whereby the suit of the plaintiff was dismissed.

2. Brief facts giving rise to the present appeal are that the plaintiff maintained a suit for permanent prohibitory and mandatory injunction against the respondents, who were defendants before the learned Trial Court (hereinafter referred to as 'the defendants'). The plaintiff alleged that prior to settlement Khasras No. 27, 33, 35, 43/37, 91/38, 89, 40/37 and 145/38, kita-9, measuring 17 bighas and 3 biswas, situated in *Chak* Badriyana (as per *jamabandi* for the year 1993-94). As per the plaintiff, the above land was in his exclusive ownership and possession. Settlement operation was concluded and *missal haquiat* was prepared in the year 2001-2002, wherein plaintiff was depicted owner of khewat No. 5 min, khatauni No. 8 min, khasra No. 171, 174, 174/1, 195, 199, 201, 226, 228, 230, 231 and 233, kita-11, measuring 0-74-40 hectares (for the sake of convenience hereinafter referred to as 'the suit land'). The plaintiff has further averred that without obtaining the prior consent of the plaintiff or his predecessor-in-interest the defendants carved out motorable Theog-Kotkhai-Hatkoti road. As per the plaintiff, he applied for demarcation in the year 1995 of the land whereon the said road is constructed. The demarcation was conducted on 04.1.1995 in presence of Tehsildar Kotkhai, Junior Engineer, HPPWD, Sub Division Kotkhai, wherein defendants were found to have constructed a road over a part of Khasras number of the plaintiff. The constructed portion of road was depicted as Khasra No. 35/1, measuring 8 biswas, Khasra No. 46/37/1, measuring 1 (one) biswa, Khasra No. 92/38/1, measuring 1 one) bigha and 1 (one) biswa and khasra No. 90/37/1, measuring 12 biswas. Thus the total area measuring 2 bighas and 2 biswas was found utilized by the defendants for the abovementioned road. A *tatima* was prepared and the demarcation report was accepted by the defendants. The said land was not acquired and the plaintiff was not paid any compensation and ultimately the plaintiff maintained Writ Petition No. 937 of 1996 in the Hon'ble High Court, which was allowed vide order dated 04.10.1996. The defendants were directed to acquire the land as per law. Consequently, vide award dated 01.07.1999 the land of the plaintiff denoted by Khasras No. 35/1, 35/2, 91/38/1, 91/38/2, 92/38/1, 92/38/2, 90/37/1 and 90/37/2, kita 8, measuring 2 bighas and 1 (one) biswa, *Chak* Badriyana, Tehsil Kotkhai, District Shimla, H.P., was acquired. To this effect mutation No. 237, dated 28.10.1999 was also attested. As per the plaintiff, it is only after demarcation dated 04.11.1995, he raised construction of his Guest House on a portion of Khasra No. 35/3, measuring 3 bighas and 2 biswas, out of which 8 biswas had been acquired by the defendant No. 1. During the construction of the aforesaid guest the defendants did not object, rather authorities under the defendants gave 'No objection certificate' qua the construction of guest house by the plaintiff on his land. The Executive Engineer, HPPWD, Jubbal on 19.06.1999 served a notice qua construction of guest house in controlled width of the road, however, no objection with respect to the construction being done within the acquired portion was raised. During the period 1999 to 2002 settlement took place and the land of the plaintiff was wrongly and illegally measured. The settlement authority found that the plaintiff had constructed the guest house over the land belonging to HPPWD over khasra No. 177. The plaintiff represented before the settlement officials that his land was acquired whereon the road is existing, specifically Khasra No. 35/1 and 35/2 and remaining land, i.e., Khasra No. 35/3 was never acquired. On the objection of the plaintiff, Field Kanungo (Settlement) inspected the land on 18.05.2002, however, no demarcation was conducted and he wrongly came to the conclusion that the guest house is on the part of the acquired land. Subsequently, Naib Tehsildar inspected the spot in August, 2002, but he too did not conduct the demarcation, and concluded the same. The plaintiff maintained an appeal against the order of the ASO, Theog, however, the defendants initiated the widening work of the road. Therefore, the plaintiff maintained a suit for permanent prohibitory injunction against the defendants wherein he prayed that the defendants may be restrained from interfering or causing any interference in the land mentioned hereinabove, more particularly in Khasra No. 35/3 (old) Khasra No. 174/1 (new) whereon the plaintiff has constructed as guest house. The plaintiff had also prayed that the defendants may also be

restrained from carrying out any construction over the land denoted by Khasra No. 35/1, 35/2, 91/38/1, 91/38/2, 92/39/1, 92/38/2, 90,37/1 and 90/27/2, kita 8, measuring 2 bighas and 1 (one) biswa, *Chak* Badriyana, Tehsil Kotkhai, till final demarcation of the land.

3. The defendants, by filing written statement, contested the claim of the plaintiff. The defendants took preliminary objections qua non-joinder of necessary parties, maintainability, cause of action, court fee and jurisdiction and the suit land is not owned and possessed by the plaintiff. On merits, the defendants averred that plaintiff was owner-in-possession of the suit land comprised in Khasras No. 27, 33, 35, 43/37, 91/38, 89, 40/37, 92/38 and 1455/39 and 145/39, kita 9, measuring 17 bighas and 3 biswas. It is further contended that the Theog-Kotkhai-Hatkoti road is in existence since 1956 and vide award No. 26/96, dated 15.03.1999, the defendants acquired the land and mutation No. 237 was attested and sanctioned in their favour. The defendants had also paid compensation alongwith interest from the year 1956 to 1999 to the plaintiff. As per the defendants, during the construction of the road the plaintiff or his predecessor-in-interest did not object, rather the road was constructed after due consent. The plaintiff maintained a writ petition in the Hon'ble High Court of H.P. and consequent upon the direction of the Hon'ble High Court land comprised in Khasras No. 35/1, 35/2, 91/38/1, 91/38/2, 92/38/1, 92/38/1, 92/38/2, 90/37/1, 90/37/2 and 46/37/1, measuring 2 bighas and 2 biswas was acquired after paying compensation alognwith interest to the plaintiff. Thereafter, settlement took place and new Khasra No. 177 was carved out from the old Khasra No. 35/1 and 35/2, whereas Khasra No. 35/3 remained with the plaintiff, which is denoted by new Khasra No. 174. As per the defendants, the plaintiff took loan from the Tourism Development Corporation against Khasra No. 35/3, however, he has constructed the guest house over Khasras No. 35/1 and 35/2 (new Khasra No. 177), which is owned and possessed by the State/defendant No. 1. Thus, the plaintiff encroached upon the government land and also misused the loan amount. The defendants have further pleaded that the plaintiff is misleading the Court by trying to project that there is variance in the old settlement record and fresh settlement record, which was finalized in the year 2002. As per the defendants, the plaintiff was summoned for 23.02.2005 for demarcation, however, he did present himself. As the plaintiff had encroached upon the government land, *missal* was prepared by the revenue officials after due demarcation of the land. Lastly, the defendants prayed that the suit of the plaintiff may be dismissed.

4. The learned Trial Court framed the following issues for determination and adjudication:

> *"1. Whether plaintiff is entitled for the relief of injunction? OPP*
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> *2. Whether suit is bad for non-joinder of necessary parties? OPD*
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> *3. Whether suit is not maintainable? OPD*
>
> *4. Whether suit is not properly valued? OPD*
>
> *5. Relief."*

After deciding issue No. 1 against the plaintiff, issue No. 2 against the defendants, issue No. 3 in favour of the defendants and issue No. 4 against the defendants, the suit of the plaintiff was dismissed. Subsequently, the plaintiff preferred an appeal before the learned Lower Appellate Court which was also dismissed. Hence the present regular second appeal, which was admitted for hearing on the following substantial questions of law:

> "1. Whether the Courts below have misread, misconstrued or misappreciated the documents Ex. PW-3/A, Ex. PX-1, PW-1/A, Ex. PX-3 and Ex. PX-4 and findings thus recorded on account of misreading and mis-appreciation of above documents are vitiated?
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> 2. Whether the presumption of correctness could be attached to the revenue entries wrongly prepared during the course of settlement proceedings and are under challenge before the competent authority?

3. Whether the Courts below have acted illegally by failing to grant a decree for permanent prohibitory injunction in favour of the appellant qua the suit land, since the appellant has established on record his exclusive ownership and possession over the suit land and interference on the part of the respondents?"

5. I have heard the learned counsel/Senior Counsel for the parties.

6. The learned counsel for the plaintiff/appellant has argued that the application under Order 41 Rule 27 CPC, which is maintained by the plaintiff in the present regular second appeal, may be allowed and the order passed by the Settlement authorities correcting the settlement record showing the plaintiff/appellant in possession of the land may also be taken into consideration and the appeal may be allowed. He has further argued that the judgment and decree passed by the learned Courts below are not as per the evidence which has come on record and same are liable to set aside and the appeal may be allowed. He argued that the Khasras No. are wrongly mentioned and in fact the plaintiff is in possession of the property, as owner, and the defendants are required to be restrained from constructing the road and an appropriate decree is also required to be passed by allowing the present regular second appeal. Conversely, the learned Senior Counsel has argued that the present appeal has no merits and qua application under Order 41, Rule 27 CPC he has addressed exhaustive arguments. He has further argued that the appeal is without any merit and no substantial question of law is involved in this appeal and the same is required to be dismissed. In rebuttal, the learned counsel for the plaintiff/appellant has argued that as the plaintiff is owner of the land, the defendants cannot construct the road without acquiring the land.

7. Detailed and exhaustive arguments addressed by the learned counsel/Senior Counsel for the respective parties have been considered while disposing of application maintained by the plaintiff/applicant under Order 41, Rule 27 CPC, order whereof has been separately passed by this Court, whereby the application has been dismissed.

8. In order to appreciate the rival contentions of the parties I have gone through the record in detail.

9. Now, I would like to advert to the merits of the present appeal. Shri Parkash Chand (PW-1), Junior Engineer, was present during demarcation which was conducted on 04.11.1995. This witness admitted the correctness of copy of certificate, Ex. PW-1/A. Shri Ram Saran (PW-2), Field Kanungo, demarcated the land on 04.11.1995 and had furnished report, copy where of is Ex. PW-3/A. Shri Mangat Ram (PW-3), Kanungo, deposed that during the settlement operation record was not properly prepared. PW-4, Shri Rajinder Singh (plaintiff) while supporting his case deposed that road was constructed through his land without his consent. Subsequently, the land under the occupation of the defendants was also ordered to be acquired and he was paid compensation. He has further deposed that the defendants did not acquire the land beyond their occupation, thus there is no question of encroachment. He has constructed a godown earlier whereupon guest house was constructed subsequently on Khasra No. 35/3 (old) Khasra No. 174 (new). As per the plaintiff, settlement officials did not demarcate the land and guest house rightly. Shri Gian Chand, Patwari (PW-5), who worked in the office of Settlement Officer deposed that the record of the last settlement did not match with the record of the first settlement of 1915.

10. On the other hand, defendants examined five witnesses. Shri Rajinder Singh, Kanungo (DW-1) deposed that he had demarcated the road and guest house of the plaintiff. As per this witness, the plaintiff had constructed his guest house on Khasra No. 177, as per copy report, Ex. DW-1/A. Shri Chet Ram (DW-2), Assistant Engineer, Kotkhai, deposed that road had been constructed through the land for which due compensation had been awarded by the Collector Land Acquisition to the plaintiff. He has further deposed that the plaintiff had encroached upon the land of the defendants by constructing a guest house thereon. As per the acquisition and site plan, the width of the road was 80 feet, however, the width was approximately 16 feet. Shri Varinder Singh and Shri Desh Raj (DW-4 and DW-5, Junior

Engineers, respectively) fortified the stand as taken by DW-2, Shri Chet Ram, Assistant Engineer Kotkhai. Shri surat Ram, Patwari (DW-3) was present during the demarcation along with the Field Kanungo. They found that the plaintiff had encroached upon the land, compensation whereof had already been paid to him.

11. On analysis of the plaint filed by the plaintiff it is found that plaintiff himself had unequivocally stated that beside the area under the occupation of the defendants, they had acquired other area of the plaintiff and he had been paid compensation for the acquired land, i.e., land measuring 2 bighas and 2 biswas. According to the documents and evidence of the defendants, the width of the road through Khasra No. 35/1, 35/2 (old) corresponding to Khasra No. 177 (new) was 80 feet, however, width of the area in fact was around 16 feet. Thus, the plaintiff had encroached upon the land for which he had already been paid compensation alongwith interest w.e.f. 01.01.1956. In cross-examination of DW-2, Shri Chet Ram, has rejected the suggestion that width of the road through the area of the plaintiff under acquisition was 80 feet. Manifestly, the suit land had been demarcated thrice and settlement officials carried out field to field measurement and the same had been recorded in the field book. The settlement officials found construction raised by the plaintiff on Khasras No. 35/1 and 35/2 (old) which corresponds to Khasra No. 177 (new). The plea that the demarcation had been carried in absence of the plaintiff is incorrect, as the plaintiff did not say qua his absence during the settlement operation. Thus, the plaintiff cannot turn around and raise a plea of ignorance qua settlement operations and demarcation of his holdings.

12. As per the record, Field Kanungo (Settlement), Naib Tehsildar (Settlement) concluded that the plaintiff had encroached upon the land of the defendants. Thus, the plea, as raised by the plaintiff that Field Kaungo (Settlement) did not demarcate the area rightly, becomes untenable. The learned Trial Court vide its order dated 07.12.2009 appointed Shri D.R. Verma, Officer retired of H.P. Administrative Services, having experience of more than 30 years in revenue administration, as Local Commissioner, when the plaintiff objected to the earlier two demarcation reports. He, in presence of both the parties, demarcated the area under acquisition and guest house of the plaintiff for three days. The Local Commissioner, after elaborate measurement, found the guest house in dispute on Khasra No. 177(new) corresponding to Khasras No. 35/1 and 35/2 (old). Again, the plaintiff filed objection against the report of the Local Commissioner and cross-examined him at length wherein he has deposed that he took into consideration the record and found that the plaintiff wanted location of his guest house beyond the area under acquisition. The Local Commissioner demarcated the land on 10.02.2010 taking aid of new record of rights and opined against the plaintiff. The plaintiff demanded that the suit land may be demarcated on the basis of old record of rights, so he had to adjourn the proceedings to 24.02.2010, on which date the plaintiff produced a field map of disputed land, viz., Khasra No. 33. The measurement of the land was conducted on the basis of said field map, which was erroneous. The plaintiff wanted to start the measurement from khasra No. 33, dimensions whereof had been 36+13+13+13+11+11, however, on inquiry dimensions whereof were found 36+13+13+11+11. The guest house was found on Khasras No. 35/1 and 35/2, therefore, the plaintiff and his men started quarreling with the defendants' men. Thus, on apprehension of breach of peace and injury, the Local Commissioner did not prepare the field map of the land under encroachment. Now, it can be safely held that there is no reason to disbelieve the report of the Local Commissioner as also the demarcations conducted by other revenue officers. The plaintiff tried to take aid of reference, dated 19.06.1999, of the concerned Executive Engineer, whereby he was directed not to raise construction in controlled width. It is admitted by the plaintiff that he had raised the construction of the guest house between RD-3/575 to RD-3/625. In fact the construction had been raised in controlled/acquired width and the construction was started by him w.e.f. June, 1999. Therefore, the plea of the plaintiff that he had raised the construction without any objection of the defendants is incorrect.

13. As the plaintiff had received the compensation for the land and thereafter he encroached upon the land, the judgment and decree passed by the learned Courts below cannot be said to be result of misreading, misconstruing or mis-appreciation of the documents, viz., Ex.

PW-3/A, Ex. PX-1, Ex. PW-1/A, Ex. PX-3 and Ex. PX-4. Thus, the findings, as recorded by the learned Court below, are as per law and after appreciating the documents to their true and right perspective. There is no mis-interpretation or even a slight mis-appreciation of these documents, what to say of misconstruing the documents. The documents have been properly appreciated and, therefore, substantial question of law No. 1 is answered holding that the documents are properly appreciated.

14. As far as the correctness of the revenue entries are concerned, the same are duly proved by two demarcating Officers and the Local Commissioner, who were appointed two at the instance of the plaintiff and one by the order of the learned Court, who was having experience of more than 40 years. All these commissions concluded that the plaintiff had encroached on the land of defendant No. 1/State, which was acquired at the instance of the plaintiff for which he had been paid due and admissible compensation alongwith interest w.e.f. 1956. As far as demarcations are concerned, the same have attained finality. It is not the one demarcation, but the three demarcations. Can it be said that all the three commissions, two at the instance of the plaintiff and one by the order of the Court, have committed illegality. Under these circumstances, this Count finds that it is not only the revenue entries upon which the learned Courts below have relied, but the same have been proved in affirmative also, therefore, substantial question of law No. 2 is answered holding that the Courts below have committed no illegality

15. As discussed hereinabove, the learned Courts below have committed no illegality. Three Local Commissioners were appointed at different points by the learned Trial Court and they all have categorically reported that the land is in the ownership of defendant No. 1 (State). These reports have attained finality and the reports were given by the experts in the revenue side, who were having experience. Third Local Commissioner, who was appointed by the learned Trial Court, was a retired Revenue Officer having experience of more than 30 years. These reports thereafter attained finality. So, the plaintiff has failed to prove his ownership over the suit land, thus substantial question of law No. 3 is answered holding that the judgments and decrees passed by the learned Courts below are just, reasoned and within the confines of law.

16. Resultantly, in view of the discussion made hereinabove, the appeal being without any merits deserves dismissal and is accordingly dismissed with costs throughout in favour of the defendants and against the plaintiff.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Smt. Anju Bala .....Petitioner.

Versus

The State of Himachal Pradesh and others .....Respondents.

CWP No.: 5872 of 2013
Date of decision: 05.01.2017

Constitution of India, 1950- Article 226- Petitioner was initially appointed as Anganwari helper – an appeal was filed by the respondent No.6 against her appointment, which was allowed – the petitioner filed an appeal, which was accepted on the ground that ADM, Kangra had no jurisdiction to adjudicate the appeal filed by respondent No.6- power was conferred upon ADM by the State Government and the appeal was again heard – appeal was allowed on the ground that income of the petitioner was more than what was mentioned in the income certificate- a writ petition was filed, which was allowed and the case was remanded with a direction to obtain income certificate from Tehsildar – Tehsildar submitted a report that the income of the petitioner was Rs. 7,609/- as against Rs. 7,000/- shown in income certificate - the appointment of the petitioner was set aside – aggrieved from the order, present writ petition has been filed – held, that as per the eligibility criteria only such female candidates were eligible to apply for the post of anganwari worker, whose annual income did not exceed Rs.8,000/- per annum – the income of

the petitioner was Rs.7,609/- as per the inquiry report, which is less than Rs. 8,000/- prescribed in the Rules – Appellate Authority had wrongly set aside the appointment on the ground that the income certificate of the petitioner was false – Appellate Authority was required to see whether the income of the petitioner was as per the eligibility criteria or not- petition allowed and order of the Appellate Authority set aside.(Para-11 to 15)

For the petitioner:	Mr. Onkar Jairath, Advocate.
For the respondents:	Mr. V.S. Chauhan, Additional Advocate General and Mr. Vikram Thakur, Deputy Advocate General, for respondents No. 1 to 5. Mr. Sanjay Jaswal, Advocate, for respondent No. 6. Jagdish Chand, Naib Tehsildar, Kotta, District Kangra present in person alongwith record.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge(Oral)**:**

Brief facts necessary for the adjudication of this case are that the petitioner was initially appointed as Anganwadi Helper in Anganwadi Centre Muhal Nawan Shehar, Tehsil Jawali, District Kangra on 10.08.2007 and she joined her duties as such on 13.08.2007.

2. Feeling aggrieved by the said appointment of the petitioner, an appeal was filed by respondent No. 6 before the appellate authority so prescribed under the guidelines issued by the respondent-State for appointment of Anganwadi Workers/Anganwadi Helpers, which appeal was allowed by the appellate authority, i.e. Additional District Magistrate, Kangra.

3. Feeling aggrieved, the present petitioner preferred an appeal before the learned Divisional Commissioner, Kangra, who accepted the appeal on the ground that Additional District Magistrate, Kangra was not having jurisdiction to adjudicate upon the appeal which was filed by respondent No. 6 and the case was remanded back for adjudication by competent appellate authority. As in the interregnum, Additional District Magistrate was conferred the power to hear appeal in the matter of appointment of Anganwadi Worker/Helper, therefore, the said authority again heard the appeal, which was filed by respondent No. 6 against the appointment of the petitioner and allowed the same on the ground that the income of the petitioner was much more than reflected in the income certificate submitted by the petitioner. Order passed by the appellate authority was assailed by the petitioner before this Court by way of CWP No. 869/2010, which was disposed by this Court vide common judgement dated 17.05.2010 by setting aside the order passed by the appellate authority and remanding the case back to the first appellate authority to decide the same afresh after obtaining a report with regard to the income of the petitioner from the competent authority/Tehsildar concerned. Thereafter, a report was called from the Tehsildar concerned by the appellate authority with regard to the income certificate of the petitioner, who vide his report dated 01.08.2012 (Annexure P-6) reported that though the income certificate produced by the petitioner reflected the income of the family of the petitioner as Rs. 7000/- per annum, however, inquiry revealed that the income of the petitioner was Rs. 7609/-.

4. On the basis of the report so submitted by the Tehsildar, Additional District Magistrate, Kangra vide order dated 15.03.2013, set aside the appointment of the present petitioner by holding that report of Tehsildar, Jawali demonstrated that the present petitioner had obtained income certificate No. 869/MC, dated 15.05.2007 by concealing the actual income of her family. Appellate authority held that the appointment of Smt. Anju Bala was made on wrong and false income and accordingly while allowing the appeal so filed by respondent No. 6, the appointment of the present petitioner was set aside on the ground of "wrong income certificate".

5. Feeling aggrieved by the said order passed by the learned appellate authority, the petitioner has filed this writ petition.

6. It is not disputed by the learned counsel for the respondents that provisions of second appeal, as provided in the guidelines pertaining to appointment of Anganwadi Workers/Helpers have been done away with subsequently.

7. Mr. Onkar Jairath, learned counsel for the petitioner has argued that the impugned order is not sustainable in the eyes of law as perversity in the same is writ large. Mr. Jairath submitted that as per the eligibility criteria contemplated in the guidelines prevailing at the relevant time, a lady whose income did not exceed Rs. 8,000/- per annum, was eligible to be appointed either as Anganwadi Worker or as Anganwadi Helper. According to Mr. Jairath, appellate authority failed to appreciate that even if the report submitted by Tehsildar was to be taken on its face value, then also income of the petitioner was not exceeding the limit as was prescribed in the eligibility criteria. In other words, as per Mr. Jairath, irrespective of the fact as to whether the income of the petitioner was Rs. 7000/- as mentioned in the income certificate or Rs. 7609/ as reported by the Tehsildar, she was eligible for the post in issue, as her income admittedly was less than Rs. 8,000/-. On these grounds, Mr. Jairath submits that the order passed by the learned appellate authority on the face of it is perverse and is liable to be set aside.

8. Mr. Sanjay Jaswal, learned counsel appearing for respondent No. 6 supported the impugned order by submitting that as the income certificate submitted by the petitioner was found to be incorrect by Tehsildar, therefore, there was no error in the order passed by the appellate authority while setting aside the appointment of the petitioner. He submitted that what was to be seen was whether the certificate submitted by the petitioner was correct or incorrect and as Tehsildar had reported that the income certificate submitted by the petitioner was an act of concealment of income, therefore, even if the income of petitioner was less than Rs. 8,000/-, she was not having any right to be appointed as an Anganwadi Worker. Though a feeble attempt was made by Mr. Sanjay Jaswal to state that in fact the income of the petitioner was much more than Rs. 8,000/-, however, it is a matter of record that neither the report of Tehsildar has been challenged by respondent No. 6 nor any other material has been placed on record from which it can be inferred that the income of the petitioner was more than Rs. 8,000/-. Even otherwise, as per the guidelines, the authority who has to certify the annual income of the incumbent is an officer who is not below the rank of Tehsildar and in this case, the report of the Tehsildar is to the effect that the income of the petitioner was Rs. 7609/.

9. Mr. V.S. Chauhan, learned Additional Advocate General has fairly submitted that it is apparent and evident from the report filed by Tehsildar that the income of the petitioner was not in excess of what was contemplated in the guidelines, however, according to him, because there is an adjudication by the appellate authority in this regard, therefore, the State is bound by it.

10. I have heard the learned counsel for the parties and have also perused the record which was produced in the Court by Mr. Jagdish Chand, Naib Tehsildar, Kotta, District Kangra.

11. In my considered view, there is merit in the contention of Mr. Onkar Jairath, learned counsel for the petitioner. A perusal of the guidelines for appointment of Anganwadi Workers/Helpers under ICDS Scheme issued vide notification dated 11th April, 2007 demonstrates that as per the eligibility criteria mentioned therein, only such female candidates were eligible to apply for the post of Anganwadi Worker or Helper *inter alia* whose annual income did not exceed Rs. 8000/- per annum and which was to be certified as such/countersigned by an officer not below the rank of Tehsildar.

12. Income certificate on the basis of which the petitioner was initially appointed as Anganwadi Helper is on record as Annexure P-2. This income certificate is dated 17.05.2007 and the said certificate reflects that the income of Anju Bala, W/o Sh. Pradeep Kumar, i.e. the present petitioner does not exceed Rs. 7000/-. Relevant portion of the report which was submitted on the said income certificate by Tehsildar concerned on the directions so issued by appellate authority-

cum-Additional District Magistrate, Kangra in obedience to the judgment passed by this Court in CWP No. 869/2010, dated 17.05.2010, Tehsildar, Jawali reads as under:

> *"9. That on 12.06.2012, the complainant, again requested that she wants to record her statement. Her statement was recorded again in which she has stated that her own children are studying privately and her income is in the year 2007 was Rs.5000/- whereas Anju Bala's husband is working in Chamera Projext with HCC and earns Rs.140/- per day, but in the affidavit income was shown Rs.7000/- and her father-in-law draws pension, copy of statement annexed as Annexure XIV.*
>
> *Hence after going through the statements, Smt. Satya Devi, the complainant (Annexure –I) that husband of Smt. Anju Bala is working in Chamera Project and the admission of the fact by Smt. Anju Bala that her husband was working in a company, it is established that Pradeep Kumar husband of Smt. Anju Bala was working in a private company (Annexure –II) and children of Smt. Anju Bala are studying in a private school i.e. Our Own English School as per her subsequent statement, i.e. Annexure XII and detail of fee structure supplied by that school (Annexure-XIII). Sh. Pradeep Kumar (husband of Smt. Anju Bala was working in HCC company since 7-3-2007 and his Gross salary per month was Rs.3125/- as per the information supplied by the HCC company to the worthy Addl. District Magistrate Kangra at Dharamshala, photocopy of which is also attasched alongwith the report and his gross salary since March, 2007 till 15.7.2012 comes as under as per information supplied by the HCC company to Incharge, Police Post Kotla (Annexure-X) photocopy of which is supplied by the complainant:*
>
> *March, 2007 =2500*
>
> *April,2007 =3418*
>
> *Up to 15th May =1691 (i.e. date of issuing*
>
> *Total =7609 Rupees income certificate)*
>
> *Hence, total income of salary was 7609/- whereas the income certificate was issued for Rs.7000/- and afterward also he was working in that company, whereas affidavit which was of the father-in-law of Smt. Anju Bala (Annexure-IX), income from all sources has been mentioned Rs.7000/- per annum. So far as the income of Smt. Satya Devi is concerned, she was issued income certificate for Rs.5000/- on 8.5.2007 as per register of certificates maintained in this office at Sr. No. 429, photocopy of which is annexed as Annexure-XIV (a) & XIV (b). Smt. Anju Bala has not stated anything about the source of income of Smt. Satya Devi, not produced any documentary proof. Smt. Satya Devi in her statement has stated that her husband is a Tailor and earns about Rs.100/- per day and her children are studying in College at present. It means they were in school when income certificate was procured and as her family is living separately, the income of her father-in-law from the landed property might not has been included. In her statement recorded on 12.6.2012, she has also stated that her husband has small shop in a village and not getting regular sewing work. So, it is established that income of Smt. Anju Bala W/o Pradeep Kumar was more than Rs. 7000/- at the time of procuring the income certificate. Hence, the certificate issued to her vide No.869/MC dated 15.5.2007 is cancelled. A separate notice of cancellation of certificate is being sent to her and directed to deposit the original certificate in this office and not to use the same for any purpose. So far as certificate issued to Smt. Satya Devi is concerned, no substantive evidence of higher income then the certificate issued to her at that time is established or brought to the notice by the respondent.*
>
> *The report is hereby submitted for your kind perusal please."*

13. It is not disputed that the findings returned by Tehsildar, Jawali to the effect that the income of the petitioner was Rs. 7609/-has not been challenged by respondent No. 6. Without going into the correctness of the report so filed by Tehsildar, Jawali, one thing which is apparent from perusal of the same is that even Tehsildar, Jawali did not return finding to the effect that annual income of Anju Bala, i.e. the present petitioner was more than Rs. 8000/-. However, learned appellate authority while setting aside the appointment of the petitioner, lost sight of the fact that whether income of the petitioner was Rs. 7000/- or Rs. 7609/-, she was entitled for being appointed against the post of Anganwadi Helper, as her income as determined by Tehsildar was also within eligibility criteria contemplated in the guidelines. Learned appellate authority set aside the appointment of the present petitioner on the ground that Anju Bala had obtained appointment on the basis of wrong and false income certificate, which finding in my considered view, is not sustainable in the eyes of law, because after report was submitted by Tehsildar, what was to be ascertained by the learned appellate authority was as to whether the income certificate initially submitted by the petitioner was correct and if the same was not correct, then what as per the authority concerned, i.e. Tehsildar concerned was the income of the petitioner. Had the appellate authority come to the conclusion that as per report of Tehsildar, the income of the petitioner was in excess of the eligibility criteria contemplated in the guidelines, then the appellate authority would have had been justified in setting aside the appointment of the petitioner. However, in view of the fact that even as per the report of Tehsildar, the income of the petitioner was not in excess of Rs. 8000/-, learned appellate authority erred in setting aside the appointment of

the petitioner on the reasonings as are contained in the said order. Therefore, impugned order passed by Additional District Magistrate, Kangra, dated 15.03.2013 is not sustainable in law.

14. As this Court has come to the conclusion that the petitioner was still eligible to be considered for being appointed as an Anganwadi Helper, even if her income was to be taken as was determined by Tehsildar vide report dated 01.08.2012 (Annexure P-6), therefore, there is no need to quash Annexure P-6 and Annexure P-10, order dated 16.07.2013 passed in appeal by Sub Divisional Officer (Civil) Jawali, District Kangra, wherein the report of Tehsildar was challenged by the present petitioner.

15. In view of the findings returned above, this writ petition is allowed. Order passed by Additional District Magistrate, Kangra in Case No. 12/2007, dated 15.03.2013 (Annexure P-8) is quashed and set aside and the respondent-State is directed to allow the petitioner to serve as Anganwadi Helper at Anganwadi Centre, Muhal Nawan Shehar, Tehsil Jawali, District Kangra. Miscellaneous applications, if any, stand disposed of. No order as to costs.

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

M/S Oswal Alloys Private Limited .....Petitioner.

Versus

M/S Gilvert Ispat Private Limited and others .....Respondents.

Company Petition No.15 of 2014.
Judgment reserved on : 04.01.2017.
Date of decision: 6th January, 2017.

Companies Act, 1956- Section 433, 434 and 439- Petitioner is a trader trading in all types of H.C. Ferro, Manganese Silicone and Metal Touch Slag etc. and supplies the material to customers all over the country – the respondent company had requested the petitioner to supply the material as per the business needs – the material was supplied as per requirement – payments were made initially but the respondent company defaulted in the payment – requests were made to make the payment repeatedly but in vain – an amount of Rs. 2,03,67,020/- was outstanding towards the payment of bill and an amount of Rs.84,50,360/- was payable as interest – hence, a

petition for winding up the company was filed – held, that the documents placed on record clearly prove that respondent/company has failed to make the payment – no reply was filed to the petition – the respondent company is not only closed but has lost its financial substratum – hence, order issued to wind up the respondent/company.(Para-10 to 14)

Cases referred:

Tata Iron and Steel Co. vs. Micro Forge (India) Ltd. (2001) 104 Comp. Cases 533 (Guj.)
Soni Gulati & Co. vs. JHS Svendgaard Laboratories Limited, I L R 2015 (III) HP 183
Amalgamated Commercial Traders (P) Ltd. vs. A.C.K. Krishnaswami, 1965 (35) Company Cases 456
Madhusudan Gordhandas & Co. vs. Madhu Woollen Industries (P) Ltd. 1971(3) SCC 632,
Pradeshiya Industrial and Investment Corporation of Uttar Pradesh vs. North India Petro Chemical and Another 1994 (79) Company Cases 835
Mediquip Systems (P) Ltd. vs. Proxima Medical System GmbH 2005 (7) SCC 42
Vijay Industries vs. NATL Technologies Limited 2009 (3) SCC 527
IBA Health (India) Private Limited vs. INFO-Drive Systems SDN. BHD. (2010) 10 SCC 553

For the Petitioner : Mr.Rahul Mahajan, Advocate.
For the Respondents : Mr.Ajay Vaidya, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The present petition has been preferred by the petitioner under Sections 433, 434 and 439 of the Companies Act, 1956 (for short the 'Act') for appropriate orders of winding up of 'M/S Gilvert Ispat Private Limited'.

2. It is averred that the petitioner-company is a trader trading in all types of H.C. Ferro, Manganese, Silicon, Manganese and Metal Touch slag etc. (hereafter referred to as the material) and supplies the ordered material all over the country to its customers/clients, who purchase the material as per their requirements and needs. It is further averred that 'M/S Gilvert Ispat' was initially a registered partnership firm, however, with effect from 27.08.2013 has been registered as a Private Limited Company under the name and style of 'M/S Gilvert Ispat Private Limited' having its registered office at Village Buranwala, Post Office Barotiwala, Tehsil Kasauli, District Solan,H.P. Mr.Umesh Moudgil and Mr.Abhin Moudgil are the Directors of the respondent-company and are managing its day to day affairs and are thus responsible for the business and operation of the respondent-company. The Certificate of Incorporation, Memorandum and Article of Association and details qua the company and its Directors have been annexed as Annexure PB with the petition.

3. The respondent-company while it was a partnership firm under the name and style of 'M/S Gilvert Ispat' before being converted into a Private Limited Company from registered partnership firm had approached the petitioner-company requesting it to supply the material i.e. H.C.Ferro, Manganese, Silicon, Manganese and Metal Touch slag etc. as per its business need. The petitioner-company after negotiations of rates, terms and conditions of payment etc. supplied various materials to the respondent-company. Invoices were raised in respect of the materials supplied from time to time. Though the respondents, initially, made some payments on time in respect of the materials so supplied by the petitioner-company, however, subsequently delay started occurring in making payments and after sometime the payments were completely stopped. The respondent-company was asked several times to make the payments of the outstanding dues in respect of the material supplied vide letters and e-mails were also sent from time to time and this process continued even after the registered partnership firm had been converted into a Private Limited Company, but to no avail.

4. Resultantly, on 07.09.2012, an amount of Rs. 2,03,67,020/- was still outstanding towards respondent No.1. The petitioner-company had supplied these materials from time to time and have been duly entered in their books of accounts and the audited balance sheets for the years ending 31.03.2011, 31.03.2012 and 31.03.2013 have been annexed as Annexure PE wherein the name of respondent-company has been shown as a sundry debtor. Further, the copies of C-Form of declaration issued by the Central Sales Tax have also been annexed as Annexure PF.

5. It is lastly averred that despite repeated correspondences, the respondent-company failed to make the outstanding payment constraining the petitioner-company to issue a legal notice under Sections 433 and 434 of the Act on 05.06.2014 calling upon it to pay an amount of Rs. 2,03,67,020/- towards the cost of material supplied by the petitioner-company and in addition thereto to pay an amount of Rs. 84,50,360/- as interest from 07.09.2012 till 31.05.2014. The notice was sent through registered post, however, the same was received back with the remarks "*refused to receive*".

6. Notice of the petition was issued to the respondents and repeatedly time was sought to file reply and this continued from 11.05.2015 till 13.10.2015 when this Court though extended the time to file reply by two weeks, but at the same time imposed costs of Rs. 3,000/-. However, even this order was not complied with as the respondents till date have not chosen to file reply or to deposit the costs.

7. In the meanwhile, the petitioner-company filed an application i.e. Company Application No.22 of 2016 under Rule 99 of the Companies (Court) Rules, 1959 (for short 'Rules') for advertising the petition in the manner as provided under Rule 24 of the Rules. This application came up for consideration and this Court on 08.12.2015 passed the following orders:-

> *"Notice of winding up petition filed under sections 433 and 439 read with section 434 of the Company Act, 1956 before hearing be advertised by the petitioner as per rule 99 of the Company Court Rules, 1959, 14 days before the next date of hearing in E-gazette, English news paper* ***The Tribune*** *and Hindi News paper* ***Dainik Bhaskar****. Notice of advertisement be published in E-gazette on payment of necessary charges."*

8. The notice as per Rule-99 was accordingly published in e-gazette and in the issue of English daily 'The Tribune' and Hindi daily 'Dainik Bhaskar', however, no one including creditors, shareholders or any other person including general public came forward to oppose this petition. Despite this, the respondent-company was again afforded an opportunity for filing objections within a period of three weeks, as would be clear from the order passed by this Court on 25.05.2016 which reads thus:-

> *"Notice as per Rule 99 stands published in e-gazette and in the issue of English daily 'The Tribune' and Hindi daily 'Dainik Bhaskar', however, no one including creditor, share holder or any other person including general public has come forward nor put in appearance. Objections, if any, be filed by the respondent-Company within three weeks. List on* ***19th July, 2016****. Publication charges Rs. 54/- in short be deposited in the Registry in the meanwhile for onward payment to the agency outsourced for the purpose."*

9. As already observed above, the respondents till date have neither filed reply nor objections and when the petition came up for consideration on 30.11.2016, Mr.Umesh Moudgil, respondent No.2, appeared before the Court and stated that he will make all endeavours to have the matter settled with the petitioner and with great reluctance the case was adjourned to 04.01.2017. When the case was taken up today for consideration, it was represented by learned counsel for the petitioner that it is only interested in its money and the respondents should, therefore, come out with concrete proposal as to how and in what manner they would liquidate the outstanding amount. However, respondent No.2 was not in a position to give any sort of undertaking, leaving this Court with no other option, but to hear the petition on merits.

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

10. Before adverting to the merits of the case, it would be necessary to delineate on some of the factors to be kept in mind before reaching the conclusion in a winding up petition and the same have been carefully articulated by the Hon'ble Division Bench of the Gujarat High Court in ***Tata Iron and Steel Co.*** *vs.* ***Micro Forge (India) Ltd. (2001) 104 Comp. Cases 533 (Guj.)*** which are as under:-

> "*Certain important chronicles and contours to be kept in the mental radar, before reaching the conclusion in a winding up petition can be articulated as under :*
>
> *(1) The remedy under section 433 in general and under clause (e) in particular is not a matter of right; as such, and it is the discretion of the company court. It does not confer any right on any person to seek order that the company should be wound up. It is a provision empowering the court by a statutory provision to pass an order of winding up in an appropriate case.*
>
> *(2) Merely because any one of the circumstances enumerated in section 433 of the Companies Act exists, the court is not bound to order winding up of the company. Nobody can aspire to wind up the company as a matter of course. The court has wide power and discretion. In this connection, inability to pay debts is required to be judged from various sets of facts and circumstances. It may also be stated that inability to pay debts in all cases, ipso facto, could not be construed as an appropriate case for winding up.*
>
> *(3) A debt is money which is payable or will be payable in future by reason of a person's obligation. The expression "debt" would refer to liability to pay and it rests on certain contingencies, conditions and causalities. Even if the debt is proved and even if the inability to pay the debt is also shown, it is not a launching pad, in all cases, for a successful winding up order. Inability may arise for a variety of reasons and the court is obliged to consider whether the inability is the outcome of any deliberate or designed action or mere temporary shock and effect of economy and market. In a given case, it may happen that a party may become unable to pay its debts for a while, but that by itself is not a criterion for exercise of the power to wind up, ipso facto.*
>
> *(4) It is necessary for the company court to consider the financial status, strength and substratum of the company, in the overall context. It is possible, at times, that there may be a cash crunch. It may be also, possible, at times, that there is temporary cash crisis despite high sales and heavy turnover and, therefore, in such a situation, mere disability or only on the ground of inability to pay would not constitute a ground empowering the court to wind up the company.*
>
> *(5) If the company is an ongoing concern having regular business and employment of employees, the court cannot remain oblivious to this aspect. The effect of winding up would be of putting an end to the business or an industry or an entrepreneurship and, in turn, resulting in loss of employment to several employees and loss of production and effect on the larger interest of the society.*
>
> *(6) Even dividend declared by the company regularly and having profit in the light of the profit and loss account, though temporarily, there may be inability to pay the debt or in the case of any eventuality, the company is unable to make the payment of dues and that by itself could not be construed as a ground to wind it up.*

(7) Winding up of a company, as such, is nothing but a commercial death or insolvency and, therefore, the company court is obliged to take into consideration not only the temporary inability, or disability to make the payment of debts, but the entire status and position of the company in the market.

(8) When grounds on which the winding up order can be denied, upon an evaluation of the facts of the case, after admission, exist from the record already placed before the court, it would be a sound exercise of discretion to reject the petition instead of admitting it. This view is very much celebrated.

(9) Inability to pay debts in terms of section 433(e) read with section 434(1)(a), demand of the debt would raise a presumption as to inability to pay its debts. But such a presumption is rebuttable. Such a presumption may be rebutted on existing material and what evidence is sufficient depends on the facts and circumstances of the case.

(10) If the company has shown considerable growth in a reasonable span and is a growth oriented enterprise, even in a case of temporary inability would not be sufficient to drive it to winding up.

(11) Though, ordinarily, an unpaid creditor may aspire for an order of winding up, the "ex debito justitiae" rule is not of inflexible mandate, but is, as such a matter of discretion of the court.

(12) Section 433 is also indicative of the fact that even if one or more grounds mentioned in section 433 exist, it is not obligatory for the court to make an order of winding up. The court has discretionary power. The court must in each case exercise its discretion in deciding whether in the circumstances of the case, it would be in the interest of justice to wind up the company. It is a well known rule of prudence that even in a case where indebtedness to the petitioning person is undisputed, the court does not pass an order for winding up where it is satisfied that it would not be in the larger interest of justice to wind up the company.

(13) It is also well settled that a winding up order shall not be made on a creditor's petition, if it would not benefit him or the company's creditors in general.

(14) The court is also obliged to consider that it would be in the interest of justice to give the company some time to come out of the momentary financial crisis or any other temporary difficulty as winding up is a measure of last resort.

(15) Winding up course cannot be adopted as a recourse to recovery of the debt.

(16) The court must bear in mind one more celebrated principle and consider whether the company has reached a stage where it is obviously and plainly and commercially insolvent, that is to say, that its assets are such and its existing liabilities are such as to make the court feel clearly satisfied that current assets would be insufficient to meet the current liabilities, along with other principles.

(17) It is also necessary to consider whether the respondent-company has become defunct or has closed its business, for quite some time, whether it is commercially insolvent. For the purpose of finding commercial insolvency, a mere look into the financial data is relevant to examine about its soundness. In all matters relating to winding up, the court may have regard to the wishes of the creditors and contributories and may, if

necessary, ascertain their wishes appropriately. If the company is solvent, the wishes of the contributories would carry more weight as they are persons, mainly, interested in the assets.

(18) The element of public policy in regard to commercial morality has, likewise, to be taken into account before determining the winding up issue. The court has also to consider the purpose and policy behind sections 443 and 557 of the Companies Act.

(19) Winding up is the last thing the court would do and not the first thing to do having regard to its impact and consequences. Winding up of a company would ensue:

(a) closing down of a company which is engaged in production or manufacture or which provides some services;

(b) it would throw out of employment numerous persons and result in gross hardship to the members of families of the employees;

(c) loss of revenue to the State by way of collection of taxes which otherwise should have been collected, on account of customs, excise duties, sales tax, income-tax, etc.;

(d) scarcity of goods and diminishing of employment opportunities

(20) A winding up petition has to be submitted in the prescribed form highlighting all the facts and emphasising the inability of the company to pay its debts. The form prescribed under the Companies (Court) Rules, clearly, indicates that the petitioner should, provide all the necessary material particulars. The petitioner is obliged to show that the financial status or the monetary substratum or the commercial viability of the company has gone so low and down that winding up is obviously, and evidently, unavoidable.

(21) It is a settled proposition of law that a winding up petition is not a legitimate means of seeking to enforce the payment of a debt which is disputed by the company, bona fide. A winding up petition ought not to be aimed at pressurising the company to pay the money. Such an attempt would be nothing but tantamount to blackmailing or stigmatizing the concerned company by abusing the process of the court.

(22) A winding up petition is not an appropriate mode enforcing bona fide disputed debts and it is nothing but misuse and abuse of the process of the court.

(23) A winding up petition is not an alternative form for resolving the debt dispute. In certain cases disputes are such that they are fit for resolving through the civil court rather than through the company court.

(24) What is bona fide and what is not is a question of fact. The expression "bona fide" would mean genuine, in good faith and when a dispute is based on substantial grounds or when a defence is probable and with some substance, it is a bona fide dispute. It must be strictly noted that a winding up petition is not an alternative to a civil suit."

11. I myself in ***Soni Gulati & Co. vs. JHS Svendgaard Laboratories Limited, Company Petition No.8 of 2009,*** decided on 07.05.2015, after taking into consideration the comprehensive law laid down by the Hon'ble Supreme Court in (i) ***Amalgamated Commercial Traders (P) Ltd.*** *vs.* ***A.C.K. Krishnaswami*** *reported in* ***1965 (35) Company Cases 456****, (ii)* ***Madhusudan Gordhandas & Co.*** *vs****. Madhu Woollen Industries (P) Ltd.*** *reported in* ***1971(3) SCC 632,*** *(iii)* ***Pradeshiya Industrial and Investment Corporation of Uttar Pradesh*** *vs.* ***North India Petro Chemical and Another*** *reported in* ***1994 (79) Company Cases 835,*** *(iv)* ***Mediquip***

Systems (P) Ltd. *vs.* ***Proxima Medical System GmbH*** *reported in* ***2005 (7) SCC 42****, (v)* ***Vijay Industries*** *vs.* ***NATL Technologies Limited*** *reported in* ***2009 (3) SCC 527****, (vi)* ***IBA Health (India) Private Limited*** *vs.* ***INFO-Drive Systems SDN. BHD. (2010) 10 SCC 553*****,** deduced the following broad principles which are required to be borne in mind while adjudicating a petition for winding up:-

> *1. If the debt is bonafide disputed and the defense is a substantial one, the Court will not wind up the company. Conversely, if the plea of denial of debit is moonshine or a cloak, spurious, speculative, illusory or misconceived, the Court can exercise the discretion to order the company to be wound up.*
>
> *2. A petition presented ostensibly for winding up order, but in reality to exert pressure to pay the bonafide disputed debt is liable to be dismissed.*
>
> *3. Solvency is not a stand alone ground. It is relevant to test whether denial of debt is bonafide.*
>
> *4. Where the debt is undisputed and the company does not choose to pay the particular debt, its defence that it has the ability to pay the debt will not be acted upon by the Court.*
>
> *5. Where there is no dispute regarding the liability, but the dispute is confined only to the exact amount of the debt, the Court will make the winding up order.*
>
> *6. An order to wind up a company is discretionary. Even in a case where the companys liability to pay the debt was proved, order to wind up the company is not automatic. The Court will consider the wishes of shareholders and creditors and it may attach greater weight to the views of the creditors.*
>
> *7. A winding up order will not be made on a creditors petition if it would not benefit him or the companys creditors generally and the grounds furnished by the creditors opposing winding up will have an impact on the reasonableness of the case.*

12. Tested on the touchstone of the exposition of law as referred to above, it would be noticed that the petitioner-company has placed on record plethora of documents including balance-sheets, invoices etc. which prove beyond reasonable doubt that the petitioner-company has supplied the material from time to time but the respondents have failed to make full payment and an amount of Rs. 2,03,67,020/- as principal is still due towards the petitioner and is, therefore, liable to pay the interest thereupon. On the other hand, the respondent-company has neither filed any reply to the statutory notice nor come out with a defence in reply to the petition itself. The only defence put-forth by the respondents during the course of hearing is that they are negotiating with the Punjab National Bank to arrive at one time settlement and as and when such negotiation is finalized, then on that stage, it would be clear that as to where the respondents stand. Obviously, this defence of the respondents cannot be accepted.

13. Thus, it appears from the records that the respondent-company is not only closed, but has lost its financial substratum and the same also leads to only one conclusion that the respondent-company is not in a position to pay debts to its creditors.

14. Considering the aforesaid facts and circumstances, it would be just and proper to direct the respondent-company to be wound up. Accordingly, the respondent-company i.e. 'M/S Gilvert Ispat Private Limited' is ordered to be wound up. The Official Liquidator attached to this Court is appointed as Official Liquidator of the respondent-company and is directed to do the needful for winding up the respondent-company as provided under the Act.

15. This petition is allowed accordingly.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Rajeev .....Petitioner.

Vs.

Divisional Forest Officer, Rohru & Ors. .....Respondents.

CMPMO No. 337 of 2016
Reserved on 26.12.2016
Decided on: 09.01.2017

Industrial Disputes Act, 1947- Section 11(3)(b)- A reference petition was pending before the Labour Court – an application for producing the complete record was filed, which was dismissed – held, that the documents were relevant to determine whether the applicant was employed by the respondents and whether his services were terminated in accordance with law – the Labour Court had wrongly dismissed the application – petition allowed and respondent directed to produce the documents before the Labour Court. (Para-7 to 10)

For the petitioner: Mr. Bhag Chand Sharma, Advocate.

For the respondents: Mr. Pushpinder Jaswal, Deputy Advocate General with Mr. Rajat Chauhan, Law Officer.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioner under Article 227 of the Constitution of India, assailing the order dated 22.04.2016, passed by the learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla, (hereinafter to be called as ("the Tribunal") in claim petition Reference No. 32 of 2015, wherein the application of the petitioner, under Section 11, sub-Section (3), clause (b) of the Industrial Disputes Act, 1947, read with Order XI, Rules 12 & 14 of the Code of Civil Procedure (hereinafter to be called as "the Code") was dismissed.

2. Briefly stating facts giving rise to the present petition are that the petitioner was engaged by the Forest Department in Bashla Range of Forest Division Rohru, on muster roll basis in the year January, 2009. The work assigned to him was of a nature i.e., growing of nursery, plantation, looking after of nursery plants, protection of forest from fire, seized timber watching, etc. The petitioner worked for 285 days during the year 2009, though the petitioner was engaged irregularly, but he was not permitted to complete his 240 days in a calendar year, in order to defeat his claim for continuous service or regularization. On April, 2011, he was engaged casually on bill/payment basis, besides him there are some other persons also, who were engaged casually on payment/bill basis and no record of such persons work is being maintained by the respondents. So as to evade petitioner from completing 240 days in a calendar year, no proper record of his work is being maintained by the respondents. Thus, the petitioner maintained an application No. 37 of 2016, which was dismissed, vide order dated 22.04.2016. Hence the present petition.

3. By filing reply, respondents resisted and contested the claim of the petitioner, wherein preliminary objection qua maintainability was taken. On merits, it was averred in the reply that the petitioner willingly worked with the Department on bill/payment basis and he never represented nor objected the same. The present petition was filed by the petitioner only to create harassment, hence the same deserves to be dismissed.

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

5. Mr. B.C. Sharma, learned counsel for the petitioner has argued that the petition may be allowed and respondents be directed to produce the complete record before the learned Tribunal. On the other hand, Mr. Pushpinder Jaswal, learned Deputy Advocate General, appearing on behalf of the respondents has argued that there is no necessity to produce the record, as the same is neither material nor required for the adjudication of the case and prayed that the present petition may be dismissed.

6. To appreciate the arguments of the learned counsel for the parties, I have gone through the records in detail.

7. It is found that the learned Tribunal below has not allowed to produce the documents, as they were not relevant, however some of the documents are relevant to prove the fact that the petitioner was not allowed to work for 240 days in a calendar year and his termination was against the Rules.

8. After going through the documents which the petitioner has sought for, and reference which is to be answered by the learned Tribunal below, I had given a deep thought and finds that as the petitioner has to prove that he was employed by the respondents and was terminated despite the fact that there is a work, so some of the documents, as mentioned in the application, seems to be relevant and if allowed to be produced on record at the instance of the petitioner, the same will assist the Court to adjudicate the matter. The following documents are mentioned as under:

(i) ***Order/letter with respect to deviation from maintaining the muster rolls to bills from April, 2011, which is against the provisions of Section 25-D of the Industrial Disputes Act.***

(ii) ***Records showing details of the works which was done during the whole year within the Forest Division Rohru and Forest Range Bashla, viz. growing of nursery, watering of nursery, gardening of the nursery and planting of nursery, fencing, timber watching, fire watching and other forest patrolling, construction of forest roads/paths etc.***

(iii) ***Record relating to the consent given by the petitioner/claimant to work on bill basis instead of muster rolls as averred in the written statement/reply. Otherwise, under Section 25-D of the Act, it is the statutory duty of the employer to maintain muster rolls of the workers.***

(iv) ***Letter No. 553, dated 29.04.2014, written by respondent No. 1 (Divisional Forest Officer, Rohru) to the Labour-cum-Conciliation Officer, Rampur.***

9. Accordingly, this Court finds that these documents are relevant as per this Court, as they will help the Tribunal to adjudicate the lis properly. Further the respondents has no privilege over these documents, as they are public documents and production of these documents will always be helpful for appropriate adjudication of the case. So the present petition is required to be allowed, in order to come to the just conclusion, while adjudicating of the dispute of the petitioner before learned Tribunal.

10. In these circumstances, the present petition is allowed and the respondents are directed to produce the abovementioned documents before the learned Tribunal and in case, so requires, the copies of the said documents be supplied to the petitioner, as per Rules.

11. No order as to costs. The petition stands disposed of, so also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Rajesh Sharma. .....Petitioner.

Versus

State of Himachal Pradesh & Ors. .....Respondents.

CWP No. 3717 of 2014
Reserved on: 27.12.2016
Decided on: 09.01.2017

Constitution of India, 1950- Article 226- D and P adopted S vide an adoption deed – the correction was not made in the revenue record, on which the petitioner filed a writ petition, which was disposed with a direction to decide the representation of the petitioner – the representation was rejected – aggrieved from the order, present writ petition was filed- held, that adoption was witnessed by a duly executed adoption deed – adoption was legal, valid and complete in all respects – it is not permissible for the authority to not recognize the adoption – petition allowed and direction issued to make correction in the revenue record. (Para-5 to 11)

For the petitioner : Mr. Naveen K. Dass, Advocate.

For the respondents : Mr. Pushpinder Jaswal, Deputy Advocate General with Mr. Rajat Chauhan, Law Officer, for respondents No. 1 & 2.
Ms. Kamlesh Shandil, Advocate, for respondents No. 3 & 4.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present writ petition is maintained by the petitioner under Article 226 of the Constitution of India for issuing following directions:

> "(i) That a writ petition in the nature of certiorari may very kindly be issued and the decision of the respondents, in compliance to the direction of this Hon'ble Court in CWP No. 6503 of 2013 and in COPC No. 4299 of 2013, vide annexure P-8 may very kindly be quashed and set aside.
>
> (ii) That writ in the nature of mandamus may very kindly be issued, directing the respondents to enter the name of Master Sagar Sharma on the Parivar Register of late Sh. Deep Ram Sharma and late Smt. Phulma Devi, and also on the Panchayat records of the Thadi Panchayat."

2. Briefly stating facts, as per the petitioner, giving rise to the present petition are that late Sh. Deep Ram Sharma and late Smt. Phulma Devi, both residents of village Bathoon, Pargana Khushalla Panchayat Thadi, P.O. Shoghi, Tehsil & District Shimla, H.P., adopted master Sagar Sharma, vide Adoption Deed ***(Annexure P-2)***, duly prepared, signed by late Sh. Deep Ram Sharma and by putting left thumb impression of late Smt. Phulma Devi, the same was also signed by the biological parents namely Sh. Rajesh Kumar Sharma and Smt. Sonia Sharma in presence of two witnesses and sub Registrar, Shimla (Rural), vide Deed No. 294/2002. However, the representations, for correction of the revenue record were made by the petitioner before the President Gram Panchayat Thadi, SDM (Rural) and Deputy Commissioner, but the same was not done, thus the petitioner preferred a civil writ petition No. 6503 of 2013 before this Court and the same was disposed of on 09.09.2013, directing the respondents No. 1 & 2 to decide the representation of the petitioner within two months. Even after the lapse of two months, the judgment/order dated 09.09.2013 was not complied with by the respondents, so the petitioner filed a contempt petition, i.e. COPC No. 4299 of 2013 and the same was disposed of on 03.12.2013, directing the respondents to comply with the earlier judgment/order dated 09.09.2013, passed in CWP No. 6503 of 2013, within a period of four weeks. Pursuant to the

directions of this Court, the representations of the petitioner was listed before the learned Principal Secretary, Panchayati Raj to the Government of Himachal Pradesh, Shimla-2 and the same was rejected/dismissed vide order dated 27.12.2013, mentioning therein that the name of master Sagar Sharma cannot be entered in the Parivar Register of late Sh. Deep Ram Sharma and late Smt. Phulma Devi, as it was in contrary to the provisions of H.P. Panchayati Raj (General) Rules 1997 "Rule 21" India. It was also mentioned in the order that the Gram Sabha refuses to enter the name of master Sagar Sharma on Panchayat records and Parivar Register, as there is already a Will regarding the said property, in the name of Sh. Heera Nand, S/o Sewakia, R/o Village Bauthian, Tehsil & District Shimla, H.P., copy of revenue record is annexed herewith as Annexure P-6. The petitioner further prays that the Adoption Deed was duly prepared in accordance with the provisions of the Hindu Adoption and Maintenance Act, 1956, therefore master Sagar Sharma, being a legal heir, has a right to got registered in the Parivar Register also in the Panchayat records of late Sh. Deep Ram Sharma and Smt. Phulma Devi. Hence the present writ petition.

3. Respondents No. 1 & 2 by way of filing reply to the writ petition specifically averred therein that in compliance to the orders of this Court, the representation of the petitioner was decided on 27.12.2013, wherein detailed order regarding each and every aspect, which was within the jurisdiction of respondent No. 1 was passed. Hence the present writ petition is nothing but, reiteration of the same facts. On merits, respondents averred that the adoption was made on 16.12.2002, the adoptive parents of master Sagar Sharma, i.e, Deep Ram Sharma, expired on 08.03.2005 and Phulma Devi, expired on 24.11.2013, however the name of master Sagar Sharma not found mentioned anywhere in the Panchayat records, including Parivar Register. The petitioner was required to take declaration from Civil Court whether the deed is genuine document, but no steps in this regard was taken by the petitioner during 11 years. Legally the entry was required to be made within 21 days from the date of Adoption, thus the order dated 27.12.2013 is correct and the present petition is deserves to be dismissed.

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

5. As far as the adoption of minor Master Sagar Sharma by the adoptive parents, from the biological parents is concerned, the same was made by registered Deed, copy of which is annexed herewith as Annexure P-2. This Deed was duly signed by the biological parents, as well as the adoptive parents. The ceremonies for giving and taking in adoption are properly performed according to the law. It has also come in the Adoption Deed that the second party (adoptive parents), will look-after, manage and maintain Master Sagar Sharma as their own son and they will give him their name and he is a legal heir of the second party. Further it has also been mentioned in the Adoption Deed that Sagar Sharma has no right in the property of first party (biological parents), as he is entitled in the property of second party and in future any child borne out from the wedlock of the second party, the second party will not disinherit the adopted child from their properties.

6. The Adoption Deed was appropriately executed in presence of the witnesses, scribed by Deed Writer and registered with the Registrar (Rural), Shimla. Now, as far as adoption is concerned, Sagar Sharma was born on 10.03.1997, at the time of adoption, he was five years old. The adoption of a Hindu is to be made by the Hindus and child can be given in adoption by a Hindu, as per Hindu Adoptions and Maintenance Act, 1956 (hereinafter to be called as "the Act"). The Act was framed, in order to legalize the right of the child which is reproduced as under:

> ***"Adoption is the admission of a stranger by birth to the privileges of a child by a legally recognized form of affiliation. During the British rule the Traditional Hindu Law of adoption with its religious basis and sacramental elements remained in force throughout the country."***
>
> Section 5 of the Act provides as under:

"(i) No adoption shall be made after the commencement of this Act by or to a Hindu expect in accordance with the provisions contained in this Chapter, and any adoption made in contravention of the said provisions shall be void.

(ii) An adoption which is void shall neither create any rights in the adoptive family in favour of any person which he or she could not have acquired expect by reason of the adoption, nor destroy the rights of any person in the family of his or her birth."

Section 6 of the Act provides requisites of a valid adoption, which is reproduced as under:

(i) The person adopting has the capacity, and also the right, to take in adoption;

(ii) The person giving in adoption has the capacity to do so;

(iii) The person adopted is capable of being taken in adoption;

(iv) The adoption is made in compliance with the other conditions mentioned in this Chapter.

Section 7 of the Act provides capacity of a male Hindu to take in adoption, which is reproduced as under:

"Any made Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption:

Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and family renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

Explanation – *If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso."*

Section 9 of the Act provides persons capable of giving in adoption, which is reproduced as under:

(i) No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption.

(ii) Subject to the provisions of sub-Section (4), the father or the mother, if alive, shall have equal right to give a son or daughter in adoption:

Provided that such right shall not be exercised by either of them save with the consent of the other unless one of them has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

(iii) Where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a court of competent jurisdiction to be a unsound mind or where the parentage of the child is not known, the guardian of the child may give the child in adoption with the previous permission of the court to any person including the guardian himself.

(iv) Before granting permission to a guardian under sub-Section (4), the court shall be satisfied that the adoption will be for the welfare of the child, due consideration being for this purpose given to the

wishes of the child having regard to the age and understanding of the child and that the applicant for permission has not received or agreed to receive and that no person has made or given or agreed to make or give to the applicant any payment or reward in consideration of the adoption except such as the court may sanction.

Explanation – *For the purposes of this section-*

(i) The expressions "father" and "mother" do not include an adoptive father and an adoptive mother.

Section 10 of the Act provides persons who may be adoptive, which is reproduced as under:

(i) He or she is a Hindu;

(ii) He or she has not already been adopted;

(iii) He or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption;

(iv) He or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.

7. It is clear from the Adoption Deed that the adoption was made by both the adoptive parents and they were Hindu. Biological parents, who gave their son in adoption have executed the Deed with their joint consent, they were having a capacity to give in adoption and further they were Hindus, the parents, who adopted Master Sagar Sharma, were also Hindus and adopted the child below the age of fifteen years. The child was unmarried and eligible to be adopted in each and every aspect.

8. Adoption Deed also contains the photographs of the adoptive, as well as, his biological parents. There is no dispute that the adoption was legal, valid and compete in all respects and executed on 16.12.2002. When the adoption is there, it is valid for all intents and purposes. No authority, law, enforcing agency has a right in these circumstances to say that this adoption cannot be recognized. The procedurel laws i.e, the Rule and Regulations to reflect the adoption in the records of Panchayat, revenue records is the procedure to record the adoption. Mere existence of any Rule showing that the adoption is to be recorded in such and such manner, could not take away the right of the parties which accrued to them, as of adoption.

9. It is made clear that adoption is a fact, which has happened, meaning thereby that since 16.12.2002, Master Sagar Sharma becomes the son of adoptive parents, i.e, late Sh. Deep Ram Sharma and late Smt. Phulma Devi for all intents and purposes. In these circumstances, the act of the respondents to not recognizing this adoption is wholly arbitrary, capricious, beyond the confines of legitimacy, required to be corrected by issuing appropriate directions to them. So, present writ petition is allowed and the respondents are directed to treat Master Sagar Sharma, as a son of late Sh. Deep Ram Sharma and late Smt. Phulma Devi, for all intents and purposes.

10. Respondents/State is directed to correct the records, as and where so required, and complete the records of past, future and correct the same, wheresoever it is required.

11. The writ petition is accordingly disposed of with costs of Rs.10,000/-(Rupees ten thousand) in favour of the petitioner and against the respondents.

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

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

Manohar Lal. ...Appellant.

Versus

H.P. Vidhan Sabha and others. ...Respondents.

LPA No. 69/2015
Reserved on: 27.12.2016
Decided on: January 10, 2017

Constitution of India, 1950- Article 226- Respondent No.1 created an additional post of Senior Assistant –Departmental Promotion Committee was held and respondent No.3 was promoted – the petitioner challenged the appointment on the ground that post was reserved for Scheduled Caste candidate and respondent No.3 belongs to General Category and could not have been promoted on the post- the Writ Court dismissed the writ petition – held, that the promotion was made in the year 2007 and the writ petition was filed in the year 2011 – writ petition was clearly barred by delay and laches and ought to have been dismissed on this ground alone – a person aggrieved by the promotion should approach the Court within six months or one year at the most- the Court should not entertain stale petitions in exercise of writ jurisdiction– even on merits, the State Government had taken a conscious decision not to provide the reservation in case of promotion – therefore, the writ petition was liable to be dismissed on this ground as well – appeal dismissed. (Para- 6 to 22)

Cases referred:

P.S. Sadasivaswamy vs. State of Tamil Nadu, AIR 1974 SC 2271
S.I. Paras Kumar and others vs. S.I. Ram Charan and others, (2004) 6 SCC 88
Tridip Kumar Dingal and others vs. State of West Bengal and others, (2009) 1 SCC 768
Shiba Shankar Mohapatra and others vs. State of Orissa and others, (2010) 12 SCC 471
Vijay Kumar Kaul and others vs. Union of India and others, (2012) 7 SCC 610
State of Uttaranchal and another vs. Shiv Charan Singh Bhandari and others, (2013) 12 SCC 179
Himachal Pradesh Scheduled Tribes Employees Federation and another vs. Himacahal Pradesh Samanaya Varg Karamchari Kalayan Mahasangh and others, (2013) 10 SCC 308
Indra Sawhney vs. Union of India, AIR 1993 SC 477
General Manager, Southern Railway and another vs. Rangachari, AIR 1962 SC 36
Rajeev Kumar Gupta and others vs. Union of India and others, AIR 2016 SC 3228

For the Appellant: Mr. P.D. Nanda, Advocate.
For the Respondents: Mr. Dushyant Dadwal, Advocate for respondents No. 1 and 2.
Mr. Shrawan Dogra, A.G. with Mr. Anup Rattan, Mr. Romesh Verma, Addl. A.Gs. and Mr. J.K. Verma, Dy. A.G. for respondent No.4.
Respondent No.3 ex parte.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

The writ petitioner is the appellant, who aggrieved by the judgment rendered by the Writ Court whereby it denied the quashing of the promotion order of respondent No.3, has filed the instant appeal.

2. Briefly stated the facts, as pleaded, are that respondent No.1 created an additional post of Senior Assistant and for filling up the said post, Departmental Promotion

Committee (for short 'DPC') was held on 31.8.2007 and on the basis of Recruitment and Promotion Rules prevalent, it was respondent No.3, who came to be promoted vide order dated 1.9.2007.

3. This promotion was challenged by the petitioner on the ground that the post in question was reserved for Scheduled Caste candidate and, therefore, respondent No.3 who is belonging to general category, could not have been promoted to the post.

4. Obviously, this position was not only disputed but contested by the respondents and consequently, the petition came to be dismissed vide impugned judgment dated 2.4.2015.

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

6. We really wonder why the Writ Court took the trouble and ventured to go into the merits of the case when admittedly the promotion was made on 1.9.2007 and the instant petition came to be filed after a lapse of more than four years thereafter only on 12.9.2011 and in such circumstances, the writ petition was clearly barred by delay and laches and ought to have been dismissed at that stage itself.

7. Normally, delay itself may not defeat the party's claim or relief unless the position of the opposite party has been irretrievably altered or would be put to undue hardship. Delay is not absolute impediment to exercise judicial discretion and rendering of substantial justice and such matters lie in the exclusive discretion of the Court, which discretion obviously has to be exercised fairly and justly. The underlying principle behind dismissal of petition on the ground of delay and laches is to discourage agitation of stale claim and has to be construed from the perspective of the opposite party being prejudiced especially when the delay effects others' ripened rights, which may have attained finality. Each case will have to be decided on its own facts and merits. There may be cases where the demand of justice is so compelling that the Court would be inclined to interfere inspite of delay. Ultimately, as observed above, it would be a matter within the discretion of the Court.

8. However, as regards the service matters, more particularly, pertaining to seniority and promotion, the delay is to be strictly construed or else it would amount to unsettling the settled matters after a lapse of time. A person aggrieved by an order of promotion should approach the Court at least within six months or at the most a year of such promotion. It is not that there is any period of limitation for the Courts to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time. But it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers under Article 226 of the Constitution of India in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle matters. The petitioner's petition should, therefore, have been dismissed in *limine*. Entertaining such petitions is a waste of time of the Court. It clogs the work of the Court and impedes the work of the Court in considering legitimate grievances as also its normal work. (Refer: ***P.S. Sadasivaswamy*** vs. ***State of Tamil Nadu***, AIR 1974 SC 2271).

9. The judgment rendered by a Bench of two Hon'ble Judges in ***P.S. Sadasivaswamy's*** case (supra) was thereafter reaffirmed by a Bench of three Hon'ble Judges in case ***S.I. Paras Kumar and others*** vs. ***S.I. Ram Charan and others***, (2004) 6 SCC 88.

10. If the appellant wanted to invoke jurisdiction of a writ-Court, he should have come to the Court at the earliest reasonably possible opportunity. Inordinate delay in making the motion for a writ will indeed be a good ground for refusing to exercise such discretionary jurisdiction. The underlying object of this principle is not to encourage agitation of stale claims and exhume matters which have already been disposed of or settled or where the rights of third parties have accrued in the meantime. (Refer: ***Tridip Kumar Dingal and others*** vs. ***State of West Bengal and others***, (2009) 1 SCC 768)

11. It is settled law that fence-sitters cannot be allowed to raise the dispute or challenge the validity of the order after its conclusion. No party can claim the relief as a matter of right as one of the grounds for refusing relief is that the person approaching the Court is guilty of delay and the laches. The Court exercising public law jurisdiction does not encourage agitation of stale claims where the right of third parties crystallises in the interregnum. (Refer: ***Shiba Shankar Mohapatra and others*** vs. ***State of Orissa and others***, (2010) 12 SCC 471).

12. At this stage it shall be profitable to refer to the following observations of the Hon'ble Supreme Court in ***Vijay Kumar Kaul and others*** vs. ***Union of India and others***, (2012) 7 SCC 610 as under:

> "[23] It is necessary to keep in mind that claim for the seniority is to be put forth within a reasonable period of time. In this context, we may refer to the decision of this Court in P.S. Sadasivaswamy v. State of Tamil Nadu, 1974 AIR(SC) 2271, wherein a two-Judge Bench has held thus: -
>
> "It is not that there is any period of limitation for the Courts to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time. But it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the courts to put forward stale claims and try to unsettle matters."
>
> [24] In Karnataka Power Corporation Ltd. & Anr. v. K. Thangappan & Anr., 2006 AIR(SC) 1581 this Court had held thus that delay or laches is one of the factors which is to be borne in mind by the High Court when they exercise their discretionary powers under Article 226 of the Constitution. In an appropriate case the High Court may refuse to invoke its extraordinary powers if there is such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the opposite party. Even where fundamental right is involved the matter is still within the discretion of the Court as pointed out in Durga Prasad v. Chief Controller of Imports and Exports, 1970 AIR(SC) 769. Of course, the discretion has to be exercised judicially and reasonably.
>
> [25] In City Industrial Development Corporation v. Dosu Aardeshir Bhiwandiwala & Ors., 2009 AIR(SC) 571 this Court has opined that one of the grounds for refusing relief is that the person approaching the High Court is guilty of unexplained delay and the laches. Inordinate delay in moving the court for a Writ is an adequate ground for refusing a Writ. The principle is that courts exercising public law jurisdiction do not encourage agitation of stale claims and exhuming matters where the rights of third parties may have accrued in the interregnum.
>
> [26] From the aforesaid pronouncement of law, it is manifest that a litigant who invokes the jurisdiction of a court for claiming seniority, it is obligatory on his part to come to the court at the earliest or at least within a reasonable span of time. The belated approach is impermissible as in the meantime interest of third parties gets ripened and further interference after enormous delay is likely to usher in a state of anarchy.
>
> [27] The acts done during the interregnum are to be kept in mind and should not be lightly brushed aside. It becomes an obligation to take into consideration the balance of justice or injustice in entertaining the petition or declining it on the ground of delay and laches. It is a matter of great significance that at one point of time equity that existed in favour of one melts into total insignificance and paves the path of extinction with the passage of time."

13. A stale claim of getting promotional benefits normally should not be entertained and reference in this regard can conveniently be made to the judgment rendered by the Hon'ble Supreme Court in ***State of Uttaranchal and another*** vs. ***Shiv Charan Singh Bhandari and others***, (2013) 12 SCC 179, wherein it was held as under:

> "[14] The centripodal issue that really warrants to be dwelled upon is whether the respondents could have been allowed to maintain a claim petition before the tribunal after a lapse of almost two decades inasmuch as the said Madhav Singh Tadagi, a junior employee, was conferred the benefit of ad hoc promotion from 15.11.1983. It is not in dispute that the respondents were aware of the same. There is no cavil over the fact that they were senior to Madhav Singh Tadagi in the SAS Group III and all of them were considered for regular promotion in the year 1989 and after their regular promotion their seniority position had been maintained. We have stated so as their inter-se seniority in the promotional cadre has not been affected. Therefore, the grievance in singularity is non-conferment of promotional benefit from the date when the junior was promoted on ad hoc basis on 15.11.1983.'
>
> [15] It can be stated with certitude that when a junior in the cadre is conferred with the benefit of promotion ignoring the seniority of an employee without any rational basis the person aggrieved can always challenge the same in an appropriate forum, for he has a right to be considered even for ad hoc promotion and a junior cannot be allowed to march over him solely on the ground that the promotion granted is ad hoc in nature. Needless to emphasise that if the senior is found unfit for some reason or other, the matter would be quite different. But, if senior incumbents are eligible as per the rules and there is no legal justification to ignore them, the employer cannot extend the promotional benefit to a junior on ad hoc basis at his whim or caprice. That is not permissible.
>
> [16] We have no trace of doubt that the respondents could have challenged the ad hoc promotion conferred on the junior employee at the relevant time. They chose not to do so for six years and the junior employee held the promotional post for six years till regular promotion took place. The submission of the learned counsel for the respondents is that they had given representations at the relevant time but the same fell in deaf ears. It is interesting to note that when the regular selection took place, they accepted the position solely because the seniority was maintained and, thereafter, they knocked at the doors of the tribunal only in 2003. It is clear as noon day that the cause of action had arisen for assailing the order when the junior employee was promoted on ad hoc basis on 15.11.1983.
>
> 17. In C. Jacob v. Director of Geology and Mining and another, 2008 10 SCC 115 a two-Judge Bench was dealing with the concept of representations and the directions issued by the court or tribunal to consider the representations and the challenge to the said rejection thereafter.In that context, the court has expressed thus: -
>
> "Every representation to the Government for relief, may not be replied on merits. Representations relating to matters which have become stale or barred by limitation, can be rejected on that ground alone, without examining the merits of the claim. In regard to representations unrelated to the Department, the reply may be only to inform that the matter did not concern the Department or to inform the appropriate Department. Representations with incomplete particulars may be replied by seeking relevant particulars. The replies to such representations, cannot furnish a fresh cause of action or revive a stale or dead claim."

[18] In Union of India and others v. M.K. Sarkar, 2010 2 SCC 59 this Court, after referring to C. Jacob has ruled that when abelated representation in regard to a "stale" or "dead" issue/dispute is considered and decided, in compliance with a direction by the court/tribunal to do so, the date of such decision cannot be considered as furnishing a fresh cause of action for reviving the "dead" issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a court's direction. Neither a court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches.

[19] From the aforesaid authorities it is clear as crystal that even if the court or tribunal directs for consideration of representations relating to a stale claim or dead grievance it does not give rise to a fresh cause of action. The dead cause of action cannot rise like a phoenix. Similarly, a mere submission of representation to the competent authority does not arrest time.

20. In Karnataka Power Corpn. Ltd. through its Chairman & Managing Director v. K. Thangappan and another, 2006 4 SCC 322 the Court took note of the factual position and laid down that when nearly for two decades the respondent-workmen therein had remained silent mere making of representations could not justify a belated approach.

[21] In State of Orissa v. Pyarimohan Samantaray, 1977 3 SCC 396 it has been opined that making of repeated representations is not a satisfactory explanation of delay. The said principle was reiterated in State of Orissa v. Arun Kumar Patnaik, 1976 3 SCC 579.

[22] In Bharat Sanchar Nigam Limited v. Ghanshyam Dass (2) and others, 2011 4 SCC 374 a three-Judge Bench of this Court reiterated the principle stated in Jagdish Lal v. State of Haryana, 1997 6 SCC 538 and proceeded to observe that as the respondents therein preferred to sleep over their rights and approached the tribunal in 1997, they would not get the benefit of the order dated 7.7.1992.

[18] In State of T.N. v. Seshachalam, 2007 10 SCC 137 this Court, testing the equality clause on the bedrock of delay and laches pertaining to grant of service benefit, has ruled thus: -

"....filing of representations alone would not save the period of limitation. Delay or laches is a relevant factor for a court of law to determine the question as to whether the claim made by an applicant deserves consideration.Delay and/or laches on the part of a government servant may deprive him of the benefit which had been given to others. Article 14 of the Constitution of India would not, in a situation of that nature, be attracted as it is well known that law leans in favour of those who are alert and vigilant."

[24] There can be no cavil over the fact that the claim of promotion is based on the concept of equality and equitability, but the said relief has to be claimed within a reasonable time. The said principle has been stated in Ghulam Rasool Lone v. State of Jammu and Kashmir and another, 2009 15 SCC 321.

[25] In New Delhi Municipal Council v. Pan Singh and others, 2007 9 SCC 278 the Court has opined that though there is no period of limitation provided for filing a writ petition under Article 226 of the Constitution of India, yet ordinarily a writ petition should be filed within a reasonable time. In the said case the respondents had filed the writ petition after seventeen years and the court, as

stated earlier, took note of the delay and laches as relevant factors and set aside the order passed by the High Court which had exercised the discretionary jurisdiction.

[26] Presently, sitting in a time machine, we may refer to a two-Judge Bench decision in P.S. Sadasivasway v. State of Tamil Nadu, 1975 1 SCC 152 wherein it has been laid down that a person aggrieved by an order of promoting a junior over his head should approach the Court at least within six months or at the most a year of such promotion. It is not that there is any period of limitation for the Courts to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time, but it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters.

[27] We are absolutely conscious that in the case at hand the seniority has not been disturbed in the promotional cadre and no promotions may be unsettled. There may not be unsettlement of the settled position but, a pregnant one, the respondents chose to sleep like Rip Van Winkle and got up from their slumber at their own leisure, for some reason which is fathomable to them only. But such fathoming of reasons by oneself is not countenanced in law. Any one who sleeps over his right is bound to suffer. As we perceive neither the tribunal nor the High Court has appreciated these aspects in proper perspective and proceeded on the base that a junior was promoted and, therefore, the seniors cannot be denied the promotion.

28. Remaining oblivious to the factum of delay and laches and granting relief is contrary to all settled principles and even would not remotely attract the concept of discretion. We may hasten to add that the same may not be applicable in all circumstances where certain categories of fundamental rights are infringed. But, a stale claim of getting promotional benefits definitely should not have been entertained by the tribunal and accepted by the High Court."

14. Even on merits, it would be noticed that the claim put forth by the appellant was that the promotional post of Senior Assistant was reserved for Scheduled Caste category and, therefore, should have been filled up from that category alone. Learned Writ Court rejected the plea raised by the appellant on the ground that the benefit of reservation for promotion to the post of Senior Assistant could not be granted as there is no reservation in promotion.

15. When the case had come earlier before this Court, learned counsel for the appellant had vehemently argued that the benefit of reservation is also available in promotion and would impress upon us that there are instructions to this effect issued by the State and Central Governments. It was then on 11.5.2016, the State of Himachal Pradesh through Secretary (GAD) was ordered to be arrayed as respondent No.4 and directed to seek instructions in the matter. Respondent No.4 has filed a detailed affidavit extracting therein the complete history of reservation wherein it has been mentioned that the Hon'ble Supreme Court in ***Himachal Pradesh Scheduled Tribes Employees Federation and another*** vs. ***Himacahal Pradesh Samanaya Varg Karamchari Kalayan Mahasangh and others***, (2013) 10 SCC 308 had directed the State Government to take necessary policy decision on the question of providing reservation to the members of Scheduled Caste and Scheduled Tribe in the matter of promotion.

16. Notably, at the earlier stage, it was decided that in view of ongoing process of Constitution (117th Amendment) Bill, 2012 in the Union Government, the matter regarding implementation of Constitution (85th Amendment) Act, 2001 may be deferred and the existing reservation system be continued till finalization of the matter relating to Constitution (117th Amendment) Bill, 2012 and accordingly instructions in this behalf were issued on 31.1.2013.

17. However, the Hon'ble Supreme Court on 13.9.2013 in ***Himachal Pradesh Scheduled Tribes Employees Federation's*** case (supra) directed the State Government to take final decision in the matter within a period of three months and pursuant to such directions the matter was placed in the meeting of Council of Ministers on 26.10.2013 wherein it was decided that the reservation in promotion to the members of Scheduled Caste and Scheduled Tribe as per Constitution (85th Amendment) Act, 2001 may not be granted.

18. The said instructions have been placed with the affidavit as Annexure R-3 and the relevant portion whereof reads as under:

> "In view of the above, reservation in promotion to the members of the Scheduled Castes and Scheduled Tribes categories as per the Constitution (85th Amendment) Act, 2001 may not be granted. These instructions will also supersede the instructions issued vide this department's letter No. PER(AP)-C-E(3)-2/2009-III, dated 11.01.2013 and No. PER(AP)-C)F(1)-2/2011, dated 31.01.2013 in this regard earlier."

19. Even otherwise prior to the pronouncement of the judgment in ***Indra Sawhney*** vs. ***Union of India***, AIR 1993 SC 477 reservation and promotions were permitted under the law as interpreted by the Hon'ble Supreme Court in ***General Manager, Southern Railway and another*** vs. ***Rangachari***, AIR 1962 SC 36. However, ***Indra Sawhney's*** case over ruled ***Rangachari's*** case and specifically addressed the question whether reservation can be permitted in the matter of promotion under Article 16 (4) and the majority held that the reservation in promotions are not permitted under our constitutional scheme.

20. This position of law has been reiterated in a recent judgment of the Hon'ble Supreme Court rendered in ***Rajeev Kumar Gupta and others*** vs. ***Union of India and others***, AIR 2016 SC 3228 wherein it was observed as under:

> "[14] We now examine the applicability of the prohibition on reservation in promotions as propounded by Indra Sawhney. Prior to Indra Sawhney, reservation in promotions were permitted under law as interpreted by this Court in General Manager, Southern Railway & Another v. Rangachari, 1962 AIR(SC) 36. Indra Sawhney specifically overruled Rangachari to the extent that reservations in promotions were held in Rangachari to be permitted under Article 16(4) of the Constitution. Indra Sawhney specifically addressed the question whether reservations could be permitted in matters of promotion under Article 16(4). The majority held that reservations in promotion are not permitted under our constitutional scheme."

21. In view of aforesaid discussion, the judgment rendered by the Writ Court calls for no interference.

22. Consequently, the appeal is dismissed, leaving the parties to bear their own costs.

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

M/s CNG Trading Company Pvt. Ltd. ...Petitioner.

Versus

H.P. State Electricity Board Ltd. ...Respondent.

CMPMO No. 393 of 2016
Reserved on: 27.12.2016
Decided on: 10.01.2017

Constitution of India, 1950- Article 227- Petitioner filed a petition under Article 227 of the Constitution of India praying that the order dismissing the application filed by the petitioner for impleadment of society for Promotion of Information Technology and e-governance (SITEG) be set aside – Learned Single Judge referred the question regarding the exercise of power of superintendence over Arbitral Tribunal- held, that the interference by the High Court with the order made by the Arbitral Tribunal is not permissible – Arbitrator is not a Court but outcome of an agreement –reference answered accordingly- petition dismissed as not maintainable.

(Para-9 to 17)

Cases referred:

M/s. M.L. Gupta And Associates versus H.P. Housing and Urban Development Authority and others, 2014 (3) Shim. LC 1694

H.P.S.E.B. versus M/s. Ansal Properties & Anr., 2005 (1) Current Law Journal (HP) 593

Lalitkumar V. Sanghavi (dead) through LRs Neeta Lalit Kumar Sanghavi and another versus Dharamdas V. Sanghavi and others, (2014) 7 Supreme Court Cases 255

SBP & Company versus Patel Engineering Ltd. and another, (2005) 8 Supreme Court Cases 618

Union of India versus M/s. Ambica Construction, AIR 2016 Supreme Court 1441

For the petitioner: Mr. G.D. Verma, Senior Advocate, with Ms. Soma Thakur & Mr. Jagmohan Chandel, Advocates.

For the respondent: Mr. J.S. Bhogal, Senior Advocate, with Mr. Satish Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

The learned Single Judge, vide order, dated 27th October, 2016, while recording the reasons as to why reference was required, has referred the following question for adjudication by the larger Bench:

> "Whether the High Court can exercise power of superintendence vested under Article 227 of the Constitution on Arbitral Tribunals constituted under the provision of Arbitration and Conciliation Act, 1996?"

2. Before we deal with the question (supra), it is apt to give a brief history of the case herein.

3. The petitioner invoked jurisdiction of this Court by the medium of petition under Article 227 of the Constitution of India praying therein that the order, dated 19th April, 2016, made by the Arbitrator-cum-Chief Engineer (PCA), HPSEBL, whereby the application filed by the petitioner for impleadment of Society for Promotion of Information Technology and E-governance (for short "SITEG") (DIT) as party-respondent was dismissed, be set aside.

4. Mr. G.D. Verma, learned Senior Counsel appearing on behalf of the petitioner, made the foundation of his arguments on the basis of the judgment rendered by a learned Single Judge of this Court in the case titled as **M/s. M.L. Gupta And Associates versus H.P. Housing and Urban Development Authority and others,** reported in **2014 (3) Shim. LC 1694.**

5. Per contra, Mr. J.S. Bhogal, learned Senior Counsel appearing on behalf of the respondent, while relying upon the judgment rendered by this Court in the case titled as **H.P.S.E.B. versus M/s. Ansal Properties & Anr.,** reported in **2005 (1) Current Law Journal (HP) 593,** argued that the High Court cannot exercise power of superintendence in terms of Article 227 of the Constitution of India over the Arbitral Tribunals constituted under the Arbitration and Conciliation Act, 1996 (for short "the Act") and thus, the petition is not maintainable.

6. The learned Single Judge, after noticing the conflicting views taken by the learned Single Judges of this Court in the judgments (supra), made a reference.

7. We have heard learned counsel for the parties.

8. The Apex Court in the case titled as **Lalitkumar V. Sanghavi (dead) through LRs Neeta Lalit Kumar Sanghavi and another versus Dharamdas V. Sanghavi and others,** reported in **(2014) 7 Supreme Court Cases 255,** has determined the issue and while placing reliance on the law declared by the Apex Court in the case titled as **SBP & Company versus Patel Engineering Ltd. and another,** reported in **(2005) 8 Supreme Court Cases 618,** held that the intervention by the High Courts, in the proceedings under Articles 226 or 227 of the Constitution of India, with the orders made by the Arbitral Tribunals is not permissible. It is apt to reproduce paras 8 to 14 of the judgment herein:

> *"8. Within a couple of weeks thereafter, the original applicant died on 7.10.2012. The question is whether the High Court is right in dismissing the application as not maintainable. By the judgment under appeal, the Bombay High Court opined that the remedy of the appellant lies in invoking the jurisdiction of the High Court under Article 226 of the Constitution. In our view, such a view is not in accordance with the law declared by this Court in S.B.P. & Co. v. Patel Engineering Ltd., (2005) 8 SCC 618. The relevant portion of the judgment reads as under:*
>
> > *"45. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible."*
>
> *That need not, however, necessarily mean that the application such as the one on hand is maintainable under Section 11 of the Act.*
>
> *9. The learned Senior Counsel for the appellants, Shri Shyam Divan, submitted that if application under Section 11 is also held not maintainable, the appellants would be left remediless while their grievance subsists. On the other hand, learned senior counsel for the respondents Shri C.U. Singh submitted that the appellant's only remedy is to approach the arbitral tribunal seeking a recall of its decision to terminate the arbitration proceedings.*
>
> *10. Chapter III of the Act deals with the appointment, challenge to the appointment and termination of the mandate and substitution of the arbitrator etc.:*
>
> *10.1. Section 11 provides for the various modes of appointment of an arbitrator for the adjudication of the disputes which the parties agree to have resolved by arbitration. Broadly speaking, arbitrators could be appointed either by the agreement between the parties or by making an application to the Chief Justice of*

the High Court or the Chief Justice of India, as the case may be, as specified under Section 11 of the Act.

10.2. Section 12(3) provides for a challenge to the appointment of an arbitrator on two grounds. They are -

> *(a) "that circumstances exist" which "give rise to justifiable doubts as to" the "independence or impartiality" of the arbitrator;*
>
> *(b) that the arbitrator does not "possess the qualification agreed to by the parties".*

10.3. Section 14 declares that "the mandate of an arbitrator shall terminate" in the circumstances specified therein. They are-

> *"**14. Failure or impossibility to act.** - (1) The mandate of an arbitrator shall terminate if -*
>
> *(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and*
>
> *(b) he withdraws from his office or the parties agree to the termination of the mandate."*
>
> *(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate."*

Section 14(2) provides that if there is any controversy regarding the termination of the mandate of the arbitrator on any of the grounds referred to in the clause (a) then an application may be made to the Court "to decide on the termination of the mandate".

11. Section 32 of the Act on the other hand deals with the termination of arbitral proceedings. From the language of Section 32, it can be seen that arbitral proceedings get terminated either in the making of the final arbitral award or by an order of the arbitral tribunal under sub-Section 2. Sub-section (2) provides that the arbitral tribunal shall issue an order for the termination of the arbitral proceedings in the three contingencies mentioned in sub-clauses (a) to (c) thereof.

12. On the facts of the present case, the applicability of sub-clauses (a) and (b) of Section 32(2) is clearly ruled out and we are of the opinion that the order dated 29.10.2007 by which the Tribunal terminated the arbitral proceedings could only fall within the scope of Section 32, sub-Section (2), sub-clause (c) i.e. the continuation of the proceedings has become impossible. By virtue of Section 32(3), on the termination of the arbitral proceedings, the mandate of the arbitral tribunal also comes to an end. Having regard to the scheme of the Act and more particularly on a cumulative reading of Section 32 and Section 14, the question whether the mandate of the arbitrator stood legally terminated or not can be examined by the court "as provided under Section 14(2)".

13. The expression "court" is a defined expression under Section 2(1)(e) which reads as follows:-

> *"2(1)(e) 'Court' means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject- matter of a suit, but does not- include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;"*

14. Therefore, we are of the opinion, the apprehension of the appellant that they would be left remediless is without basis in law." (Emphasis added)

9. In the case titled as **Union of India versus M/s. Ambica Construction,** reported in **AIR 2016 Supreme Court 1441,** the Apex Court, while discussing Sections 2(c) and 41 of the Act, has held that the Arbitrator is not a Court, but outcome of an agreement. It is profitable to reproduce para 6 of the judgment herein:

"6. "Court" has been defined in section 2(c) of the Act to mean a civil court having jurisdiction to decide the questions forming the subject- matter of the reference. Section 41 of the Act is extracted hereunder:

"41. Procedure and powers of Court. Subject to the provisions of this Act and of rules made thereunder :

(a) The provisions of the Code of Civil Procedure, 1908 (5 of 1908), shall apply to all proceedings before the Court, and to all appeals, under this Act, and

(b) The Court shall have, for the purpose of, and in relation to arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to any proceedings before the Court:

Provided that nothing in CI. (b) shall be taken to prejudice any power which may be vested in an Arbitrator or umpire for making orders with respect to any of such matters."

The court can exercise the power specified in Second Schedule of the Act. However, Arbitrator is not a court. Arbitrator is the outcome of agreement. He decides the disputes as per the agreement entered into between the parties. Arbitration is an alternative forum for resolution of disputes but an Arbitrator ipso facto does not enjoy or possess all the powers conferred on the courts of law."

(Emphasis added)

10. It is worthwhile to record herein that in para 18 of the judgment in **M/s. M.L. Gupta's case (supra),** the learned Single Judge has discussed the judgment rendered by the Apex Court in **SBP & Company's case (supra),** but despite that has fallen in an error.

11. Mr. G.D. Verma, learned Senior Counsel appearing on behalf of the petitioner, argued that the petitioner will be left remediless.

12. This question was also raised before the Apex Court in **Lalitkumar V. Sanghavi's case (supra)** and was replied in para 14 of the judgment, reproduced hereinabove.

13. Having said so, it is held that the judgment made by the learned Single Judge in **M/s. Ansal Properties' case (supra)** is in tune with the judgments rendered by the Apex Court, reproduced hereinabove and the judgment in **M/s. M.L. Gupta's case (supra)** is in conflict with the said Apex Court judgments, is, accordingly, overruled.

14. The reference is answered accordingly.

15. In view of the discussions made hereinabove, the petition merits to be dismissed being not maintainable.

16. The petitioner is at liberty to work out the remedy(ies) in terms of the mandate of the Act.

17. The petition is dismissed accordingly alongwith all pending applications.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh. ....Appellant.

Versus

Ashok Kumar ....Respondent.

Cr. Appeal No 146 of 2015.
Reserved on: 20.12.2016.
Decided on: 10.01.2017

N.D.P.S. Act, 1985- Section 15- Accused was found in possession of 80.6 k.g. of poppy husk – he was tried and acquitted by the Trial Court- held in appeal thatindependent witness had not supported the prosecution version and there are major contradictions in the statements of police officials- this casts doubt regarding the prosecution version – the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para-8 to 27)

Cases referred:

Mohammed Ankoos and Others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad, (2010) 1 Supreme Court Cases 94

State of Himachal Pradesh Vs. Kahan Chand, 2016 (1) Drugs Cases (Narcotics) 576

For the appellant Mr. Vikram Thakur and Mr. Punit Rajta, Dy. Advocate Generals.
For the respondent Mr. Anup Chitkara, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this appeal, the appellant/State has challenged the judgment passed by the Court of learned Special Judge-II, Kangra at Dharamshala, in Sessions Trial RBT No. 44-I-VII/13/2012, dated 26.11.2014, vide which, learned Trial Court has acquitted the present respondent (hereinafter referred to as 'accused') for commission of offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances, Act (in short 'NDPS Act').

2. The case of the prosecution in brief was that on 23.07.2012, a police party headed by ASI Suresh Kumar and comprising of PW4 HC Govind Singh, PW5 HHC Balkar Singh, HHC Inderpal, HHGs Hoshiar Singh and Puroshatam Lal was on patrolling at a place known as Milwan. PW1 Satpal Singh, Up-Pradhan, Gram Panchayat, Milwan, and PW2 Janak Raj were called and associated by the Investigating Officer for the purpose of raid and at around 3:10 a.m., a secret information was received by the Investigating Officer to the effect that ahead of Milwan village, on an old path which leads to railway bridge, one person was concealing bags in the bushes and these bags might contain some illicit articles. Further as per the prosecution, on the receipt of said secret information, Investigating Officer alongwith independent witnesses and other police officials proceeded to the spot and found the accused concealing bags in the bushes. The accused was apprehended by the police party and, on inquiry, he disclosed his name as Ashok Kumar @ Sonu. One bag was lying on the road and three bags were taken out from the bushes. The bags on checking were found containing plastic envelopes and when these plastic envelopes were opened, on smelling and taste, the envelopes were found containing poppy straw. First bag was found containing 20 plastic envelopes of green colour, second bag was found containing 25 plastic envelopes of green colour, third bag was found containing 15 plastic envelopes of green colour and fourth bag was found containing 15 plastic envelopes of blue colour and 11 plastic envelopes of white colour and all the envelopes were filled with poppy straw. As per prosecution, accused could not produce any licence/permit for possessing the said contraband.

In these circumstances, one Shamsher Singh was asked telephonically to bring weighing scales and the poppy husk on weighing was found to be 80 kilograms and 600 grams. Each bag was tied with thread and sealed with seal impression 'A' and specimen of seal Ext. PW11/C was taken on a separate piece of cloth and seal after use was handed over to witness Satpal Singh. NCB forms in triplicate were filled on the spot and recovered contraband was taken into possession vide memo Ext. PW1/A. The Investigating Officer sent rukka Ext. PW11/A to police station through HHC Inderpal, on the basis of which, FIR Ext. PW8/A was registered in Police Station, Indora. Thereafter, Investigating Officer prepared site plan and recorded the statements of witnesses under Section 161 of the Code of Criminal Procedure (hereinafter for short as 'Cr.P.C.'). Case property was resealed with seal impression 'B'. PW7 MHC Chain Singh entered the case property in Malkhana register. HHC Balkar Singh deposited the same in State Forensic Science Laboratory, Junga.

3. After the completion of investigation, challan was filed in the Court and as a prima-facie case was found against the accused, accordingly, he was charged for commission of offence punishable under Section 15 of the NDPS Act, to which he pleaded not guilty and claimed trial.

4. Learned trial Court vide its judgment under challenge acquitted the accused for commission of offences punishable under Section 15 of the NDPS Act by holding that the evidence produced by the prosecution was neither cogent nor satisfactory nor it pointed towards the guilt of the accused. Learned trial Court further held that testimonies of prosecution witnesses were full of improbabilities and contradictions and, hence, inescapable inference was that prosecution had failed to bring home the guilt of the accused beyond reasonable doubt that on 23.07.2012, at around 3:10 a.m. at place Milwan near Purani Sadak Pul he was found in exclusive and conscious possession of 80 kilograms and 600 grams of poppy husk.

5. Feeling aggrieved by the said judgment passed by the learned trial Court, the State has filed this appeal.

6. We have heard the learned Deputy Advocate General as well as learned counsel appearing for the respondent/accused. We have also gone through the records of the case as well as the judgment passed by the learned trial Court.

7. In order to prove its case, the prosecution in all examined 11 witnesses.

8. PW1 Satpal Singh, Up-Pradhan, Gram Panchayat, Milwan deposed in the Court that on 23.07.2012 he was called by ASI Suresh Kumar, Incharge, PP Thakurdwara at about 1:30 a.m./2:00 a.m. and accordingly, he visited the spot where police officials were present and police officials told him that they had recovered poppy husk weighing 80 kilograms 600 grams from Ashok Kumar. He further deposed that he did not see the accused on the spot as it was dark. As this witness did not support the case of the prosecution he was declared as a hostile witness.

9. PW2 Janak Raj deposed in the Court that he worked as carpenter and on 23.07.2012, at about 5:00 p.m. he went to Bopar Rai Dhaba at Milwan where one Innova car was parked in which four plastic bags were there. He further deposed that he was told by the police that said bags were containing poppy husk. This witness was also declared as a hostile witness as he did not support the case of prosecution.

10. PW3 Shamsher Singh, Ex-Pradhan, Gram Panchayat, Ulehrian deposed that he was not called by the police in the said case on 23.07.2012 to weigh contraband nor he went to the spot with scales and weights. As this witness also not support the case of the prosecution, he was also declared as a hostile witness.

11. PW4 HC Govind Singh deposed in the Court that on 22.07.2012, at about 11:30 p.m., he was on patrolling towards Milwan alongwith ASI Suresh Kumar, HHC Balkar Singh, HHC Inder Pal, HHGs Hoshiar Singh and Puroshatam. He further stated that Investigating Officer received information that accused was concealing bags in the bushes and there might be some contraband material in the bushes. He further deposed that Investigating Officer called local

witnesses namely Satpal Singh and Janak Raj and they also reached the spot. He further stated that said information was received on 23.07.2012 at around 3:10 a.m. He further deposed that police party reached old Railway Bridge which was 400 meters away from NH-1-A where accused was concealing three bags in bushes and one bag was lying on the path. He further deposed that in the meanwhile, police party caught the accused who on inquiry disclosed his name as Ashok Kumar. He further deposed that in the presence of witnesses bags were checked and poppy husk was found in the same. According to him, four bags of poppy husk were found in the possession of accused on the spot and accused was not having permit of contraband. He further stated that Investigating Officer called Shamsher Singh alongwith scales and weights to weigh the contraband who came to the spot within 30-40 minutes and thereafter all the bags containing polythene bags were weighed by Shamsher Singh on the spot and same were found containing 80 kilograms 600 grams poppy husk. According to him, the contraband so recovered was taken into possession by the police vide memo Ext. PW1/A. He further stated that Investigating Officer also prepared rukka on the spot and sent the same to Police Station Indora through HHC Inder Pal. Thereafter he deposed that all the bags containing poppy husk were sealed on the spot with seal impression 'A' and specimen of seal was taken on plain cloth and seal after use was handed over to witness Satpal Singh. He deposed that memo Ext. PW1/A was prepared on the spot.

12. PW5 HHC Balkar Singh deposed that on 22.07.2012, at around 11:30 p.m., he was on patrolling duty alongwith other police officials and when the police party reached at place Milwan, Investigating Officer ASI Suresh Kumar received information that the accused was concealing bags in the bushes on the spot 400 meters away from NH-1-A and there might be some contraband substance in the same. He further stated that Investigating Officer called Satpal Singh and Janak Raj who also reached the spot. He further stated that information was received on 23.7.2012, at about 3:10 a.m. Thereafter he deposed about the factum of police party apprehending the accused with poppy husk which when weighed was found 80 kilograms and 600 grams and other proceedings conducted at the spot by the police.

13. The next relevant witness is PW7, MHC Chain Singh who deposed that at the relevant time he was working as MHC, Police Station Indora and on 23.07.2012 after resealing the contraband, SHO/SI Onkar Nath deposited four plastic bags, sealed with seal impressions 'A' and 'B' five in number on each parcel, containing 80 kilograms and 600 grams poppy husk in all the bags. He further stated that NCB form was also deposited by SI Onkar Nath. He deposed that on 25.07.2012, vide R/C No. 138/2012, all the four bags alongwith NCB form were handed over to HHC Nasib Singh and HHC Balkar Singh for depositing at FSL, Junga for chemical test.

14. PW8 SI Onkar Nath deposed in the Court that in the year 2012, he remained posted as SI/Additional SHO at Police Station Indora and on 23.07.2012, he received a rukka written by ASI Suresh Kumar through HHC Inder Pal, on the basis of which, FIR Ext. PW8/A was registered. He also deposed that on the same day, Investigating Officer ASI Suresh Kumar produced case property i.e. four plastic bags sealed with seal impression 'A' before him in the police station which were resealed by him and thereafter deposited in the malkhana of the Police Station,Indora with MHC Chain Singh.

15. Investigating Officer ASI Suresh Kumar entered the witness box as PW11. He deposed that on 22.07.2012, at about 1:30 p.m. he went for patrolling duty alongwith other police officials in his personal vehicle. On 23.07.2012, at about 3:10 a.m., when the police party was present at place Milwan, he called Janak Raj and Satpal Singh to join the raiding party. He further deposed that he received information regarding the contraband at old Railway Station road Milwan and that somebody was concealing contraband in the bushes. He deposed that he alongwith other police officials and local witnesses visited the spot and found that one person was hiding three bags in the bushes and fourth bag was lying on the road. This witness deposed that they brought the three bags on the road from the bushes and opened all the bags in the presence of local witnesses and found that there was poppy husk in the polythene bags. He further deposed that he called Shamsher Singh to weigh the contraband which when weighed was found to be 80 kilograms and 600 grams. He further deposed that he prepared rukka Ext. PW11/A and

handed over the same to HHC Inder Pal, on the basis of which, FIR Ext. PW8/A was registered. He further deposed that he also prepared site plan Ext. PW11/B and poppy husk was taken into possession vide memo Ext. PW1/A. He further stated that he took four samples of poppy husk from each bag and the samples and bags of poppy husk were sealed with seal impression 'A'. He deposed that he recorded the statements of witnesses on the spot and further sent the case property to police station through HHC Govind Singh. He further stated that case property was resealed in the police station by SI Onkar Nath. In his cross examination, this witness deposed that they left the police station on 22.07.2012 in his personal vehicle. He also deposed that besides Alto car, remaining police officials travelled by Motorcycles. He further deposed that Milwan was at a distance of 10 kilometres from Thakurdwara. He stated that first he called witnesses Satpal Singh and Janak Raj and information was received thereafter. He also deposed that there were 86 polythene bags in four plastic bags and all the plastic bags were weighed individually.

16. From the perusal of the testimony of the prosecution witnesses it is apparent that (a) the so called private witnesses did not support the case of the prosecution and (b) there are major and material contradictions in the testimonies of police officials i.e. PW4, PW5 and PW11.

17. As per the statements of PW4 and PW5, who were part of the police party, Investigating Officer called the independent witnesses PW1 Satpal Singh and PW2 Janak Raj and associated them with the raiding party after a secret information was received by him. However, when we peruse the statement of Investigating Officer, this witness has stated that he had already associated the independent witnesses before he received the secret information to the effect that accused was hiding some bags in the bushes which might be containing contraband. This major contradiction in the statements of PW1 and PW2 on the one hand and PW11 on the other hand has not been satisfactorily explained by the prosecution. In this background, when we peruse the statements of PW1 and PW2 who were declared as hostile witnesses and were subjected to lengthy cross examination by the learned Public Prosecutor, it seems probable that in fact search and seizure of the alleged contraband did not take place in the mode and manner as put forth by prosecution. It has come in the statement of PW11 Investigating Officer that four plastic bags which were recovered from the accused were containing poppy husk in 86 polythene bags. However, a perusal of the F.S.L. report which is on record as Ext. PW11/D demonstrates that 168 envelopes were in fact received at State forensic Science Laboratory, Junga. As per Ext. PW11/D i.e. report of Forensic Science Laboratory, four parcels were received in the laboratory and parcel (a) contained 50 poly bags, parcel (b) contained 39 poly bags, parcel (c) contained 50 poly bags and parcel (d) contained 29 poly bags. It is not understood that when as per Investigating Officer, 86 poly bags were in fact recovered and seized from the accused, how the case property sent to Forensic Science Laboratory contained 168 poly bags in stead of 86 as were recovered by the Investigation Officer from the accused as per his own statement.

18. As we have already mentioned above that PW1 Satpal Singh, PW2 Janak Raj as well as PW3 Shamsher Singh have not supported the case of the prosecution. PW1 Satpal Singh has denied that he was part of raiding party and any recovery of contraband took place in his presence as is the case put forth by the prosecution and rather he has contended that when he was called by the Investigating Officer, he visited the spot where police officials were already present and police officials told him that they had recovered poppy husk weighing 80 kilograms and 600 grams from accused Ashok Kumar. Similarly, PW2 has also not corroborated the case of the prosecution that any recovery of contraband in fact was made in his presence and all that he has stated was that on 23.07.2012, when he went to the Dhaba of Bopar Rai at Milwan, a Innova car was parked there in which four plastic bags were found, which as informed by the police officials were containing poppy husk. PW3 has denied that he took scales and weights to the spot with which the poppy husk allegedly recovered from the accused was weighed.

19. Now the factum of independent witnesses not supporting the case of the prosecution when seen together with the contradiction in the statements of official witnesses viz.

PW4, PW5 and PW11, then the same shrouds clouds of suspicion over the case of the prosecution as to whether in fact contraband was recovered from the accused in the mode and manner in which the prosecution wants this Court to believe.

20. Besides this, there are other contradictions also in the statements of official witnesses which also make the case of the prosecution to be doubtful. PW4 HC Govind Singh has deposed in his cross examination that the contraband was weighed in polythene bags one by one whereas PW11 Investigating Officer ASI Suresh Kumar in his cross examination deposed that all the polythene bags were not weighed individually.

21. PW4 stated in his cross examination that he did not remember as to who took out the polythene bags from the bushes, however, PW11 has stated that Hoshiar Singh, Inder Pal, Janak Raj and Satpal Singh took out the bags from the bushes. In addition, HHC Balkar Singh (PW5) in his cross examination stated that barrack of the police guarding the bridge was also in the vicinity of the place of occurrence and was visible from the spot, however, police officials from the said post were not called, but PW11 in his cross examination deposed that there was no railway bridge guard or barrack for the said guard near the spot and same was not visible from the spot.

22. This demonstrates that there is neither any consistency nor any harmony even in the deposition of police officials.

23. Another important fact is that both PW4 and PW5 have deposed that they travelled from police post Thakurdwara to Milwan on foot and PW4 also stated that distance between police post Thakurdwara to Milwan where 'nakabandi' was laid was 11 kilometres. However, PW11 deposed that police party had in fact left for Milwan in Alto car and Motorcycles.

24. Taking into consideration all these contradictions in the statement of prosecution witnesses especially official witnesses create a serious doubt over the case of the prosecution and, therefore, keeping in view the fact that accused has the benefit of acquittal in his favour, we do not find that the judgment of acquittal so passed by the learned trial Court calls for any interference.

25. Besides this, learned trial Court after taking into consideration all aspects of the matter has returned the findings of acquittal in favour of accused. We have also gone through the judgment so passed by the learned trial Court and, in our considered view, the findings so returned by the learned trial Court are neither perverse nor it can be said that the findings so returned by the learned trial Court are not borne out from the records of the case and the same do not call for any interference.

26. It has been held by Hon'ble Supreme Court in ***Mohammed Ankoos and Others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad, (2010) 1 Supreme Court Cases 94***

> *"12. This Court has, time and again, dealt with the scope of exercise of power by the Appellate Court against judgment of acquittal under Sections 378 and 386, Cr.P.C. It has been repeatedly held that if two views are possible, the Appellate Court should not ordinarily interfere with the judgment of acquittal. This Court has laid down that Appellate Court shall not reverse a judgment of acquittal because another view is possible to be taken. It is not necessary to multiply the decisions on the subject and reference to a later decision of this Court in Ghurey Lal v. State Of Uttar Pradesh1 shall suffice wherein this Court considered a long line of cases and held thus : (SCC p.477, paras 69 -70)*
>
> *"69. The following principles emerge from the cases above:*
>
> *1. The appellate court may review the evidence in appeals against acquittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire*

evidence on record. It can review the trial court's conclusion with respect to both facts and law.

2. The accused is presumed innocent until proven guilty. The accused possessed this presumption when (2008) 10 SCC 450 he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that the trial court was wrong.

70. In light of the above, the High Court and other appellate courts should follow the well-settled principles crystallised by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

(i) The trial court's conclusion with regard to the facts is palpably wrong;

(ii) The trial court's decision was based on an erroneous view of law;

(iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

(iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

(v) The trial court's judgment was manifestly unjust and unreasonable;

(vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the ballistic expert, etc.

(vii) This list is intended to be illustrative, not exhaustive.

2. The appellate court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached--one that leads to acquittal, the other to conviction--the High Courts/appellate courts must rule in favour of the accused."

27. In ***State of Himachal Pradesh Vs. Kahan Chand, 2016 (1) Drugs Cases (Narcotics) 576***, a Coordinate Bench of this Court has held as under

"19. The accused has had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in Mohamed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94, it cannot be said that the Court below has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice. No ground for interference is called for. The present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged."

Accordingly, while concurring with the findings of acquittal returned by the learned trial Court, we dismiss the present appeal being devoid of any merit, so also pending miscellaneous application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh. ....Appellant.

Versus

Sanjiv Kumar ....Respondent.

Cr. Appeal No.: 4007 of 2013.
Reserved On : 27.12.2016.
Decided on: 10.01.2017.

Indian Penal Code, 1860- Section 376 and 417- Accused established physical relation with the prosecutrix on the allurement of marrying her – the accused solemnized marriage with the prosecutrix in a temple and kept her in a rented house for sometime – the accused informed the prosecutrix that his parents had refused to accept her and he had to marry somewhere else- the prosecutrix became pregnant but the accused refused to keep her – she delivered a child but the accused refused to own the child – the accused was tried and acquitted by the Trial Court- held in appeal that physical relation between the parties were duly established - it was also proved by DNA that accused is the biological father of the child- prosecutrix admitted that her affair continued for about eight years – she was aware of the consequences of physical relations - she had not disclosed the factum of marriage to her parents – the testimony of the prosecutrix does not establish that physical relations were developed due to allurement – the conduct of the prosecutrix shows that she was a willing party – the prosecution version regarding the rape was not established – the accused was willing to maintain the prosecutrix but her family members had refused to keep her- therefore, it cannot be said that accused had cheated the prosecutrix- appeal dismissed. (Para-8 to 23)

Cases referred:

U.P. Vs. Pappu alias Yunus and another (2005) 3 Supreme Court Cases 594
Rameshwar Vs. State of Rajasthan AIR 1952 SC 54
State of Punjab Vs. Gurmit Singh and others, (1996) 2 Supreme Court Cases 384:
Radhu Vs. State of Madhya Pradesh, (2007) 12 Supreme Court Cases 57
Narender Kumar Vs. State (NCT of Delhi), (2012) 7 Supreme Court Cases 171
Munna Vs. State of Madhya Pradesh, (2014) 10 Supreme Court Cases 254
Manoharlal Vs. State of Madhya Pradesh, (2014) 15 Supreme Court Cases 587
Tilak Raj Vs. State of Himachal Pradesh, AIR 2016 Supreme Court 406

For the appellant : Mr. Vikram Thakur, Dy. Advocate General.
For the respondent : Mr. D.N. Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this appeal, appellant/State has challenged the judgment passed by the Court of learned Sessions Judge, Kinnaur, Sessions Division at Rampur Bushahr, in Sessions Trial No. 0100053/2010, dated 22.03.2013, vide which, learned Trial Court acquitted the present respondent (hereinafter referred to as 'accused') for commission of offences punishable under Section 376 and 417 of Indian Penal Code (in short 'IPC').

2. The case of the prosecution in brief was that prosecutrix, who was studying in 10th class, came in contact with the accused who fell in love with her. Prosecutrix also out of ignorance started loving the accused who allured her to marry her and also established physical

relations with her on this pretext. As per prosecution, accused established physical relations with prosecutrix on the pretext of marriage and he also made her to run from her house and thereafter solemnized marriage with her at Hattu temple in the absence of Pandit and relatives. Further the case of the prosecution was that after the marriage, accused brought the prosecutrix to Shimla where she was kept in a rented house at Sanjauli/Dhalli for about three months and thereafter she was taken to village Hutli where accused owned some land. Prosecutrix was kept there for some time and when prosecutrix asked the accused to take her to his parental house, he told her that firstly he would go alone and thereafter will take her after ensuring that everything was settled. However, later on prosecutrix was informed by accused that his parents had refused to accept her in their house and he had to marry somewhere else. From village Hutli, when prosecutrix went to house of accused, he threatened to kill her with a sword. On this, prosecutrix went to Police Station, Kumarsain where she was told to file case in the Court. When the parents of prosecutrix came to know that she was pregnant, they refused to keep her in their house and asked her to live with the accused. In the meantime, she went to house of her maternal uncle at Shimla who also refused to keep her when he came to know that she was pregnant. Prosecutrix gave birth to a child at Rippon Hospital, Shimla on 28.06.2009. As per prosecution case, accused even refused to own newly born child and at that time, he asked/advised her to put the child in orphanage. In this background, prosecutrix registered the case against the accused.

3. After registration of the case, prosecutrix was medically examined at D.D.U, Shimla. On 21.07.2009, she got demarcated the place where she was kept by accused at Dhalli and on 22.07.2009, she got the spot map of the place prepared where she was kept at village Hutli. On 10.08.2009, accused was got medically examined, blood samples of accused, prosecutrix and newly born child were taken for the purpose of DNA test. Report obtained suggested that accused was the biological father of the child.

4. After the conclusion of the investigation, challan was filed in the Court and as a prima-facie case was found against the accused, he was charged for commission of offences punishable under Sections 376 and 417 of IPC, to which he pleaded not guilty and claimed trial.

5. Learned trial Court on the basis of evidence produced before it by the prosecution held that from the evidence it could not be said that accused had cheated the prosecutrix by fraudulently solemnizing marriage with her. Learned trial Court also held that evidence of the prosecutrix could not prove that accused had cheated her in terms of Section 415 of IPC and accused could not thus be held guilty for commission of offence punishable under Section 417 of IPC. It was also held by the learned trial Court that though evidence collected from the DNA test, blood samples of accused and prosecutrix and newly born child opined that accused was the biological father of the child but on this score, it could not be held that accused had committed rape on the prosecutrix. Learned trial Court concluded that prosecutrix had continued to remain in love with the accused for many years and during that period, she had established sexual relations with accused on her own sweet will while being aware of the consequences of such relations with the accused prior to marriage. Learned trial Court also concurred with the contention of learned counsel for the defence that there was no evidence on record which proved that accused had committed rape on the prosecutrix at any time as prosecutrix had consented to have sexual relations with the accused and thus, if prosecutrix contended that she had consented to have sexual acts with the accused on the allurement of the accused to marry her, the same was not sufficient to show that while indulging in the acts of physical relations with the accused, her voluntary consent was lacking. On these bases, learned trial Court acquitted the accused.

6. Feeling aggrieved by the judgment so passed by the learned trial Court, the State has filed this appeal.

7. We have heard the learned Deputy Advocate General as well as the learned counsel for the respondent/ accused. We have also gone through the records of the case as well as the judgment passed by the learned trial Court.

8. In the present case, the case as put forth by the prosecution and the evidence on record clearly and categorically demonstrate that admittedly there were physical relations between the prosecutrix and the accused. A child having been born out of these physical relations is also not a disputed fact.

9. The point for consideration before us is whether the findings returned by the learned trial Court to the effect that physical relations which were established by the accused with the prosecutrix were with the consent of the prosecutrix and there was no allurement given by him to marry her for the purpose of establishing physical relations with her is correct finding or not. It is thus necessary to minutely scrutinize the testimony of prosecutrix who entered the witness box as PW2. A perusal of her statement demonstrates that she deposed in the Court that she was in contact with the accused since she was studying in 10th class and thereafter both of them fell in love with each other and also established physical relations with each other. According to her, accused established physical relations with her on the allurement that he would marry her. She further deposed that on 23.08.2008 accused took her to Hattu temple from the house of her maternal uncle and performed marriage with her and thereafter took her to Shimla and kept her in a rented accommodation situated at bypass road near Dhalli tunnel for about three months. She further deposed that when she asked the accused to take her to his ancestral house, he used to put off the same on one pretext or the other. She further deposed that during Navatras of the year 2008, accused took her to Hulli near Chhaila and kept her there in a rented house and after some time when he had gone to his ancestral house, accused telephonically told her that his family members were not ready to accept her and were planning to marry him somewhere else. She further stated that thereafter she visited the ancestral house of accused at village Shilbag but the accused threatened to do away with her life. She deposed that thereafter she came back to the house of her maternal uncle and narrated the entire incident to him and also visited Police Station, Kumarsain to lodge complaint. She also deposed that during the period she stayed with the accused she got pregnant from him and when she disclosed this fact to her parents, they refused to keep her at her parental house and asked her to stay with accused. She deposed that thereafter she visited the house of her maternal uncle at Shimla and he also refused to keep her in his house when he came to know about her pregnancy. She further deposed that on 29.06.2009, she gave birth to a male child at Rippon Hospital, Shimla. She also deposed that accused refused to own the child and asked her to keep him at some orphanage and thereafter she made a complaint against the accused to S.P. Shimla. She also stated that during the course of investigation, her blood and DNA samples were also obtained. She also deposed that accused had committed sexual intercourse with her by assuring her that he will marry her and thus cheated her. In her cross examination, prosecutrix deposed that her date of birth was 25th of September, 1982. She further stated that she passed her matriculation examination around in the year 1998. She further stated that she could not remember as to in which year accused started loving her. She deposed that they used to meet once or twice in a week at village Madhawani and when they used to meet, her sister-in-law (Bhabhi) used to be present with her. She also deposed that during this period when she used to meet the accused, they used to go to stations like Rampur, Shimla, Narkanda etc. and they used to stay together for one or two days. She deposed that whenever she used to go with accused she used to inform her home that she was going to meet some relative at Shimla. She deposed that her affair continued with accused for about eight years and accused established physical relations with her after 3 or 4 months of their coming into contact with each other. She further stated in her cross examination that the complaint Ext. PW2/A was prepared by her cousin Virender Thakur at her instance, who was a Reporter in 'Doordarshan' at Shimla. She further stated that after she performed marriage with the accused at Hattu temple, she used to live like a married woman. She also stated that she was aware of the consequences of having physical relations before marriage. She further stated that when she went to the house of accused, his parents and nephew threatened her and gave her beatings but she did not suffer any injury. When she was confronted with her statement recorded earlier wherein it was not so recorded, she deposed that she did not disclose the factum of her marriage with accused to her parents, however she stated that her Bhabhi was aware of this fact. She admitted it to be correct that she had filed Civil Suit No. 13-1 of 2009 against the accused in

the Court of Civil Judge (Sr. Divn.), Rampur to restrain accused from contracting marriage with other girl. She further admitted it to be correct that said suit was withdrawn by her later on. She denied that accused had not promised to marry her during the last five years preceding to filing of complaint by her. She admitted that she had given her consent for physical relations with the accused but thereafter self stated that she had given such consent after accused had promised to marry her.

10. A perusal of statement of the prosecutrix categorically demonstrates that she had developed physical relations with the accused about 3-4 months after she initially came in contact with him. Now it has come in her statement that accused came in contact with her when she was studying in 10th class. In her cross examination, this witness deposed that she passed her matriculation around in the year 1998. However, a careful perusal of the statement of this witness demonstrates that narration made by her in the Court was to the effect that after the accused came in contact with her, he allured her for having physical relations with her on the promise of marriage and thereafter he took her to Hattu temple where they solemnized marriage on 23.08.2008 and after performing marriage with her, he initially kept her at Shimla in rented accommodation and thereafter at village Hulli again in a rented accommodation and during this period, he established physical relations with her. In our considered view, the version so put forth by the prosecutrix cannot be believed. This is for the reason that it is her own case that accused came in contact with her when she was studying in 10th class, meaning thereby that they came in contact with each other somewhere in the year 1998 and they established physical relations with each other about 3-4 months thereafter as has come in the testimony of the prosecutrix. If it is so then the aforesaid version of the prosecutrix belies the case put forth by her wherein she wants this Court to believe that accused took her to Hattu temple and performed marriage with her on 23.08.2008 and thereafter he established physical relations with her. Thus it is evident that prosecutrix has not been able to establish that initially when she and accused developed physical relations with each other, there was any allurement given by the accused that he would marry her or the accused cheated her on the pretext of marriage and thus established physical relations with her. It is further evident from her testimony that she maintained relationship with accused for a fairly long time and she used to visit various places with the accused by keeping her family in dark. It has also come on record that when she came to know about marriage of accused with some other girl she filed a civil suit for restraining the accused from marrying some other person which suit was subsequently withdrawn by her. The said conduct of the prosecutrix, in our considered view, demonstrates that she was a willing party to the alleged acts of sexual relations which existed between her and the accused. The alleged factum of her having married the accused at Hattu temple was concealed by her from her parents as has come in the deposition of the prosecutrix. She had stated in her cross examination that she was aware of the consequences of having physical relations before marriage but it remains a fact that despite this, she had maintained physical relations with the accused. Therefore, in our considered view, prosecution has not been able to prove that accused had committed rape on the prosecutrix or had established physical relations with her without her consent by alluring her as is the case of the prosecution.

11. Though it is matter of record that the accused is the biological father of the accused who was given birth by the prosecutrix, but in our considered view, this factum alone cannot be taken as a piece of evidence to prove that accused had raped the prosecutrix. It is a matter of record that prosecutrix maintained relations with accused for a substantial long period of time and during the said period she established physical relations with him willingly. This is apparent from her own deposition whereby she stated to be fully aware of the consequences of such relations before marriage. The material on record categorically demonstrates that prosecutrix from the very beginning had been a consenting party to the alleged acts of sexual intercourse with the accused. There is no evidence on record produced by the prosecution from which it can be inferred that consent of the prosecutrix while establishing physical relations with the accused was on the promise of marriage. There is also no evidence on record from which it could be proved that accused committed rape on the prosecutrix on the alleged allurement of

either solemnizing marriage with her or fraudulently on account of marrying her. Not only this, the complaint filed by the prosecutrix when compared with her deposition in the Court shows that besides contradictions and inconsistencies in both of them there are lot of improvements in her deposition in the Court. The prosecutrix has also admitted that complaint in fact was prepared by her cousin namely Virender Thakur at her instance who happens to be a Reporter in 'Doordarshan' at Shimla.

12. If we consider the evidence placed on record by the prosecution from another different perspective, what apparently can be deduced from the evidence placed on record including the testimony of prosecutrix is that accused in fact was interested in marrying the prosecutrix but the family of the accused was not interested in the accused marrying her. That being so, it cannot be said that accused had cheated the prosecutrix. In our considered view, accused could have been convicted for commission of offence punishable under Section 417 of IPC only if the prosecution had been able to prove that he had deceived the prosecutrix which the prosecution had not been able to prove on record beyond reasonable doubt.

13. Before proceeding further, it is relevant to take note of the fact that this Court is not oblivious to the fact that in a case under Section 376 of the Indian Penal Code, conviction of the accused can be based on the sole testimony of the prosecutrix itself if the same is cogent, trustworthy and reliable.

14. It is settled law that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. This is for the reason that the prosecutrix stands at a higher pedestal than an injured witness. However, the fact still remains that the testimony of the prosecutrix on the face of it has to be acceptable. *{See State of U.P. Vs. Pappu alias Yunus and another (2005) 3 Supreme Court Cases 594}*.

15. Though it is settled law that corroboration is not sine qua non for conviction in a rape case, however, it is relevant to refer to the judgment of Hon'ble Supreme Court in **Rameshwar** Vs. **State of Rajasthan** AIR 1952 SC 54, in which it has been observed as under:

> *"The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge...."*

16. In our considered view, in the facts of the present case, as they emerge from the evidence which has been placed on record by the prosecution, it cannot be said that the testimony of the prosecutrix is either cogent or it is trustworthy, reliable or the same seems to be truthful. Further, the credibility of the testimony of the prosecutrix has also been impinged by the defence in her cross-examination. Not only this, there are inconsistencies and contradictions in her statement recorded in the Court of law and which was previously recorded with the police, but she has also made improvements in the same which have gone unexplained. At the cost of repetition, we state that the prosecution has not been able to produce iota of evidence to substantiate that prosecutrix was raped by the accused on the promise of marriage.

17. The Hon'ble Supreme Court has held in ***State of Punjab Vs. Gurmit Singh and others, (1996) 2 Supreme Court Cases 384***:

> *"x x x x x x x x x The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts*

should not over-look. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman, who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be over-looked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another persons's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. In State of Maharashtra Vs. Chandraprakash Kewalchand Jain (1990 (1) SCC 550) Ahmadi, J. (as the Lord Chief Justice then was) speaking for the Bench summarised the position in the following words: (SCC p. 559, para 16)

"A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction of her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the

person charged, the court should ordinarily have no hesitation in accepting her evidence. "

18. The Hon'ble Supreme Court in ***Radhu Vs. State of Madhya Pradesh, (2007) 12 Supreme Court Cases 57*** has held:

" 6. It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a 'rape', if the girl is under 16 years of age. It is also well settled that absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor construed as evidence of consent. Similarly, the opinion of a doctor that there was no evidence of any sexual intercourse or rape, may not be sufficient to disbelieve the accusation of rape by the victim. Bruises, abrasions and scratches on the victim especially on the forearms, writs, face, breast, thighs and back are indicative of struggle and will support the allegation of sexual assault. The courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case."

19. In ***Narender Kumar Vs. State (NCT of Delhi), (2012) 7 Supreme Court Cases 171,*** the Hon'ble Supreme Court has held:

"*20. It is a settled legal proposition that once the statement of prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under 1 Page 12 the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.*

21. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial, which may lend assurance to her testimony. (Vide: Vimal Suresh Kamble v. Chaluverapinake Apal S.P and Vishnu v. State of Maharashtra).

22. Where evidence of the prosecutrix is found suffering from serious infirmities and inconsistencies with other material, prosecutrix making deliberate improvements on material point with a view to rule out consent on her part and there being no injury on her person even though her version may be otherwise, no reliance can be placed upon her evidence. (Vide: Suresh N. Bhusare & Ors. v. State of Maharashtra.

23. In Jai Krishna Mandal & Anr. v. State of Jharkhand, this Court while dealing with the issue held: (SCC p. 535, para 4)

"4…….the only evidence of rape was the statement of the prosecutrix herself and when this evidence was read in its totality, the story projected by the prosecutrix was so improbable that it could not be believed."

20. In ***Munna Vs. State of Madhya Pradesh, (2014) 10 Supreme Court Cases 254***, the Hon'ble Supreme Court has been pleased to held:

"*7. We are conscious that testimony of the prosecutrix is almost at par with an injured witness and can be acted upon without corroboration as held in various decisions of this Court. Reference may be made to some of the leading judgments.*

8. In Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat, this Court held as under (SCC pp. 224-26, paras 9-10)

"9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and 1 (1983) 3 SCC 217 Page 5 5 its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical.

10. Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault …….. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because (1) A girl or a woman in the tradition-bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends, and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition-bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want to

avoid publicity on account of the fear of social Page 6 6 stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by counsel for the culprit, and the risk of being disbelieved, acts as a deterrent."

9. In State of Maharashtra vs. Chandraprakash Kewalchand Jain, this Court held as under : (SCC pp. 558-60, paras 15-17)

"15. It is necessary at the outset to state what the approach of the court should be while evaluating the prosecution evidence, particularly the evidence of the prosecutrix, in sex offences. Is it essential that the evidence of the prosecutrix should be corroborated in material particulars before the court bases a conviction on her testimony ? Does the rule of prudence demand that in all cases save the rarest of rare the court should look for corroboration before acting on the evidence of the prosecutrix ? Let us see if the Evidence Act provides the clue. Under the said statute 'Evidence' means and includes all statements which the court permits or requires to be made before it by witnesses, in relation to the matters of fact under inquiry. Under Section 59 all facts, except the contents of documents, may be proved by oral evidence. Section 118 then tells us who may give oral evidence. According to that section all persons are competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Even in the case of an accomplice Section 133 provides that he 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. However, illustration (b) to Section 114, which lays down a rule of practice, says that the court 'may' presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. Thus under Section 133, which lays down a rule of law, an accomplice is a competent witness and a conviction based solely on his uncorroborated evidence is not 2 (1990) 1 SCC 550 Page 7 7 illegal although in view of Section 114, illustration (b), courts do not as a matter of practice do so and look for corroboration in material particulars. This is the conjoint effect of Sections 133 and 114, illustration (b).

16. A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not

trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness. For the above reasons we think that exception has rightly been taken to the approach of the High Court as is reflected in the following passage:

"It is only in the rarest of rare cases if the court finds that the testimony of the prosecutrix is so trustworthy, truthful and reliable that other corroboration may not be necessary."

With respect, the law is not correctly stated. If we may say so, it is just the reverse. Ordinarily the evidence of a prosecutrix must carry the same weight as is attached to an injured person who is a victim of violence, unless there are special circumstances which call for greater caution, in which case it would be safe to act on her testimony if there is independent evidence lending assurance to her accusation.

17. We think it proper, having regard to the increase in the number of sex violation cases in the recent past, particularly cases of molestation and rape in custody, to remove the notion, if it persists, that the testimony of a woman who is a victim of sexual violence must ordinarily be corroborated in material particulars except in the rarest of rare cases. To insist on corroboration except in the rarest of rare cases is to equate a woman who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her story of woe will not be believed unless it is corroborated in material particulars as in the case of an accomplice to a crime. Ours is a conservative society where it concerns sexual behaviour. Ours is not a permissive society as in some of the western and European countries. Our standard of decency and morality in public life is not the same as in those countries. It is, however, unfortunate that respect for womanhood in our country is on the decline and cases of molestation and rape are steadily growing. An Indian woman is now required to suffer indignities in different forms, from lewd remarks to eve-teasing, from molestation to rape. Decency and morality in public life can be promoted and protected only if we deal strictly with those who violate the societal norms. The standard of proof to be expected by the court in such cases must take into account the fact that such crimes are generally committed on the sly and very rarely direct evidence of a person other than the prosecutrix is available. Courts must also realise that ordinarily a woman, more so a young girl, will not stake her reputation by levelling a false charge concerning her chastity."

10. Similar observations were made in State of Punjab vs. Gurmit Singh, as under : (SCC pp. 395-96, para 8)

"8……The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of

sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial 3 (1996) 2 SCC 384 Page 10 10 credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable." ***(emphasis in original)***

11. Thus, while absence of injuries or absence of raising alarm or delay in FIR may not by itself be enough to disbelieve the version of prosecutrix in view of the statutory presumption under Section 114A of the Evidence Act but if such statement has inherent infirmities, creating doubt about its veracity, the same may not be acted upon. We are conscious of the sensitivity with which heinous offence under Section 376, IPC has to be treated but in the present case the circumstances taken as a whole create doubt about the correctness of the prosecution version. We are, thus, of the opinion that a case is made out for giving benefit of doubt to the accused."

21. The Hon'ble Supreme Court of India in ***Manoharlal Vs. State of Madhya Pradesh, (2014) 15 Supreme Court Cases 587*** has held:

"8. Though as a matter of law the sole testimony of the prosecutrix can sufficiently be relied upon to bring home the case against the accused, in the instant case we find her version to be improbable and difficult to accept on its face value. The law on the point is very succinctly stated in Narender Kumar v. State (NCT of Delhi), to which one of us (Dipak Misra, J). was a party, in following terms: (SCC p. 178, paras 29 and 21)

"20. It is a settled legal proposition that once the statement of the prosecutrix inspires confidence 4 Page 5 and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or

insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.

21. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject-matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial which may lend assurance to her testimony." ***(emphasis in original)***

9. Having found it difficult to accept her testimony on its face value, we searched for support from other material but find complete lack of corroboration on material particulars. First, the medical examination of the victim did not result in any definite opinion that she was subjected to rape. Secondly, Riyaz who was like a brother to the victim and thus a close confidant, has not supported the case of the prosecution and has completely denied having met her when she allegedly narrated the incident to him. Thirdly the person who was 5 Page 6 suffering from fever and to whose house she was first taken by the appellant was not examined at all. Fourthly, the policeman who the victim met during the night was also not examined. Fifthly, neither the brother nor any of the parents of the victim were examined to corroborate the version that she had come from the village of her brother and alighted around 10:00 P.M. at Bajna bus stand. Lastly, the sequence of events as narrated would show that she had allegedly accompanied the appellant to various places. In the circumstances, we find extreme difficulty in relying upon the version of the victim alone to bring home the charge against the appellant. We are inclined to give benefit of doubt to the appellant."

22. It is also relevant to refer to the judgment of the Hon'ble Supreme Court in ***Tilak Raj Vs. State of Himachal Pradesh, AIR 2016 Supreme Court 406,*** in which the Hon'ble Supreme Court has held:

"19. We have carefully heard both the parties at length and have also given our conscious thought to the material on record and relevant provisions of The Indian Penal Code (in short "the IPC"). In the instant case, the prosecutrix was an adult and mature lady of around 40 years at the time of incident. It is admitted by the prosecutrix in her testimony before the trial court that she was in relationship with the appellant for the last two years prior to the incident and the appellant used to stay overnight at her residence. After a perusal of copy of FIR and evidence on record the case set up by the prosecutrix seems to be highly unrealistic and unbelievable.

23. From the aforesaid, it is clear that the evidence of the prosecution is neither believable nor reliable to bring home the charges leveled against the appellant. We are of the view that the impugned judgment and order passed by the High Court is not based on a careful re-appraisal of the evidence on record by the High Court and there is no material evidence on record to show that the appellant is guilty of the charged offences i.e., offence of cheating punishable under Section 417 of IPC and offence of criminal intimidation punishable under Section 506 part I of IPC. "

23. Besides this, we have also carefully gone through the judgment passed by the learned trial Court and a perusal of the judgment passed by the learned trial Court demonstrates that the entire evidence produced on record by the prosecution had been minutely taken into consideration by the learned trial Court and after a careful consideration of the same, learned trial Court had returned the finding of acquittal in favour of accused.

24. Therefore, while concurring with the findings of acquittal returned by the learned trial Court, we dismiss the present appeal being devoid of any merit, so also pending miscellaneous application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh. ....Appellant.
Versus
Suneel Kumar @ Bobby ... Respondent.

Cr. Appeal No.: 4266 of 2013.
Reserved on : 06.12.2016.
Decided on: 10.01.2017.

Indian Penal Code, 1860- Section 302 and 201- A was working as an assistant with R- A did not return to his home on 23.5.2011 and his wife sent her son to inquire about A – R told that he and A had returned from work at about 5-5:15 P.M. and A had gone towards jungle – dead body of A was found during search operation – the accused was arrested on the basis of investigation - recoveries were effected at the instance of the accused– the accused was tried and acquitted by the trial Court- held in appeal that the prosecution version that accused and R were last seen together was not proved – disclosure statements were also not established satisfactorily – rope/Nawar stated to have been recovered pursuant to the disclosure statements did not contain the blood to connect the accused with the commission of offence- motive to commit the crime was also not proved – the chain of circumstances do not point towards the guilt of the accused- accused was rightly acquitted by the Trial Court- appeal dismissed.(Para-6 to 24)

Case referred:
Vijay Thakur Vs. State of Himachal Pradesh, (2014) 14 Supreme Court Cases 609

For the appellant Mr. Vikram Thakur and Mr. Punit Rajta, Dy. Advocate Generals.
For the respondent Mr. Ajay Chandel, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this appeal, appellant/State has challenged the judgment passed by the Court of learned Additional Sessions Judge(I), Kangra at Dharamshala, District Kangra, in Sessions Trial No. 24/2011, dated 29.06.2013, vide which, learned Trial Court acquitted the present respondent (hereinafter referred to as 'accused') for commission of offences punishable under Section 302 and 201 of Indian Penal Code (in short 'IPC').

2. The case of the prosecution in brief was that Amar Singh was working as an assistant with painter Roshan Lal and they were executing painting work in the house of one Kapoor Chand of village Tiara in the month of May, 2001. Further as per the prosecution, both of them used to return to their houses together in the evening after the work. On 23.05.2011, Amar Singh (hereinafter referred to as 'deceased') did not return to his house and thereafter his wife Nirmla Devi (complainant) sent her son Ashwani Kumar to inquire about the welfare of her husband Amar Singh from Roshan Lal. Ashwani Kumar telephonically inquired the whereabouts of his father from Roshan Lal who told that both of them had returned back around 5:00/5:15 p.m. from the work but Amar Singh expressed his desire to go via Jungle and therefore they both took their own ways. Complainant Nirmla Devi suspected that her husband might not have

slipped in the way and got himself injured, so she accompanied her son and started searching for her husband but when Amar Singh was not traced, she informed her brother-in-law, Kishori Lal, who thereafter alongwith other villagers and family members started searching for Amar Singh, but without any success. Further as per the prosecution, on next day, at about 4:00 a.m. when the search operation began, body of deceased was found lying in the jungle near a cheer tree and there were injury marks near the right eye, left ear and other parts of the body. The complainant suspected that her husband had been murdered by some unknown person and a telephonic message was made to Police Post Gaggal at around 6:45 a.m. On this, rapat No. 42 was registered and I.O. Santosh Raj immediately visited village Tiara and at around 2:40 p.m., I.O. recorded the statement of complainant Nirmla Devi under Section 154 of Cr.P.C, which was sent to Police Station Kangra, on the basis of which, FIR was lodged under Section 302 and 201 of IPC against unknown persons. Further as per the prosecution, body of the deceased was sent for postmortem and after the report of postmortem was received, body was handed over to the family members. This was followed by investigation by the Investigating Officer, who received additional information on 01.06.2011 that accused was the suspected person behind the murder of the husband of the complainant. As per the prosecution, during the course of investigation, Smt. Sonu Bala w/o Sarup Chand made a statement that accused had murdered Amar Singh. Accused was arrested on 03.06.2011. As per prosecution, on 07.06.2011, during investigation, he made confessional statement with regard to belt (patta)/nawar, which was used by him to strangulate the deceased on 05.06.2011 and he also led the police to the place from where he got the said nawar recovered. As per the prosecution, accused also offered to recover his pant and shirt from the place where he had concealed the same after the commission of offence and same were recovered in the presence of witnesses on 07.06.2011.

3. After the completion of investigation, challan was filed in the Court and as a prima-facie case was found against the accused, he was charged for commission of offences punishable under Sections 302 and 201 of IPC, to which he pleaded not guilty and claimed trial.

4. Learned trial Court vide its judgment under challenge acquitted the accused by holding that prosecution had failed to prove that accused in the night hours on 23.05.2011, in Tiara jungle had murdered Amar Singh with nawar patta and thereafter concealed the said nawar patta with the intent to cause the disappearance of evidence so as to shield himself from legal punishment. It was held by the learned trial Court that neither the statement of prosecution witnesses inspired confidence as there were too many contradictions, improvements and omissions in the same nor the prosecution was able to complete the chain of links to connect the accused with the commission of offence, nor any motive could be proved for the accused to do away with the deceased. The judgment of acquittal so returned by the learned trial Court is under challenge by way of this appeal.

5. We have heard the learned Deputy Advocate General as well as the learned counsel appearing for the respondent/accused. We have also gone through the records of the case as well as the judgment passed by the learned trial Court.

6. Admittedly in the present case, there is no eyewitness and the entire case of the prosecution rests upon the circumstantial evidence. Learned Deputy Advocate General has culled out the following circumstances which as per the prosecution link the accused with the commission of the offence for which he was charged.

1. Last seen together
2. Recovery of dead body
3. Disclosure Statements
4. Postmortem report
5. Motive

7. The Hon'ble Supreme Court in **Vijay Thakur** Vs. **State of Himachal Pradesh**, (2014) 14 Supreme Court Cases 609 has held on circumstantial evidence:

"18. It is to be emphasized at this stage that except the so-called recoveries, there is no other circumstances worth the name which has been proved against these two appellants. It is a case of blind murder. There are no eyewitnesses. Conviction is based on the circumstantial evidence. In such a case, complete chain of events has to be established pointing out the culpability of the accused person. The chain should be such that no other conclusion, except the guilt of the accused person, is discernible without any doubt. Insofar as these two appellants are concerned, there is no circumstance attributed except that they were with Rajinder Thakur till Sainj and the alleged disclosure leading to recoveries, which appears to be doubtful. When we look into all these facts in entirety in the aforesaid context, we find that not only the chain of events is incomplete, it becomes somewhat difficult to convict the appellant only on the basis of the aforesaid recoveries.

19. In Mani v. State of Tamil Nadu, (2008) 1 SCR 228, this Court made following pertinent observation on this very aspect:

> *"26. The discovery is a weak kind of evidence and cannot be wholly relied upon on and conviction in such a serious matter cannot be based upon the discovery. Once the discovery fails, there would be literally nothing which would support the prosecution case...."*

20. There is a reiteration of the same sentiment in Manthuri Laxmi Narsaiah v. State of Andhra Pradesh, (2011) 14 SCC 117 in the following manner:

> *"6. It is by now well settled that in a case relating to circumstantial evidence the chain of circumstances has to be spelt out by the prosecution and if even one link in the chain is broken the accused must get the benefit thereof. We are of the opinion that the present is in fact a case of no evidence."*

21. Likewise, in Mustkeem alias Sirajudeen v. State of Rajasthan, (2011) 11 SCC 724, this Court observed as under:

> *"24. In a most celebrated case of this Court, Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116, in para 153, some cardinal principles regarding the appreciation of circumstantial evidence have been postulated. Whenever the case is based on circumstantial evidence the following features are required to be complied with. It would be beneficial to repeat the same salient features once again which are as under: (SCC p.185) "(i) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established;*

(ii) 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 on any other hypothesis except that the accused is guilty;

(iii) The circumstances should be of a conclusive nature and tendency;

(iv) They should exclude every possible hypothesis except the one to be proved; and

(v) 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."

> *25. With regard to Section 27 of the Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material object and its use in the commission of the offence. What is admissible under Section 27 of*

the Act is the information leading to discovery and not any opinion formed on it by the prosecution."

It is settled position of law that suspicion, however strong, cannot take the character of proof.

22. We, therefore, have no hesitation in allowing these appeals and setting aside the conviction and sentence of the two appellants under Section 302 read with Section 34 of the Penal Code. We order accordingly. The appellants are directed to be released from jail forthwith, if not required in any other case."

8. Thus, the salient points which have been carved out by the Hon'ble Supreme Court in a case of circumstantial evidence, on the basis of which the guilt of the accused can be brought home are as under:

"(i) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established;

(ii) 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 on any other hypothesis except that the accused is guilty;

(iii) The circumstances should be of a conclusive nature and tendency;

(iv) They should exclude every possible hypothesis except the one to be proved; and

(v) *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."*

9. Keeping in view the law so declared by the Hon'ble Supreme Court, this Court has to satisfy its judicial conscious as to whether by way of circumstantial evidence produced on record by the prosecution, it was able to link the accused with the commission of the offences or not.

10. We will deal with each of the circumstance independently in order to satisfy ourselves as to whether the chain of circumstances as culled out by learned Deputy Advocate General linked the accused with the commission of offence or not, in view of the law laid down by the Hon'ble Supreme Court.

1. **Last seen together:**

11. According to Mr. Thkaur, the factum of accused having been last seen together with the deceased was substantiated by the statement of PW5. A perusal of the statement of PW5 Praveen Kumar demonstrates that he stated in the Court that he knew deceased Amar Singh. On 23.05.2011, he had seen Amar Singh working at Kapur Singh's house doing painting work and on the same day, at about 5:15-5:30 p.m., Amar Singh was going through Kuhan (well) path which passes nearby to the house of PW5 and at that time, PW5 and his wife were working in the wheat fields. This witness further deposed that when he inquired from Amar Singh that why he was going through that path, Amar Singh told him that he was in a hurry, so he was going through that path. He further deposed that when he asked Amar Singh to sit, then again he (Amar Singh) told that he was in hurry, and thereafter on 24.05.2011, he came to know that Amar Singh was no more.

12. Now it is nowhere stated by PW5 that he had seen accused Suneel Kumar with deceased Amar Singh. Therefore, it cannot be said that prosecution was able to prove this circumstance against the accused that he was last seen with the deceased.

2. Recovery of dead body:

13. The factum of recovery of dead body as per learned Deputy Advocate General stood proved on record by PW1, PW2, PW3, PW16 and PW26. PW1 Nirmla Devi deposed that after

her husband went missing on the night of 23.05.2011, she informed her relatives about this fact and search was carried out to find her husband. On the next day, in the morning, at about 5:30 a.m., body of her husband was found in Tipri Jungle near the 'Cheer' tree. PW2 Ashwani Kumar, son of the deceased, has also deposed that after his father went missing on the night of 23.05.2011, search was carried out to find him and on the following morning, his father's dead body was found in Tipri Jungle near the 'Cheer' tree. PW3 Jaishi Ram, brother of the deceased, has also deposed about the recovery of dead body of the deceased at around 5:30 a.m. in the morning of 24.05.2011 near a pine tree in Tipri Jungle. PW16 Kishori Lal, brother of the deceased has also deposed to this effect. Similarly PW26 Uttam Chand, bother of the deceased has also deposed to this effect. It is evident from the testimony of above stated witnesses that dead body of the deceased was in fact recovered in the morning of 24.05.2011 in Tipri Jungle near a 'Cheer' tree. However, relevant aspect of the matter is as to whether prosecution was able to link the accused with the death of deceased so as to convict him for the commission of offences for which he was charged with. This aspect of the matter shall be dealt with by us in the subsequent part of the judgment.

3. <u>Disclosure statements:</u>

14 . There are three disclosure statements on record as Ext. PW7/A, PW21/A and Ext. PW23/F. We will deal with all these disclosure statements separately.

Disclosure statement Ext. PW7/A as per prosecution was made by the accused under Section 27 of the Indian Evidence Act in the presence of witnesses Swarup Chand and Kishan Singh to the effect that he could get the place demarcated where he had hidden a plastic 'nawar'. Kishan Singh who entered the witness box as PW7 deposed that on 05.06.2011, accused while in police custody had made a statement that he had hidden a plastic rope in jungle and he could get the same recovered. He further deposed that he as well as witness Swarup Chand had signed this statement. He further stated that accused had told that near that place there was one big tree of Safeda and bushes of one small tree of Khajoor. In his cross examination, he deposed that he was associated in the investigation of the case by the police from 9:00 a.m. to 11:00 a.m. He denied that disclosure statement was not recorded in his presence. He further stated that he did not remember as to how many questions were put to accused by the police. He further stated that disclosure statement was recorded in the office of SHO by a Head Constable. Incidentally, this witness at the relevant time was posted as Home Guard in Police Station Kangra. He also stated that he was put on duty near the gate of the police station. Swarup Chand, the other witness to the statement so recorded under Section 27 of the Evidence Act has not been examined by the prosecution.

15. Now, if we peruse disclosure statement Ext. PW23/F, what has been mentioned therein is that the accused could get the place demarcated where the incident had taken place. However, PW7 has not made any mention in his deposition in the Court that accused had made any disclosure statement to the effect as is mentioned in Ext. PW23/F. Similarly, when we refer to Ext. PW21/A, a perusal of this statement demonstrates that vide this disclosure statement, accused had stated in the presence witnesses Uttam Chand and Rumel Singh that he could get the place demarcated where he had hidden his clothes which he was wearing on the fateful day and he could also get his said clothes recovered. As per prosecution, this disclosure statement stands proved by PW21 HHG Rumel Singh and PW26 Uttam Chand. Incidentally, one of the so called two witnesses to this disclosure statement happens to be a Home Guard and other witnesses happens to be the brother of the deceased. PW18 Ashok Kumar in whose presence purportedly the rope with which accused strangulated the deceased was recovered has not supported the case of the prosecution. In fact he has stated in his cross examination by the defence that when he reached the spot, rope/nawar was already in possession of the police. Besides this, a perusal of Ext. P-C, which is report of Forensic Science Laboratory, Himachal Pradesh at Dharamshala pertaining to nawar with which allegedly the deceased was killed by the accused, demonstrates that no blood could be detected on Ext. P-1 nawar as well as Ext. 2-a, shirt of the deceased. Therefore, in our considered view, even this circumstance was not proved by the prosecution against the accused.

4. Postmortem report:

16. Postmortem report of the deceased is on record as Ext. PW24/A. This report has been proved by PW24 Dr. S. Chakarvarti. As per postmortem report as well as the deposition of PW24 what is evident is this that ligature marks present on the deceased's neck were possible with plastic strip, if it is encircled by someone and it may result in asphyxia and death. However, fact the matter remains that it was the accused who strangulated the deceased and thereby caused his death by asphyxia has not been proved by the prosecution beyond reasonable doubt. Therefore, it cannot be said that postmortem report substantiates or proved the involvement of the accused with the commission of the offences which were alleged against him. Thus, in our considered view, even this circumstance was not proved by the prosecution against the deceased.

5. Motive:

17. According to learned Deputy Advocate General, accused was having the motive to do away with the deceased and the said motive was that deceased had seen the accused and Sonu Bala (daughter-in-law of deceased) in a compromising position and this, as per the prosecution was the motive with the accused to do away with the deceased. As per learned Deputy Advocate General, this circumstance stood proved against the accused by PW1 Smt. Nirmla Devi wife of the accused and Sonu Bala, daughter in law of the deceased. A perusal of the statement of Nirmla Devi demonstrates that in her examination-in-chief, she stated that she had told to the police that 7-8 months before the incident, her husband had gone to jungle for fetching grass for the goats and while returning, he (deceased) saw accused Suneel and Sonu Bala in a compromising position in the bushes. Further as per this witness, her husband asked them as to why they were sitting there and when her husband confronted the accused, he ran away. She further deposed that after 2-3 days when her husband had gone to the market to buy vegetables there accused met him and threatened her husband that in case he (deceased) came in his way, he will finish him. She further deposed that her husband had told her that he had seen accused and Sonu Bala in a compromising position and Sonu Bala had in fact pleaded that she would not repeat it. She also deposed that on 23.05.2011, her daughter-in-law, Sonu Bala had also gone to jungle for grazing goats and her husband also came from that way and on this count, she suspected that accused Suneel Kumar had killed her husband. In her cross examination, she admitted that it to be correct that when her statement Ext. PW1/A was recorded, she told that some unknown person had killed her husband. She admitted that her husband had gone to fetch grass for goats from the jungle and that she also not got recorded in her statement that her husband had disclosed to her that he had seen accused and Sonu Bala in a compromising position.

18. Sonu Bala who entered the witness box as PW4 did not support the case of the prosecution. She in fact stated that accused used to call her 'Bhabhi' and he had never shown his willingness to be her friend. She stated in her examination-in-chief that deceased had never found her alongwith accused in compromising position, as was the version of the prosecution. This witness was subjected to lengthy cross examination by learned Public Prosecutor but nothing could be elucidated from her to further the case of the prosecution. This witness resiled from her statements recorded earlier under Section 161 of Cr.P.C as well as under Section 164 of Cr.P.C.

19. Thus besides the bald statement of PW1, there is no other material produced on record by the prosecution from which it could be inferred that accused had the motive to do away with the deceased and the motive was that the accused had been caught by the deceased with Sonu Bala in a compromising position. There is not even an iota of evidence on record to prove and substantiate this circumstance against the accused except the bald self serving statement of PW1, which in our considered view does not inspires confidence and does not seems to be trustworthy. Not only this, a perusal of cross examination of this witness demonstrates that her credibility stands impeached by the defence. Therefore, in our considered view, it cannot be said that this circumstance was proved by the prosecution against the accused.

20. It has been held by the Hon'ble Supreme Court in **Pankaj** Vs. **State of Rajasthan** in Criminal Appeal No. 2135 of 2009 decided on 9th September, 2016 that it is a well settled principle of law that when the genesis and manner of the incident is doubtful, the accused cannot be convicted. The Hon'ble Supreme Court has further held that when the evidence produced by the prosecution has neither quality nor credibility, it would be unsafe to rest conviction upon such evidence and in such circumstances, the appellant is entitled to the benefit of doubt. It has further been held by the Hon'ble Supreme Court that motive is not sine qua non for the conviction of the accused, however, the effect of not proving motive raises a suspicion in the mind of the Court.

21. In our considered view also, keeping in view the fact that the prosecution has miserably failed to prove that the accused had any motive to do away with the deceased, it seriously raises question mark over the credibility of the case of the prosecution.

22. Therefore, according to us, the chain of circumstances enumerated above by learned Deputy Advocate General does not in any manner forms a complete chain linking the accused with the commission of the alleged offence.

23. Further, a perusal of the judgment passed by learned trial Court also demonstrates that after taking into consideration the entire material produced on record by the prosecution and after discussing the same in detail, learned trial Court held that the prosecution was not able to complete chain of circumstantial evidence against the accused nor the testimony of the complainant was free from reasonable doubts and the prosecution had not been able to prove its case against the accused beyond reasonable doubts.

24. In view of above discussion, we do not find any infirmity with the judgment which has been passed by the learned trial Court acquitting the accused of the charges levelled against him. It cannot be said that the judgment passed by the learned trial Court is either perverse or that the prosecution had proved its case beyond reasonable doubt against the accused, but learned trial Court erred in acquitting him. According to us, the prosecution has not been able to prove its case beyond reasonable doubt. Therefore, the judgment passed by the learned trial Court is upheld and the present appeal is accordingly dismissed being devoid of any merit. Pending miscellaneous application(s), if any also stand disposed of.

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

The Director HIMURJA ...Appellant.

Versus

Oasis Power Project Private Limited and another ...Respondents.

LPA No. 189 of 2015
Decided on: 10.01.2017

Constitution of India, 1950- Article 226- Writ Court disposed of the writ petition by providing that writ petitioner is at liberty to file representation before the Government – representation was made but was rejected – fresh writ petition was filed and the writ Court directed the respondents to consider the case of the writ petitioner afresh- held, that the judgment is non-speaking, illegal and arbitrary – the same is set aside- writ Court requested to hear the writ petition afresh and decide the same on merits. (Para-3 to 5)

For the appellant: Mr. Vijay Arora, Advocate.

For the respondents: Mr. Satyen Vaidya, Senior Advocate, with Mr. Vivek Sharma, Advocate, for respondent No. 1.

Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma, Additional Advocate General, and Mr. J.K. Verma& Mr. Kush Sharma, Deputy Advocate Generals, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Challenge in this appeal is to judgment and order, dated 2nd June, 2015, made by the learned Single Judge in CWP No. 352 of 2014, titled as Oasis Power Project Private Limited versus State of H.P. and another, whereby the writ respondents were directed to consider the case of the writ petitioner afresh (for short "the impugned judgment").

2. We have gone through the writ petition read with the impugned judgment and are of the view that the impugned judgment, on the face of it, is non-speaking one and merits to be set aside for the following reasons:

3. It appears that writ petitioner-respondent No. 1 herein is in the lis right from the year 2001. The writ petitioner-respondent No. 1 had approached this Court by the medium of CWP No. 841 of 2001, which was disposed of vide order, dated 4th May, 2011, by providing that the writ petitioner-respondent No. 1 is at liberty to file representation before the Government. The writ petitioner-respondent No. 1 made a representation before the Chief Secretary to the Government of Himachal Pradesh and Chief Executive Officer, HIMURJA, which was rejected on 12th December, 2012 (Annexure P-10 in the writ petition), constraining him to file CWP No. 352 of 2014 seeking quashment of Annexure P-10 (supra).

4. It is apt to record herein that without quashing Annexure P-10 (supra), the learned Single Judge has directed the writ respondents to consider the case of the writ petitioner-respondent No. 1 herein afresh without thrashing and marshalling out the facts and merits of the case.

5. In the given circumstances, the impugned judgment is non-speaking, illegal, arbitrary and is, accordingly, set aside. The writ petition is ordered to be restored to its original number. List the same before the leaned Single Judge, having the Roster, on 27th February, 2017. The learned Single Judge is requested to hear the writ petition afresh and decide the same on merits.

6. Parties are directed to cause appearance before the learned Single Judge on 27th February, 2017.

7. The appeal is disposed of accordingly along with all pending applications.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Deep Ram ....Petitioner.

Versus

State of Himachal Pradesh through its Secretary (Forests) ...Respondent.

CMPMO No.: 465 of 2016.
Decided on: 11.01.2017.

Constitution of India, 1950- Article 227- An application filed for seeking direction to the Administrative Tribunal to return the record on the groundthat case could not have been transferred to the Administrative Tribunal- held, that the prayer was made in the writ petition to issue direction to appoint the petitioner on regular basis as was done in the case of similarly

situated person- the writ pertains to service matter and is to be adjudicated by Administrative Tribunal- petition dismissed. (Para-5 to 7)

Case referred:
L. Chandra Kumar vs. Union of India, (1997) 3 SCC 261

For the petitioner : Mr. Parveen Chandel, Advocate.
For the respondents : Mr. Pramod Thakur, Addl. AG with Ms. Parul Negi, Dy. AG.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition filed under Article 227 of the Constitution of India, the petitioner has prayed for issuance of direction to learned Himachal Pradesh Administrative Tribunal to return back the records of the case file TA No. 1907 of 2015 to this Court on the ground that CWP No. 2373 of 2013 filed by the petitioner in this Court was wrongly transferred by this Court to Himachal Pradesh Administrative Tribunal.

2. According to learned counsel for the petitioner, keeping in view the reliefs prayed for in CWP No. 2373 of 2013, the case could not have been transferred to learned Himachal Pradesh Administrative Tribunal in view of law laid down by this Court in ***CWP No. 3557 of 2009, Pawan Kumar versus State of H.P. and others*** decided on 14.07.2011 and ***CWP No. 780 of 2001, Deep Ram versus State of H.P. and others*** decided on 20.12.2001. Accordingly, he prays that this petition be allowed and order vide which writ petition was transferred to learned Himachal Pradesh Administrative Tribunal be recalled and learned Administrative Tribunal be directed to send back the case to this Court to be tried and adjudicated by this Court as a writ petition.

3. Mr. Pramod Thakur, learned Additional Advocate General has opposed the prayer so made by learned counsel for the petitioner on the ground that the present petition is totally misconceived as keeping in view the fact that issue raised in the writ petition i.e. CWP No. 2373 of 2013 was a service matter, the same was rightly transferred to the learned Tribunal for adjudication.

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

5. CWP No. 2373 of 2013 was filed in this Court praying for the following reliefs:

> *"i. That the respondent may kindly be directed to appoint the petitioner on regular basis as has been done in the cases of similarly situated persons, i.e. Mahesh Kumar, Jeet Ram, Ishwar Dass etc., with all consequential benefits including seniority, pay etc.*
>
> *ii. That the records of the case may kindly be summoned for perusal.*
>
> *iii. That or any other order, which this Hon'ble Court may deem fit may kindly be passed in the interest of justice."*

6. It cannot be disputed that the writ so filed pertained to service matter and as per the law declared by Hon'ble Supreme Court in ***L. Chandra Kumar vs. Union of India, (1997) 3 SCC 261*** the court of first instance to adjudicate upon service matters is Himachal Pradesh Administrative Tribunal.

7. There is no merit in the contention of learned counsel for the petitioner that the writ petition could not have been transferred in view of law laid down by this Court in judgments referred to above because it is neither the case of the petitioner that what stood assailed in CWP No. 2373 of 2013 was an award passed by Industrial Tribunal-cum-Labour Court nor the

petitioner can call upon this Court to recall the transferred case on the ground that the reliefs prayed in the petition in fact pertain to Industrial Disputes Act. This is for the reason that in case the issues raised in the transferred case are in the domain of Industrial Tribunal Act, then it is for the learned Tribunal to pass appropriate orders in the same after taking into consideration the averments made therein as well as prayers made therein and the law laid down by this Court. However, the transferred case cannot be recalled to this Court on the said pretext.

In view of the above, as there is no merit in this petition, the same is dismissed. No orders as to costs. Registry is directed to send back the records of the case to the learned Himachal Pradesh Administrative Tribunal forthwith.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Satish Kumar ...Petitioner.

Versus

State of H.P. and others ...Respondents.

Criminal Writ Petition No.26 of 2016
Date of Decision : January 11, 2017

Code of Criminal Procedure, 1973- Section 427- Petitioner was convicted for the commission of offence punishable under Section 307 of I.P.C and was sentenced to undergo R.I. for a period of five years and to pay fine of Rs.10,000/- - he was convicted of the commission of offences punishable under Section 452, 323 and 506 of I.P.C and was sentenced to undergo imprisonment for a period of two years and to pay fine of Rs.3,000/- each- the petitioner was also convicted of the commission of offence punishable under Section 302 of I.P.C and was sentenced to undergo imprisonment for life –conviction for the commission of offence punishable under Section 302 of I.P.C was altered to the commission of offence punishable under Section 304(I) of I.P.C– sentence was modified to the imprisonment already undergone – petitioner was convicted of the commission of offences punishable under Sections 341 and 323 of I.P.C and was sentenced to undergo imprisonment for a period of two years and to pay fine of Rs.1,500/- each –the petitioner was convicted of the commission of offences punishable under Sections 8/9 of H.P. Good Prisoners (TR) Act, 1968 and was sentenced to undergo imprisonment for a period of one year – the petitioner applied for the release but the application was rejected – held, that the date on which the petitioner was convicted of the commission of three out of four sentences was subsequent to imposition of sentence of imprisonment for life – the petitioner had undergone sentences in all the three convictions before the sentence of life imprisonment was modified by the Court – the further detention of the petitioner is not justified and petitioner ordered to be released, unless required in any other case not mentioned in the petition. (Para-11 to 16)

For the Petitioner : Mr. Adarsh Sharma, Advocate.
For the Respondents : Mr. V.S. Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Petitioner Satish Kumar, through the Superintendent of Jail, M.C. Jail, Nahan, has invoked the writ jurisdiction of this Court.

2. The issue pertains to the application of provisions of Section 427 of the Code of Criminal Procedure (hereinafter referred to as the Code), which read as under:

"427. Sentence on offender already sentenced for another offence.-

(1) When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence:

Provided that where a person who has been sentenced to imprisonment by an order under section 122 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

(2) When a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence."

3. Earlier request made by the petitioner for his release stands rejected by the Additional Sessions Judge (2), Mandi, Himachal Pradesh, vide order date 5.7.2016.

4. Undisputed facts, emerging from the record, are as under: (a) In connection with Sessions Trial No.37/2001, 67/2004, petitioner Satish Kumar was convicted for having committed an offence, punishable under Section 307 of the Indian Penal Code (hereinafter referred to as IPC), and sentenced to serve rigorous imprisonment for a period of five years and pay fine of Rs.10,000/-, failing which to undergo rigorous imprisonment for a period of one year. Such conviction, rendered by Fast Track Court, Mandi, Himachal Pradesh, vide judgment dated 28.7.2005, has attained finality, with no appeal having been field by the petitioner. From the response filed by the Superintendent of Jail, it is apparent that the petitioner had served the substantive sentence, but however, sentence in default for payment of fine was kept in abeyance.

5. In connection with another FIR, vide judgment dated 19.9.2009, passed by Judicial Magistrate 1st Class, Sundernagar, petitioner was convicted for having committed offences, punishable under Sections 452, 323 and 506 IPC, for which he was sentenced to serve imprisonment for a period of two years, each and pay fine of Rs.3,000/-, each and in default thereof serve imprisonment for a period of three months, each. From the response filed by the Superintendent of Jail, it is apparent that the petitioner has served substantive sentence concurrently in view of his earlier conviction in connection with an offence punishable under Section 302 IPC.

6. It is a matter of record that in relation to an offence under Section 302 IPC, petitioner came to be convicted with imprisonment for life, vide judgment dated 8.3.2006, rendered by Fast Track Court, Mandi, Himachal Pradesh, in Sessions Trial No.18/2004, 79/2005. It is also a matter of record that in an appeal preferred by the petitioner, such conviction under Section 302 IPC came to be altered to that of Section 304(1) IPC, and the sentence reduced to imprisonment already undergone, as petitioner remained in jail for more than 11 years. This was so done by this Court in Criminal Appeal No.194 of 2011, titled as *Satish Kumar v. State of H.P.* Significantly, this Court directed that petitioner be released forthwith. It is not disputed before us that the said judgment has attained finality.

7. It is also a matter of record that petitioner was also convicted for having committed offences punishable under Sections 341 and 323 IPC, vide judgment dated 18.12.2009, rendered by Judicial Magistrate 1st Class, Sundernagar, whereby he was directed to serve imprisonment for a period of two years and pay fine of Rs. 1,500/-. From the response filed by the Superintendent of Jail, it is apparent that the said sentence was also executed

concurrently with the imposition of sentence of imprisonment for life, in connection with an offence punishable under Section 302 IPC.

8. It is also a matter of record that vide judgment dated 29.5.2010, passed by Chief Judicial Magistrate, Sirmaur District at Nahan, petitioner was convicted for having committed an offence punishable under Section 8/9 of the H.P. Good Prisoners (TR) Act, 1968, whereby he was directed to serve sentence for a period of one month.

9. From the response filed by the Superintendent of Jail, it is quite apparent that the petitioner, in connection with one case or the other, remained in judicial custody for more than 12 years.

10. Petitioner came to be convicted for life imprisonment, in terms of judgment dated 8.3.2006. From the response filed by the Superintendent of Jail, it is apparent that sentence in relation to such offence commenced only after completion of rigorous imprisonment, so rendered in connection with his conviction under Section 307 IPC, vide judgment dated 28.7.2005. In connection with the said offence, petitioner remained in Jail continuously with effect from 29.7.2005/29.12.2005. But the fact of the matter is that in relation to his conviction under Section 302 IPC, the authorities construed commencement of his imprisonment only after expiry of his prior conviction, in relation to an offence under Section 307 IPC, which factual position is not disputed before us.

11. It is in this backdrop that when we peruse the relevant provisions of Section 427 of the Code, we find the trial Court to have committed grave illegality in rejecting the petitioner's application.

12. There is no ambiguity in the statutory provisions, which are clear and simple.

13. Trial Court erred in coming to the conclusion that sub-section (2) of Section 427 of the Code was not applicable. Again, the language is simple. The date on which petitioner came to be convicted in relation to three out of four different offences, was subsequent to imposition of sentence of imprisonment for life and these sentences were to run concurrently with the sentence of life imprisonment, as per provisions of sub-section (2) of Section 427 of the Code and it is also not disputed before us that the petitioner had undergone sentence in all the above mentioned three convictions before the sentence of life imprisonment was modified by this Court.

14. From the record produced before us, it is not clear as to whether petitioner had deposited the amount of fine of Rs. 10,000/-, in relation to his first conviction. Assuming hypothetically that it was not so done, even then, since he continuously remained in jail with effect from July/December, 2005, he had already undergone the period of default imprisonment in relation to such offence, for his conviction for life commenced only after execution of the first sentence.

15. Hence, in whichever way the matter is perceived, we find no justification for further detention of the petitioner, and as such order dated 5.7.2016, passed by Additional Sessions Judge (II), Mandi, Himachal Pradesh, is quashed and set aside, with a direction to the Superintendent of Jail, Nahan, to forthwith release the petitioner, unless so required in connection with any other offence, save and except the ones recorded by us.

16. Registrar (Judicial) of this Court is directed to forthwith take all consequential action(s) and ensure compliance of the order.

Present petition stands disposed of, so also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh .....Appellant.

Vs.

Pankaj Samkadia .....Respondent.

Cr. Appeal No.: 44 of 2015
Reserved on: 27.12.2016
Date of Decision: 11.01.2017

Indian Penal Code, 1860- Section 376 and 506- The prosecutrix was a student of 10+1 class – she was aged 16 years – she was taken to a hotel and was raped by the accused after alluring her to marry him- the accused continued to have sexual intercourse with the prosecutrix for about three years – he used to intimidate her by saying that he would show her MMS – the prosecutrix lodged a report after attaining the age of 18 years – the accused was tried and acquitted by the Trial Court- held in appeal that the accused had entered into a sexual relations with the prosecutrix in the year 2010- the matter was reported to the police in the year 2012 – a complaint was lodged by the prosecutrix, which was withdrawn by her – the prosecutrix had concealed her relations with the accused from every person including her parents – the prosecutrix had stayed with the accused in different hotelsbut had not raised any hue and cry – the version that accused had threatened her to show her MMS was not established as no MMS was found by the police – the testimony of prosecutrix is not cogent, trustworthy or reliable – the Trial Court had rightly acquitted the accused- appeal dismissed.(Para-9 to 38)

Cases referred:

Mohammed Ankoos and Others Vs. Public Prosecutor, High Court of Andhra Pradesh, Hyderabad, (2010) 1 Supreme Court Cases 94
State of Himachal Pradesh *Vs.* Kahan Chand, 2016 (1) Drugs Cases (Narcotics) *576*,
State of U.P. Vs. Pappu alias Yunus and another (2005) 3 Supreme Court Cases 594}
Rameshwar Vs. State of Rajasthan AIR 1952 SC 54
State of Punjab *Vs.* Gurmit Singh and others, (1996) 2 Supreme Court Cases 384
Radhu *Vs.* State of Madhya Pradesh, (2007) 12 Supreme Court Cases 57
Narender Kumar *Vs.* State (NCT of Delhi), (2012) 7 Supreme Court Cases 171
Munna *Vs.* State of Madhya Pradesh, (2014) 10 Supreme Court Cases 254
Manoharlal *Vs.* State of Madhya Pradesh, (2014) 15 Supreme Court Cases 587
Tilak Raj Vs. State of Himachal Pradesh, AIR 2016 Supreme Court 406,
Uday Vs. State of Karnataka (2003) 4 Supreme Court Cases 46
State of Madhya Pradesh Vs. Munna (2016) 1 Supreme Court Cases 696

For the appellant: Mr. Vikram Thakur, Deputy Advocate General.
For the respondent: Ms. Arti Sharma, Advocate, vice Mr. Naresh Kaul, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge :

By way of this appeal, the State has challenged the judgment passed by the Court of learned Additional Sessions Judge-I, Kangra at Dharamshala in Sessions Case (RBT) No. 268/2012, dated 17.09.2014, vide which learned trial Court has acquitted the accused for commission of offences punishable under Sections 376 and 506 of the Indian Penal Code.

2. The case of the prosecution was that prosecutrix moved an application on 16.11.2012 to Superintendent of Police, Kangra mentioning therein that three years ago while she was a student of +1 class in a school at Rehan, accused used to come and obstruct her path and insisted for her friendship and also threatened that in case she refused his friendship, then he would falsely level allegations against her. At that relevant time, age of the prosecutrix was 16 years and she was allured by the accused, who took her to a hotel at Nurpur and committed sexual intercourse with her forcibly and also allured her to marry him, besides threatening her that in case she revealed these facts to anyone, he would kill her family members. Accused continued to have sexual intercourse with prosecutrix for about three years and also intimidated her that he would defame the prosecutrix by showing her MMS. It was also the case of the prosecutrix that she lodged the FIR when after attaining the age of 18 years, she asked the accused to marry her, who however declined to marry her. Prosecutrix also stated that she had reported the matter to SHO, Police Station, Nurpur on 05.09.2011, wherein she was called upon to enter into a compromise forcibly.

3. On the basis of said complaint of the prosecutrix, FIR No. 392/2012 was registered on 17.11.2012 at Police Station, Nurpur. Thereafter, investigation was carried out by the police and in the course of investigation, SHO prepared site plans of hotel Vatika at Bohad and hotel Span Spa at Khushinagar, Nurpur as well as hotel Midnight at Harnota, wherein prosecutrix was allegedly sexually assaulted by the accused. The Investigating Officer also prepared the site plan of the school where prosecutrix had studied and seized the Sim and Mobile of accused alongwith his motorcycle. Prosecutrix was got medically examined and details of her mobile call records were also obtained. Thereafter, statements of the witnesses were recorded under Section 161 of the Code of Criminal Procedure.

4. After completion of investigation, challan was filed in the Court and as a prima facie case was made out against the accused, accordingly he was charged for commission of offences punishable under Sections 376 and 506 of the Indian Penal Code, to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced ocular as well as documentary evidence before the learned trial Court, which included the statements of 16 prosecution witnesses. Defence examined one witness.

6. Learned trial Court vide its judgment dated 17.09.2014, acquitted the accused by holding that in view of shaky and unreliable evidence qua rape and criminal intimidation as projected in the prosecution case, it would be unsafe to hold that prosecution had established and proved its case against the accused under Section 376 and 506 of the Indian Penal Code beyond reasonable doubt. Learned trial Court took note of the fact that FIR was lodged after almost three years or more from the first incident of rape allegedly committed by the accused upon the prosecutrix. Learned trial Court also took note of the fact that prosecutrix had not reported the first incident of rape and subsequent incidents of sexual intercourse committed with her by the accused, though it was the case of the prosecutrix that accused was allegedly criminally intimidating her to kill her family members and send her MMS in case she revealed to anyone about their sexual relations. Learned trial Court also took note of the fact that prosecutrix had stayed in different hotels at different times with the accused and while she was moving around with the accused in various hotels at different places where accused allegedly committed sexual intercourse with her, it was unbelievable that the said sexual intercourse was without the consent of the prosecutrix. Learned trial Court held that there were ample opportunities for the prosecutrix to have had reported the matter to the police earlier, though in her subsequent application, she had given a reasoning that it was only after she attained the age of 18 years and she asked the accused to marry her and when the accused refused to do so, she filed the complaint. On these bases, learned trial Court held that the primary grievance of the prosecutrix remained that she had sexual relations with the accused for about three years and she did not report the same to anyone as the accused had threatened her and also promised to marry her, however, as on the date of offence, prosecutrix was more than 16 years old and could legitimately

have given consent for sexual intercourse and further there was no cogent explanation for delay of more than three years in reporting the matter to the police, which was fatal to the case of the prosecution. Learned trial Court also held that though the case of the prosecutrix was that she was criminally intimidated by the accused qua displaying of her photographs and MMS and killing her family members if she disclosed that petitioner was sexually harassing her, however, said allegations did not found mention in the FIR and the deposition of the prosecutrix in Court was unreliable as the same was full of improvements. Learned trial Court held that prosecutrix had specifically stated in her cross-examination that accused maintained sexual relations with her for a period of about three years and it was difficult to believe that for such long period her consent was not there. Learned trial Court also held that there was inconsistency in the story as was put forth by the prosecutrix as firstly her case was that accused had promised to marry her and thereafter she came forth with the version that her MMS was prepared by the accused who threatened to reveal the same. Learned trial Court also held that though the prosecutrix had stated that she had seen her own MMS recorded by the accused, but this fact was not there in the statement of the prosecutrix recorded under Section 154 of the Code of criminal Procedure, on the basis of which FIR was recorded. On these bases, learned trial Court came to the conclusion that in fact story of preparation of MMS as was put forth by the prosecutrix was manifestly untrue and was rather an afterthought to justify the delay. Learned trial Court also took note of the fact that the prosecutrix had admitted in her cross-examination that she had not disclosed to her parents that she had visited and stayed at several hotels with the accused at different places, which clearly established that she had kept her affair with the accused a secret. Learned trial Court also took note of the fact that PW-16 ASI Surjeet Singh, the Investigating Officer of the case had admitted in his cross-examination that the prosecutrix was in fact interested in getting married with the accused at any cost and when accused refused to accept the proposal of the prosecutrix, she was motivated to implicate the accused falsely. Learned trial Court also held that prosecutrix was visiting the jail to meet the accused after his arrest which was evident from Ex. D1 to Ex. D3, entries in the prisoners interview register, which contained signatures of prosecutrix qua her visit to meet accused on different dates, which clearly established that prosecutrix was not aggrieved with her sexual relations with accused for about three years and the story propounded by the prosecutrix was unreliable. On these bases, learned trial Court held that the prosecution had failed to prove its case against the accused qua rape and criminal intimidation and it acquitted the accused for commission of offences punishable under Sections 376 and 506 of the Indian Penal Code.

7. Feeling aggrieved by the judgment so passed by the learned trial Court, the State has filed this appeal.

8. We have heard the learned counsel for the parties and have also gone through the records of the case as well as the judgment passed by the learned trial Court.

9. Before proceeding further, it is relevant to take note of the fact that in the present case, the accused has the benefit of being acquitted by the learned trial Court.

10. The Hon'ble Supreme Court in **Mohammed Ankoos and Others Vs. Public Prosecutor, High Court of Andhra Pradesh, Hyderabad, (2010) 1 Supreme Court Cases 94** has held:

> *"12. This Court has, time and again, dealt with the scope of exercise of power by the Appellate Court against judgment of acquittal under Sections 378 and 386, Cr.P.C. It has been repeatedly held that if two views are possible, the Appellate Court should not ordinarily interfere with the judgment of acquittal. This Court has laid down that Appellate Court shall not reverse a judgment of acquittal because another view is possible to be taken. It is not necessary to multiply the decisions on the subject and reference to a later decision of this Court in Ghurey Lal v. State Of Uttar Pradesh1 shall suffice wherein this Court considered a long line of cases and held thus : (SCC p.477, paras 69 -70)*
>
> *"69. The following principles emerge from the cases above:*

1. The appellate court may review the evidence in appeals against acquittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.

2. The accused is presumed innocent until proven guilty. The accused possessed this presumption when (2008) 10 SCC 450 he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that the trial court was wrong.

70. In light of the above, the High Court and other appellate courts should follow the well-settled principles crystallised by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

(i) The trial court's conclusion with regard to the facts is palpably wrong;

(ii) The trial court's decision was based on an erroneous view of law;

(iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

(iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

(v) The trial court's judgment was manifestly unjust and unreasonable;

(vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the ballistic expert, etc.

(vii) This list is intended to be illustrative, not exhaustive.

2. The appellate court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached--one that leads to acquittal, the other to conviction--the High Courts/appellate courts must rule in favour of the accused."

11. In **State of Himachal Pradesh *Vs.* Kahan Chand,** 2016 (1) Drugs Cases (Narcotics) *576*, a Coordinate Bench of this Court has held as under

"19. The accused has had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in Mohamed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94, it cannot be said that the Court below has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice. No ground for interference is called for. The present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged."

12. In this background, now this Court has to scrutinize the judgment passed by the learned trial Court as well as the evidence adduced on record by the prosecution to ascertain as

to whether the findings of acquittal returned by the learned trial Court are borne out from the records of the case or the judgment so passed by the learned trial Court is hit by perversity.

13. In order to prove its case, the prosecution in all examined 16 witnesses, whereas defence examined one witness.

14. Prosecutrix entered the witness box as PW-4 and she stated that in the year 2010, she was a student of +1 class at Senior Secondary School, Rehan and accused used to pursue her to have friendship with her. She further stated that accused used to proclaim that if she did not accept his friendship, then he would come to her house and insult her. According to the prosecutrix, her age at that relevant time was 16 years and she was not interested in talking to the accused, who kept on troubling her for three years. She further stated that the accused had told her that he had arranged a party at Nurpur in a hotel and there accused took her in a room where he committed sexual intercourse with her without her consent. She further deposed that accused assured her that he would marry her and accordingly, she did not reveal this fact to anyone. She further deposed that accused continuously had sexual intercourse with her for three years and criminally intimidated her by saying that in case she revealed the same to anyone, he would send the MMS of her which had been prepared by him. She further stated that when she attained the age of 18 years, she asked the accused to marry her, which he denied and thereafter she reported the matter to SHO, Police Station Nurpur. She further stated that accused alongwith his parents had forcibly made her to enter into a compromise for marriage with accused, but accused did not marry her and thereafter, she approached Police Station, Nurpur for registration of FIR, which was deferred on the pretext of compromise and in these circumstances, she moved an application Ex. PW4/A to Superintendent of Police Kangra at Dharamshala, pursuant to which, FIR No. 392/12 was registered at Police Station, Nurpur. In her cross-examination, she admitted that her caste and the caste of the accused were different. She further deposed that she could not tell the specific date or month when accused had taken her to hotel at Nurpur. She further stated that hotel was at a distance of 15 to 20 kms. from her village. She further stated that there was staff in the hotel. She admitted that she did not report the matter to the police in the year 2010 nor she took up the matter with her parents. She also admitted it to be correct that in the year 2011, neither she reported the matter to the police nor did she reveal the said fact to any one. She further stated that she had seen her own MMS recorded by the accused, but she had not stated before the police while making statement Ex. PW4/A that she had seen her MMS. She also admitted that her statement was recorded twice and in neither of her statements on either of the two occasions, she revealed watching of the said MMS. She also stated that police had not shown during the course of investigation the said MMS to her. She further admitted it to be correct that she had not stated in her statements that the accused was possessing more than one mobile phone. She admitted the suggestion that in her statement/compromise Ex. PW4/F, there was no reference of assurance of her marriage with the accused. She also admitted it to be correct that the said document contained her signatures as well as signatures of both of her parents. She also admitted it to be correct that she had sworn affidavit mark-DA, wherein she had stated that she had falsely reported the matter with the police and she was not interested in pursuing the case. She also admitted it to be correct that she had not disclosed to her parents that she had visited different hotels at different places with the accused.

15. Mother of the prosecutrix entered the witness box as PW-5 and she deposed that prosecutrix told her that accused had committed sexual intercourse with her on several occasions on the false pretext of marriage and that she had visited number of hotels at Nurpur and Dehri with him. In her cross-examination, she stated that she had not reported either to the Panchayat or in her Biradari or to the police the factum of accused allegedly teasing the prosecutrix. She admitted it to be correct that in the year 2010-11, neither she nor her husband nor the prosecutrix lodged any complaint with the police to the effect that prosecutrix was subjected to sexual intercourse on the pretext of false marriage. She also admitted it to be correct that in the year 2010, prosecutrix had completed 16 years of age. She also admitted it to be correct that in Ex. PW4/F, there was no reference of assurance of marriage by the accused with the prosecutrix.

16. Dr. Surekha Gupta, who medically examined the prosecutrix on an application so filed by the police, entered the witness box as PW-2 and she deposed that physical examination of the prosecutrix revealed that she was a conscious and a well aware lady and there were no marks of injury on any part of her body. In her cross-examination, this witness deposed that it was correct that she did not note or observe any marks of resistance or violence on the person of the prosecutrix and as per clinical examination, she found the prosecutrix to be habitual of sexual intercourse.

17. Investigating Officer, ASI Surjeet Singh, who entered the witness box as PW-16, in his cross-examination admitted that his investigation revealed that prosecutrix was interested in getting married to the accused at any cost. He further deposed that no record of MMS or SMS was recovered by him during the course of investigation nor any record or MMS was traced. He admitted it to be correct that prosecutrix was aged 16 years in the year 2010. He also stated in his cross-examination that the record traced of the hotels which were visited by the prosecutrix alongwith the accused revealed that no specific dates had been mentioned as to when the prosecutrix had visited the aforesaid hotels in the company of the accused.

18. Ranjeet Singh Dogra, Assistant Superintendent Sub Jail Nurpur was examined by the defence as DW-1 and he deposed that as per entries of prisoners interview register dated 03.12.2012, 05.12.2012 and 07.12.2012, prosecutrix had come to Sub Jail Nurpur to visit the accused while he was in judicial custody.

19. Before proceeding further, it is relevant to mention that the birth certificate of the prosecutrix is on record Ex. PW3/A and as per the said certificate, the date of birth is recorded as 02.01.1994.

20. A perusal of the statement of the prosecutrix demonstrates that as per her, against her wishes she was allured by the accused to enter into physical relations with him on the pretext of marriage. It was further the case of the prosecutrix that in fact accused allured her while she was a student of +1 class at Senior Secondary School, Rehan in the year 2010.

21. In the present case, complaint on the basis of which FIR was lodged is Ex. PW4/A dated 16.11.2012 and FIR is dated 17.11.2012. There is on record a statement of the prosecutrix Ex. PW4/F, in which it finds mentioned that she had filed a complaint against the accused at Police Station, Nurpur under the influence of some people and as a compromise had been entered into between the parties, she was not interested in pursuing the complaint so lodged by her and that she was making the statement in front of her parents. This statement of her also bears the signatures of her father and her mother. The complaint which was so made by her against the accused and which she withdrew by way of this statement of her is on record as Ex. PW4/D, in which it was alleged that the accused used to harass the prosecutrix when she was studying in the School and he wanted her to have friendship with him and he coerced her to enter into friendship with him and thereafter on the pretext of marriage, he maintained physical relations with her and as he had gone back upon his word and was not willing to marry her, therefore, action be taken against him.

22. A perusal of Ex. PW4/D reveals that it is not mentioned therein as to in which particular year, the accused started alluring her or initially following her and since when he started maintaining physical relations with her on the pretext of marrying her.

23. Be that as it may, it is a matter of record, as we have already discussed above, that as per the prosecutrix, complainant initially had sexual intercourse with the accused somewhere in the year 2010 and FIR was lodged against the accused on 17.11.2012 and before this, a complaint which was filed by the prosecutrix against the accused, was withdrawn by her. It is a matter of record, as has come forth in the statement of the prosecutrix herself that the factum of her relation with the accused was concealed by her from everyone. According to her, she had not disclosed these facts to her parents also.

24. Besides this, another important aspect of the matter is that it stands proved on record that the prosecutrix has stayed with the accused in different hotels at different places, where according to the prosecutrix, accused sexually exploited her. If that was so, then no explanation has come forth from the prosecutrix as to why she did not raise any hue and cry, because it was not her case that either these places were secluded or the hotels to which she was taken by the accused were at isolated places which were not visited by other customers. The explanation which has been given by the prosecutrix that the accused in fact maintained physical relations with her against her will and without her consent, as he threatened to exploit her on the basis of MMS of her which was with him, is without any credibility, because it has come in the statement of the Investigating Officer that no such MMS in fact has been found. Not only this, twice statements of the prosecutrix were recorded by the police and in none of these statements it was stated by the prosecutrix that she had seen any MMS of her allegedly recorded by the accused. Thus, the explanation which has been given by the prosecutrix as to why she did not raise any hue and cry when she was sexually exploited by the accused has not been proved or corroborated by any material on record.

25. Therefore, in our considered view, the prosecution has not been able to prove, nor it is borne out from the testimony of the prosecutrix that she was subjected to sexual intercourse by the accused against her will. On the other hand, the factum of the prosecutrix having maintained relations with the accused over a span of about three years and her visiting the accused even after he was arrested and lodged in jail, demonstrates that the sexual relationship entered into between the prosecutrix and the accused was a consensual sexual relationship. In the absence of any material on record from which it can be inferred that the said relationship was not a result of the consent of the prosecutrix, in our considered view, no inference to the contrary can be drawn only on the basis of conjectures and surmises.

26. This Court is not oblivious to the fact that in a case under Section 376 of the Indian Penal Code, the sole testimony of the prosecutrix is enough to hold the accused guilty, but then such deposition of the prosecutrix has to be cogent, reliable and trustworthy. In this case, according to us, the statement of the prosecutrix is neither cogent, nor reliable nor the same is trustworthy. Besides this, it has come in the statement of Dr. Surekha Gupta, who has medically examined the prosecutrix that neither any marks have been found on the body of the prosecutrix of violence and further that the prosecutrix was habitual to sex.

27. It is settled law that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. This is for the reason that the prosecutrix stands at a higher pedestal than an injured witness. However, the fact still remains that the testimony of the prosecutrix on the face of it has to be acceptable. *{See State of U.P. Vs. Pappu alias Yunus and another (2005) 3 Supreme Court Cases 594}.*

28. Though it is settled law that corroboration is not *sine qua non* for conviction in a rape case, however, it is relevant to refer to the judgment of Hon'ble Supreme Court in **Rameshwar** Vs. **State of Rajasthan** AIR 1952 SC 54, in which it has been observed as under:

> *"The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge...."*

29. In our considered view, in the facts of the present case, as they emerge from the evidence which has been placed on record by the prosecution, it cannot be said that the testimony of the prosecutrix is either cogent or it is trustworthy, reliable or the same seems to be truthful. Further, the credibility of the testimony of the prosecutrix has also been impinged by the defence in her cross-examination. At the cost of repetition, we state that the prosecution has not been able to produce iota of evidence to substantiate that prosecutrix was raped by the accused on the promise of marriage.

30. The Hon'ble Supreme Court has held in **State of Punjab *Vs.* Gurmit Singh and others,** (1996) 2 Supreme Court Cases 384:

> *"x x x x x x x x x The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not over-look. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman, who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be over-looked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another persons's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. In State of Maharashtra Vs. Chandraprakash Kewalchand Jain (1990 (1) SCC 550) Ahmadi, J. (as the Lord Chief Justice then was) speaking for the Bench summarised the position in the following words: (SCC p. 559, para 16)*
>
> *"A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the*

charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction of her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

31. The Hon'ble Supreme Court in **Radhu** ***Vs.*** **State of Madhya Pradesh,** (2007) 12 Supreme Court Cases 5***7*** has held:

" 6. It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a 'rape', if the girl is under 16 years of age. It is also well settled that absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor construed as evidence of consent. Similarly, the opinion of a doctor that there was no evidence of any sexual intercourse or rape, may not be sufficient to disbelieve the accusation of rape by the victim. Bruises, abrasions and scratches on the victim especially on the forearms, writs, face, breast, thighs and back are indicative of struggle and will support the allegation of sexual assault. The courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case."

32. In **Narender Kumar** ***Vs.*** **State (NCT of Delhi),** (2012) 7 Supreme Court Cases 171, the Hon'ble Supreme Court has held:

"*20. It is a settled legal proposition that once the statement of prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under 1 Page 12 the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.*

21. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a

criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial, which may lend assurance to her testimony. (Vide: Vimal Suresh Kamble v. Chaluverapinake Apal S.P and Vishnu v. State of Maharashtra).

22. Where evidence of the prosecutrix is found suffering from serious infirmities and inconsistencies with other material, prosecutrix making deliberate improvements on material point with a view to rule out consent on her part and there being no injury on her person even though her version may be otherwise, no reliance can be placed upon her evidence. (Vide: Suresh N. Bhusare & Ors. v. State of Maharashtra.

23. In Jai Krishna Mandal & Anr. v. State of Jharkhand, this Court while dealing with the issue held: (SCC p. 535, para 4)

"4…….the only evidence of rape was the statement of the prosecutrix herself and when this evidence was read in its totality, the story projected by the prosecutrix was so improbable that it could not be believed."

33. In **Munna *Vs.* State of Madhya Pradesh,** (2014) 10 Supreme Court Cases 254, the Hon'ble Supreme Court has been pleased to held:

"*7. We are conscious that testimony of the prosecutrix is almost at par with an injured witness and can be acted upon without corroboration as held in various decisions of this Court. Reference may be made to some of the leading judgments.*

8. In Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat, this Court held as under (SCC pp. 224-26, paras 9-10)

"9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and 1 (1983) 3 SCC 217 Page 5 5 its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical.

10. Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault …….. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because (1) A girl or a woman in the tradition-bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends, and neighbours. (3) She would have to brave the whole world. (4) She would face the

risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition-bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social Page 6 6 stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by counsel for the culprit, and the risk of being disbelieved, acts as a deterrent."

9. In State of Maharashtra vs. Chandraprakash Kewalchand Jain, this Court held as under : (SCC pp. 558-60, paras 15-17)

"15. It is necessary at the outset to state what the approach of the court should be while evaluating the prosecution evidence, particularly the evidence of the prosecutrix, in sex offences. Is it essential that the evidence of the prosecutrix should be corroborated in material particulars before the court bases a conviction on her testimony ? Does the rule of prudence demand that in all cases save the rarest of rare the court should look for corroboration before acting on the evidence of the prosecutrix ? Let us see if the Evidence Act provides the clue. Under the said statute 'Evidence' means and includes all statements which the court permits or requires to be made before it by witnesses, in relation to the matters of fact under inquiry. Under Section 59 all facts, except the contents of documents, may be proved by oral evidence. Section 118 then tells us who may give oral evidence. According to that section all persons are competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Even in the case of an accomplice Section 133 provides that he 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. However, illustration (b) to Section 114, which lays down a rule of practice, says that the court 'may' presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. Thus under Section 133, which lays down a rule of law, an accomplice is a competent witness and a conviction based solely on his uncorroborated evidence is not 2 (1990) 1 SCC 550 Page 7 7 illegal although in view of Section 114, illustration (b), courts do not as a matter of practice do so and look for corroboration in material particulars. This is the conjoint effect of Sections 133 and 114, illustration (b).

16. A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is

necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness. For the above reasons we think that exception has rightly been taken to the approach of the High Court as is reflected in the following passage:

"It is only in the rarest of rare cases if the court finds that the testimony of the prosecutrix is so trustworthy, truthful and reliable that other corroboration may not be necessary."

With respect, the law is not correctly stated. If we may say so, it is just the reverse. Ordinarily the evidence of a prosecutrix must carry the same weight as is attached to an injured person who is a victim of violence, unless there are special circumstances which call for greater caution, in which case it would be safe to act on her testimony if there is independent evidence lending assurance to her accusation.

17. We think it proper, having regard to the increase in the number of sex violation cases in the recent past, particularly cases of molestation and rape in custody, to remove the notion, if it persists, that the testimony of a woman who is a victim of sexual violence must ordinarily be corroborated in material particulars except in the rarest of rare cases. To insist on corroboration except in the rarest of rare cases is to equate a woman who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her story of woe will not be believed unless it is corroborated in material particulars as in the case of an accomplice to a crime. Ours is a conservative society where it concerns sexual behaviour. Ours is not a permissive society as in some of the western and European countries. Our standard of decency and morality in public life is not the same as in those countries. It is, however, unfortunate that respect for womanhood in our country is on the decline and cases of molestation and rape are steadily growing. An Indian woman is now required to suffer indignities in different forms, from lewd remarks to eve-teasing, from molestation to rape. Decency and morality in public life can be promoted and protected only if we deal strictly with those who violate the societal norms. The standard of proof to be expected by the court in such cases must take into account the fact that such crimes are generally committed on the sly and very rarely direct evidence of a person other than the prosecutrix is available. Courts must also realise that ordinarily a woman, more so a young girl, will not stake her reputation by levelling a false charge concerning her chastity."

10. Similar observations were made in State of Punjab vs. Gurmit Singh, as under : (SCC pp. 395-96, para 8)

"8……The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial 3 (1996) 2 SCC 384 Page 10 10 credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

(emphasis in original)

11. Thus, while absence of injuries or absence of raising alarm or delay in FIR may not by itself be enough to disbelieve the version of prosecutrix in view of the statutory presumption under Section 114A of the Evidence Act but if such statement has inherent infirmities, creating doubt about its veracity, the same may not be acted upon. We are conscious of the sensitivity with which heinous offence under Section 376, IPC has to be treated but in the present case the circumstances taken as a whole create doubt about the correctness of the prosecution version. We are, thus, of the opinion that a case is made out for giving benefit of doubt to the accused."

34. The Hon'ble Supreme Court of India in **Manoharlal *Vs.* State of Madhya Pradesh,** (2014) 15 Supreme Court Cases 587 has held:

"8. Though as a matter of law the sole testimony of the prosecutrix can sufficiently be relied upon to bring home the case against the accused, in the

instant case we find her version to be improbable and difficult to accept on its face value. The law on the point is very succinctly stated in Narender Kumar v. State (NCT of Delhi), to which one of us (Dipak Misra, J). was a party, in following terms: (SCC p. 178, paras 29 and 21)

"20. It is a settled legal proposition that once the statement of the prosecutrix inspires confidence 4 Page 5 and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.

21. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject-matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial which may lend assurance to her testimony." (emphasis in original)

9. Having found it difficult to accept her testimony on its face value, we searched for support from other material but find complete lack of corroboration on material particulars. First, the medical examination of the victim did not result in any definite opinion that she was subjected to rape. Secondly, Riyaz who was like a brother to the victim and thus a close confidant, has not supported the case of the prosecution and has completely denied having met her when she allegedly narrated the incident to him. Thirdly the person who was 5 Page 6 suffering from fever and to whose house she was first taken by the appellant was not examined at all. Fourthly, the policeman who the victim met during the night was also not examined. Fifthly, neither the brother nor any of the parents of the victim were examined to corroborate the version that she had come from the village of her brother and alighted around 10:00 P.M. at Bajna bus stand. Lastly, the sequence of events as narrated would show that she had allegedly accompanied the appellant to various places. In the circumstances, we find extreme difficulty in relying upon the version of the victim alone to bring home the charge against the appellant. We are inclined to give benefit of doubt to the appellant."

35. It is also relevant to refer to the judgment of the Hon'ble Supreme Court in **Tilak Raj *Vs.* State of Himachal Pradesh,** *AIR 2016 Supreme Court 406***,** in which the Hon'ble Supreme Court has held:

"19. We have carefully heard both the parties at length and have also given our conscious thought to the material on record and relevant provisions of The Indian Penal Code (in short "the IPC"). In the instant case, the prosecutrix was an adult and mature lady of around 40 years at the time of incident. It is admitted by the prosecutrix in her testimony before the trial court that she was in relationship with the appellant for the last two years prior to the incident and the appellant used to stay overnight at her residence. After a perusal of copy of FIR and evidence on record the case set up by the prosecutrix seems to be highly unrealistic and unbelievable.

23. From the aforesaid, it is clear that the evidence of the prosecution is neither believable nor reliable to bring home the charges leveled against the appellant. We are of the view that the impugned judgment and order passed by the High Court is not based on a careful re-appraisal of the evidence on record by the High Court and

there is no material evidence on record to show that the appellant is guilty of the charged offences i.e., offence of cheating punishable under Section 417 of IPC and offence of criminal intimidation punishable under Section 506 part I of IPC. "

36. The Hon'ble Supreme Court in **Uday** Vs. **State of Karnataka** (2003) 4 Supreme Court Cases 46 has held:

"21. It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.

22. The approach to the subject of consent as indicated by the Punjab High Court in Rao Harnarain Singh and by the Kerla High Court in Vijayan Pillai has found approval by this Court in State of H.P. Vs. Mango Ram. Balakrishanan, J. speaking for the Court observed: (SCC pp.230-31, para 13)

"The evidence as a whole indicates that there was resistance by the prosecutrix and there was no voluntary participation by her for the sexual act. Submission of the body under the fear of terror cannot be construed as a consented sexual act. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."

23. Keeping in view the approach that the Court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown-up girl studying in a college. She was deeply in love with the appellant. She was, however, aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to them. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances, lead us to the conclusion that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact.

24. There is another difficulty in the way of the prosecution. There is no evidence to prove conclusively that the appellant never intended to marry her. Perhaps he wanted to, but was not able to gather enough courage to disclose his

intention to his family members for fear of strong opposition from them. Even the prosecutrix stated that she had full faith in him. It appears that the matter got complicated on account of the prosecutrix becoming pregnant. Therefore, on account of the resultant pressure of the prosecutrix and her brother the appellant distanced himself from her.

25. There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellate knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due couse. There is hardly any evidence to prove this fact. On the contrary, the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, are permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 O' clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent."

37. Recently, the Hon'ble Supreme Court in **State of Madhya Pradesh** Vs. **Munna** (2016) 1 Supreme Court Cases 696 has held that consensual sex by a girl who is more than 16 years of age cannot be termed as rape.

38. A perusal of the judgment passed by the learned trial court also demonstrates that all these aspects of the matter have been taken into consideration by the learned trial court and in our considered view the findings returned by the learned trial court to the effect that prosecution was not able to bring home the guilt of the accused beyond all reasonable doubt cannot be faulted with. We concur with the findings so returned by the learned trial court. In our considered view also the material produced on record by the prosecution does not prove beyond reasonable doubt the guilt of the accused.

39. Accordingly, while upholding the judgment passed by the learned trial Court, we dismiss the present appeal being devoid of merit.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Raj Kumar & others ....Petitioners.

Versus

Smt. Shakuntla Devi (dead) through LRs Padam Chand and others ...Respondents.

Civil Revision No.60 of 2007
Reserved on: 27.10.2016
Date of Decision: January 13, 2017

H.P. Urban Rent Control Act, 1987- Section 14(2)- Landlady filed a petition on the ground that successors-in-interest of original tenant had sublet the premises to respondent No.2 and the premises was being used for a purpose other than for which it was let out – Rent Controller allowed the petition – an appeal was filed, which was allowed and eviction petition was dismissed- held, that if the dominant purpose for which a premises is let out is maintained, tenant may not be liable to be evicted in absence of any covenant to the contrary – change of user from one commercial activity to another is no ground for eviction - tenancy devolved upon the widow and minor children of the tenant – they were not in a position to run the business and employee helped them in running the business on profit sharing basis- he set up his independent business thereafter - the ingredients of subletting were not established – petition dismissed.(Para-11 to 45)

Cases referred:

Hari Rao vs. N. Govindachari & others, (2005) 7 SCC 643
Shiv Ram & another vs. Sheela Devi, AIR 1993 H.P. 49
Rajinder Kumar Sharma vs. Smt. Kanta Kumari, Latest HLJ 2007 (HP) 73
Jagdish Lal vs. Parma Nand, (2000) 5 SCC 44
Peary Mohun Mookherjee v. Badul Chandra Bagdi and others, ILR (1901) 28 CL. 205
Surisetti Butchayya and another v. Sri Rajah Parthasarthy Appa Row Bahadur Zamindar Garu and another, AIR 1922 PC 243
Secretary of State v. Bahadur Chand and others, AIR 1932 Lah 67
Associated Hotels of India Ltd., Delhi v. S.B. Sardar Ranjit Singh, AIR 1968 SC 933
Krishnawati v. Hans Ran, (1974) 1 SCC 289
Jagan Nath (Deceased) through LRs v. Chander Bhan and others, (1988) 3 SCC 57
Gopal Saran v. Satyanarayana, (1989) 3 SCC 56.
G.K. Bhatnagar (Dead) by LRs v. Abdul Alim, (2002) 9 SCC 516
Parvinder Singh v. Renu Gautam and others, (2004) 4 SCC 794
Mahendra Saree Emporium (II) v. G.V. Srinivasa Murthy, (2005) 1 SCC 481
Murlidhar v. Chuni Lal, 1970 Ren CJ 922
Helper Girdharbhai v. Saiyed Mohd. Mirasaheb Kadri, (1987) 3 SCC 538
Vaishakhi Ram and others v. Sanjeev Kuamr Bhatiani, (2008) 14 SCC 35
Nirmal Kanta (Dead) through LRs v. Ashok Kumar and another, (2008) 7 SCC 722
Kala and another versus Madho Parshad Vaidya, (1998) 6 SCC 573

For the Petitioners	:	Mr. R.K. Gautam, Senior Advocate, with Mr. Gaurav Gautam, Advocate.
For the Respondents	:	Mr. Bhupinder Gupta, Senior Advocate, with Mr. Janesh Gupta, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

The short point, which arises for consideration in the present Revision Petition, is as to whether the landlady has made out a case for ejectment, on the ground of sub-letting or not. In effect, what is the true meaning and scope of the terms "sub-letting" requires to be interpreted.

2. Certain facts are not in dispute. The demised premises, i.e. Shop No.12/42, situate in Ward No.8, Doonga Bazar, Kangra, was let out to Kishori Lal (now dead and represented through legal representatives) in the year 1994. Rent Note (Ex. PW-3/A) is on record.

3. The Act specifies several grounds on which a tenant can be evicted. For ready reference Section 14(2) of the Act is reproduced as under:-

> "14. Eviction of tenants.
>
> (1). … …
>
> (2) A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the applicant, is satisfied-
>
> (i) …….
>
> (ii) that the tenant has after the commencement of this Act without the written consent of the landlord -
>
> (a) transferred his rights under the lease or sublet the entire building or rented land or any portion thereof, or
>
> (b) used the building or rented land for a purpose other than that for which it was leased ; or
>
> … …
>
> the Controller may make an order directing the tenant to put the landlord in possession of the building or rented land … …"

4. The landlady filed a petition for ejectment on two grounds: (a) successors-in-interest of the original tenant having sub-let the premises to Padam Chand (respondent No.2, herein), and (b) the premises used for a purpose other than the one for which it was let out.

5. The Rent Controller, in terms of order dated 19.11.1999, passed in Rent Petition No.7 of 1996, titled as *Smt. Urbashi v. Smt. Shakuntla Devi and others,* allowed the petition, directing ejectment of the tenant on both the counts.

6. In the tenants' appeal, the Appellate Authority, vide judgment dated 28.3.2007, passed in Rent Civil Misc. Appeal No.1/K/2000, titled as *Smt. Shakuntla & others versus Smt. Urbashi (now deceased), through LRs,* reversed such findings of fact on both the counts, and dismissed the petition, so filed by the landlady.

The scope of interference in a petition, filed under sub-section (5) of Section 24 of the Act, is now well settled. This Court in Civil Revision No.154 of 2004, titled as *Yog Raj Sood v. Smt. Sunita Kaushal & another,* decided on 1.6.2016, has observed as under:

> "28. For the purpose of convenience and ready reference sub-Section (5) of Section 24 of the Act is extracted as under:-
>
> "Vesting of Appellate Authority on officers by the State Government.
>
> Section 24 … …
>
> … …
>
> (5) The High Court may, at any time, on the application of the aggrieved party or on its own motion call for and examine the records relating to any order passed

or proceedings taken under this Act for the purpose of satisfying itself as to the legality or propriety of such order or proceeding and may pass such order in relation thereto as it may deem fit." [Emphasis supplied]

29. A Full Bench of this court in *Vinod alias Raja vs. Smt. Joginder Kaur,* 2012 (3) Him. L. R. (FB) 1401 has held the right of appeal to be a statutory right, not to be circumscribed by the delegatee/State Government.

30. The order of the authority attaches finality not to be called in question in any Court of law, except by the High Court in exercise of its revisional jurisdiction which can be either on an application filed by an aggrieved party or *suo motu* by the Court. The court can call for and examine the records for "satisfying itself" about the "legality and propriety" of the "order" or the "proceedings". The High Court may pass orders as it may "deem fit".

31. Now what is the scope of such revisional jurisdiction and the extent of the power which the court can exercise is now well settled by a five-Judge Bench of the apex Court reported in *Hindustan Petroleum Corporation Limited vs. Dilbahar Singh,* (2014) 9 SCC 78. The findings can be summarized as under:

(i) The term 'propriety' would imply something which is legal and proper.

(ii) The power of the High Court even though wider than the one provided under Section 115 of the Code of Civil Procedure is not wide enough to that of the appellate Authority.

(iii) Such power cannot be exercised as the cloak of an appeal in disguise.

(iv) Issues raised in the original proceedings cannot be permitted to be reheard as a appellate Authority.

(iv) The expression "revision" is meant to convey the idea of much narrower expression than the one expressed by the expression "appeal". The revisional power under the Rent Control Act may not be as narrow as the revisional power under Section 115 of the CPC but certainly it is not wide enough to make the High Court a second court of first appeal. While holding so the Court reiterated the view taken in *Dattonpant Gopalvarao Devakate vs. Vithalrao Maruthirao Janagawal,* (1975) 2 SCC 246.

(vi). The meaning of the expression "legality and propriety" so explained in *Ram Dass vs. Ishwar Chander,* (1988) 3 SCC 131 was only to the extent that exercise of the power is not confined to jurisdictional error alone and has to be "according to law".

(vii) Whether or not the finding of fact is according to law or not is required to be seen on the touch stone, as to whether such finding of fact is based on some legal evidence or it suffers from any illegality like misreading of the evidence; overlooking; ignoring the material evidence all together; suffers from perversity; illegality; or such finding has resulted into gross miscarriage of justice. Court clarified that the ratio of *Ram Dass (supra)* does not exposit that the revisional power conferred upon the High Court is as wide as an appellate power to reappraise or reassess the evidence for coming to a finding contrary to the findings returned by the authority below.

(viii) In exercise of its revisional jurisdiction High Court shall not reverse findings of fact merely because on reappreciation of the evidence it may have a different view thereupon.

(ix) The exercise of such power to examine record and facts must be understood in the context of the purpose that such findings are based on firm legal basis and not on a wrong premise of law.

(x) Pure findings of fact are not to be interfered with. Reconsideration of all questions of fact is impermissible as Court cannot function as a Court of appeal.

(xi) Even while considering the propriety and legality, high Court cannot reappreciate the evidence only for the purposes of arriving at a different conclusion. Consideration of the evidence is confined only to adjudge the legality, regularity and propriety of the order.

(xii) Incorrect finding of fact must be understood in the context of such findings being perverse, based on no evidence; and misreading of evidence.

32. The Court was dealing with the provisions of the Kerala Buildings (Lease and Rent Control) Act, 1965, T. N. Buildings (Lease and Rent Control) Act, 1960 and Haryana Urban (Control of Rent and Eviction) Act, 1973. The incongruity in the decisions rendered by the apex Court in *Rukmini Amma Saradamma vs. Kallyani Sulochana,* (1993) 1 SCC 499 and *Ram Dass (supra)* was the backdrop in which the Constitution Bench was called upon to decide the scope of the revisional jurisdiction and the expression "legality and propriety" provided in the relevant statues. The essential question being as to whether in exercise of such powers, the revisional authority could reappreciate the evidence or not. Finally the Court answered the reference by making the following observations:-

> "43. We hold, as we must, that none of the above Rent Control Acts entitles the High Court to interfere with the findings of fact recorded by the first appellate court/first appellate authority because on reappreciation of the evidence, its view is different from the court/authority below. The consideration or examination of the evidence by the High Court in revisional jurisdiction under these Acts is confined to find out that finding of facts recorded by the court/authority below is according to law and does not suffer from any error of law. A finding of fact recorded by court/authority below, if perverse or has been arrived at without consideration of the material evidence or such finding is based on no evidence or misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice, is open to correction because it is not treated as a finding according to law. In that event, the High Court in exercise of its revisional jurisdiction under the above Rent Control Acts shall be entitled to set aside the impugned order as being not legal or proper. The High Court is entitled to satisfy itself as to the correctness or legality or propriety of any decision or order impugned before it as indicated above. However, to satisfy itself to the regularity, correctness, legality or propriety of the impugned decision or the order, the High Court shall not exercise its power as an appellate power to reappreciate or reassess the evidence for coming to a different finding on facts. Revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a court of first appeal. Where the High Court is required to be satisfied that the decision is according to law, it may examine whether the order impugned before it suffers from procedural illegality or irregularity." [Emphasis supplied]

7. Facts need to be appreciated in the aforesaid backdrop.

8. Mr. R.K. Gautam, learned Senior Counsel appearing for the landlady, fairly states that on the issue of change of user, findings returned by the lower Appellate Authority are just, fair, proper and borne out from the record.

9. Significantly, Rent Note (Ex.PW-3/A) did not restrict use of premises for a purpose other than the one for which it is now being put to use. As such, change of any business activity, so carried out in the shop, in the absence of any stipulation to the contrary, does not, in any manner, entitle the landlady for ejectment of a tenant.

10. Broadly speaking, a building or a part thereof can be let out for three purposes viz. (i) Residential; (ii) Business; and (iii) Manufacturing.

11. Section 108 of the Transfer of Property Act, 1882 prohibits the lessee to use the tenanted premises for a purpose other than the one for which it was leased. Normally, if the dominant purpose for which a building is let out is maintained, then a tenant may not be liable to be evicted in the absence of any covenant in the contract between the parties, prohibiting a user different from the one mentioned in the lease deed and the tenant would be entitled to carry on any trade in the premises, consistent with the location and the nature of the premises. But if the building is let out for residential or business purpose and the tenants starts manufacturing activity or vice a versa, then it would amount to change of user subject to the provisions of the Act.

12. What is the meaning of the expression "*used the building or rented land for a purpose other than that for which it was leased*" had arisen for consideration before various Courts. Generally it is held that mere change of user from one commercial activity to another, in itself, is no ground for claiming ejectment unless and until injury to the property and interest of the landlord is proved. [Civil Revision No. 54 of 2012, titled as *Sain Ram Jhingta vs. Surinder Singh,* decided on 9th October, 2015 by this Court and *Hari Rao vs. N. Govindachari & others,* (2005) 7 SCC 643].

13. This Court in *Shiv Ram & another vs. Sheela Devi,* AIR 1993 H.P. 49 has held that:-

> "(7) On the question whether such a change of user is incidental or allied to the business or that it was only a small change in the user and would not be actionable, reliance is placed upon two judgments of the Supreme Court in Mohan Lal v. Jai Bhagwan, AIR, 1988 SC 1034 and Gurdial Batra v. Raj Kumar Jain (1983) 3 SCC 441 (sic).
>
> (8) Section 14(2)(ii)(b) of the Act enumerates the grounds on which eviction of petitioner No. 1 has been sought and ordered, namely, 'use of the building or rented land for a purpose other than that for which it was leased'. ... ...
>
> (11) The ratio of the aforementioned two judgments of the apex court in Mohan Lal's and Gurdial Batra's cases (supra) appears to be that carrying of a business other than the one for which the premises were let out when such a business is an allied business would not amount to change of user. However, a small change in the user in the business, which is not allied to the business for which it was let out, would also not amount to change of user unless there is impairment to the utility or likelihood of damage being caused to the building and business can conveniently be carried on without creating any nuisance."

14. The rent control legislation is enacted in the larger interest of the society as a whole and it is not intended to confer any disproportionately larger benefit on the tenant to a greater disadvantage of the landlord. But it is also a beneficial piece of legislation recognizing reasonable protection to the tenant as one of the objects. While construing a provision of law imposing a liability for eviction, like Section 14(2)(ii)(b) of the Act, one must see whether there has been such a change of user of the premises as to make it alien to the purpose for which the building was let.

15. A Coordinate Bench of this Court in *Rajinder* Kumar *Sharma vs. Smt. Kanta Kumari,* Latest HLJ 2007 (HP) 73 has held that "13. Similarly, in Mohan Lal vs. Jai Bhagwan [1988 (2) SCC 474] citing the observations of Lord Diplock about the legislative intendment, their Lordships clearly held that unless any mischief or detriment or an impairment is caused to the shop in question, the change of user by itself from one commercial activity to another commercial activity cannot be a ground for eviction of the tenant. Culling the aforesaid ratio in the aforesaid two judgments and applying the same to our case, I have no hesitation in holding that there is a clear nexus between the concept of change of user (provided the activity remains either commercial or business, as the case may be) and any injury or impairment caused to the property or any prejudice caused or likely to be caused to the landlord because such a nexus alone can be made the basis of the eviction of the tenant. Otherwise in ordinary prudence and in normal circumstances merely because a tenant changes his commercial activity from one business to another for any reason, this should not be by itself a ground for eviction. It is very commonly understood in the mercantile world that even though a tenant may have obtained a shop on lease for a particular and specified commercial activity, either because of the reason of his failure in that activity or changes in the economic scenario, he may have to put that commercial activity to an end and to earn his livelihood by starting another commercial activity in the same shop. After all, a businessman cannot be compelled to carry on with a particular commercial activity even if he feels it to be non-viable, non-manageable or non-profitable. Every businessman has a right to carry on a business of his choice. Merely because for the reasons best suited to him he undertakes a change in commercial activity, this by itself should not be a ground of his eviction from the shop. As noticed above, the change of user has to be clearly linked, and inseparably coupled with, an element of injury or impairment of the shop or causing any prejudice or having the potential of prejudice, to the landlord."

16. The apex Court in *Jagdish Lal vs. Parma Nand,* (2000) 5 SCC 44 has observed that:-

> "18. On a consideration of these decisions, it comes out that where the new business started by the tenant in the premises let out to him was an allied business or a business which was ancillary to the main business, it would not amount to change of user. It is true that where a premises is let out for commercial purposes, carrying on of a new business activity therein would not change the nature of the building and it would still remain a commercial building. But that is not enough. Having regard to the provisions of the Act and the intendment of the legislature in providing that the tenant would not use the premises for a purpose other than that for which it was let out, the new business should either have some linkage with the original business, which under the agreement of lease the tenant was permitted to carry on, or it should be an allied business or ancillary to that business. Where local laws provide a specific prohibition in respect of the use of the premises under the rent legislation and that provision has been interpreted in a particular manner by the High Court consistently, it would not be proper to disturb the course of decisions by interpreting that provision differently."

17. In the very same decision, finding the tenant to have reverted to his original business, Court only in exercise of its power under Article 136 of the Constitution of India – to meet the ends of justice – allowed the tenant to continue and occupy the premises on an enhanced rent. The Court noticed the observations made by the Punjab and Haryana High Court with respect to the provisions which are paramateria with the Act in question and found that the change of business from general merchant to a tea stall; dry fruits and soda water to selling *pakoras* and general provision store to selling stones and marble chips to be change of user making the tenant liable for ejectment.

18. This takes the Court to the main issue of subletting. Has the tenant really sublet the shop to respondent Padam Chand.

19. The concept of sub-letting during the pre-independence period stands discussed in various judgments.

20. Calcutta High Court in 1900 in one of its judgments *Peary Mohun Mookherjee v. Badul Chandra Bagdi and others,* ILR (1901) 28 CL. 205, clearly taken the view that even if under any law, the right of a third-party was protected, even there, that right of the third party should have been legal and valid. Sub-letting without and against the will of the landlord would be considered a nullity.

> "I am of opinion that this contention is sound. It is true that Sub-section 1 of Section 22 concludes with these words: "Nothing in this sub-section shall prejudicially affect the rights of any third party;" but that can only mean rights such as are valid. Here the right, which, it is contended, was protected by that provision, is expressly declared by Section 85 of the Act to be invalid as against the landlord. Therefore we must hold that there was no right in the sub-lessee as such, which could have subsisted, and which can stand in the way of the landlord s recovering khas possession. The necessity of following the procedure prescribed by Section 167 of the Bengal Tenancy Act for annulling an incumbrance arises only where the incumbrance is a subsisting one, and but for the annulment which that section contemplates by the purchaser at a sale for arrears of rent, would be valid. Here the sub-lease which would otherwise have come within the definition of an incumbrance, was invalid from the beginning as against the landlord; and for the landlord it was not necessary to annul that which was never operative against him. If a third party had purchased the right of occupancy at the sale for arrears of rent, it would have been necessary for such third party to follow the procedure prescribed by Section 167 of the Tenancy Act. I am therefore of opinion that the decision appealed against must be reversed."

21. The Privy Council in their judgment *Surisetti Butchayya and another v. Sri Rajah Parthasarthy Appa Row Bahadur Zamindar Garu and another,* AIR 1922 PC 243, were of the view that it would be quite opposed to the policy to confer on middlemen who sublet to occupying and cultivating tenants, rights and privileges at all resembling those conferred on occupying and cultivating tenants, rights and privileges at all resembling those conferred on occupying cultivators, and, indeed, would result in depriving the latter call of the benefits intended to be conferred upon them.

22. The decisions in judgments supra make it clear that any third party interference which is not legal and valid; and without the consent of the landlord is considered to be bad in law, which is the exact case of the petitioner in the present matter.

23. Lahore High Court has defined the term "tenants" in its judgment *Secretary of State v. Bahadur Chand and others,* AIR 1932 Lah 67, as under:

> "The defendants' contention was that they were not "tenants" within the meaning of that term as denned in the Punjab Tenancy Act. "Tenant" is defined in the Punjab Tenancy Act as follows:
>
> Tenant means a person who holds land under another person, and is or but for a special contract would be, liable to pay rent for that land to that other person; bat it does not include:
>
> (a) an inferior landowner; or (b) a mortgagee of the rights of a landowner or; (c) a person to whom a holding has been transferred, or an estate or holding has boon let in farm, under the Punjab Land Revenue Act, 1887, for the recovery of an arrear of land revenue of a sum recoverable as such an arrear; or (d) a person who takes from the Government a lease of unoccupied land for the purpose of subletting it."

24. Even in the post independence era, the position, more or less, continued to remain as such.

25. In the case of *Associated Hotels of India Ltd., Delhi v. S.B. Sardar Ranjit Singh,* AIR 1968 SC 933, the Hon'ble Apex Court held that when eviction is sought on the ground of subletting, the onus to prove subletting is on the landlord. Further, if the landlord prima facie establishes the third party to be in exclusive possession of the premises let out for valuable consideration, it would then be for the tenant to rebut the evidence. (Also: *Krishnawati v. Hans Ran,* (1974) 1 SCC 289).

26. While dealing with the mischief contemplated under Section 14(1)(b) of the Delhi Rent Control Act, 1958, providing for eviction on the ground of subletting, the Hon'ble Supreme Court in the case of *Jagan Nath (Deceased) through LRs v. Chander Bhan and others,* (1988) 3 SCC 57, reiterated similar position.

27. The question, whether the tenant has assigned, sublet or otherwise parted with the possession of the whole or any part of the premises without permission of the landlord within the meaning of Section 13(1)(e) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950, came up for consideration in *Gopal Saran v. Satyanarayana,* (1989) 3 SCC 56. The Court held:

> "Sub-letting means transfer of an exclusive right to enjoy the property in favour of the third party. In this connection, reference may be made to the decision of this Court in *Shalimar Tar Products Ltd. v. H>C Sharma,* (1988) 1 SCC 70, wherein it was held that to constitute a sub-letting, there must be a parting of legal possession, i.e. possession with the right to include and also right to exclude others and whether in a particular case there was sub-letting was substantially a question of fact."

The Court also reiterated that to prove sub-tenancy, two ingredients are required to be established, firstly, the tenant must have exclusive right of possession or interests in the premises or part of the premises in question and secondly, the right must be in lieu of payment of some compensation or rent.

28. In the case of *G.K. Bhatnagar (Dead) by LRs v. Abdul Alim,* (2002) 9 SCC 516, the apex Court held:

> "A conjoint reading of these provisions shows that on and after 9th June, 1952, sub-letting, assigning or otherwise parting with the possession of the whole or any part of the tenancy premises, without obtaining the consent in writing of the landlord, is not permitted and if done, the same provides a ground for eviction of the tenant by the landlord However, inducting a partner in his business or profession by the tenant is permitted so long as such partnership is genuine If the purpose of such partnership may ostensibly be to carry on the business or profession in partnership, but the real purpose be sub-letting of the premises to such other person who is inducted ostensibly as a partner, then the same shall be deemed to be an act of sub-letting attracting the applicability of clause (b) of sub-section (1) of section 14 of the Act."

29. A Three-Judge Bench of the Hon'ble Apex Court in *Parvinder Singh v. Renu Gautam and others,* (2004) 4 SCC 794, commented upon the device adopted by the tenants, many a time in creating partnership as a camouflage to circumvent the provisions of the Rent Control Act. The Court made the following observations:

> "The rent control legislations which extend many a protection to the tenant, also provide for grounds of eviction. Once such ground , most common in all the legislations, is subletting or parting with possession of the tenancy premises by the tenant. Rent Control laws usually protect the tenant so long as he may himself use the premises but not his transferee inducted into possession

of the premises, in breach of the contract or the law, which act is often done with the object of illegitimate profiteering or rack renting. To defeat the provisions of law, a device is at times adopted by unscrupulous tenants and sub-tenants of bringing into existence a deed of partnership which gives the relationship of tenant and sub-tenant an outward appearance of partnership while in effect what has come into existence is a sub-tenancy or parting with possession camouflaged under the cloak of partnership. Merely because a tenant has entered into a partnership he cannot necessarily be held to have sublet the premises or parted with possession thereof in favour of his partners. If the tenant is actively associated with the partnership business and retains the use and control over the tenancy premises with him, may be along with the partners, the tenant may not be said to have parted with possession. However, if the user and control of the tenancy premises has been parted with and deed of partnership has been drawn up as an indirect method of collecting the consideration for creation of sub-tenancy or for providing a cloak or cover to conceal the transaction not permitted by law, the Court is not estopped from tearing the veil of partnership and finding out the real nature of transaction entered into between the tenant and the alleged sub-tenant."

"A person having secured a lease of premises for the purpose of his business may be in need of capital or finance or someone to assist him in his business and to achieve such like purpose he may enter into partnership with strangers. Quite often partnership is entered into between the members of any family as a part of tax planning. There is no stranger brought on the premises. So long as the premises remain in occupation of the tenant or in his control, a mere entering into partnership may not provide a ground for eviction by running into conflict with prohibition against subletting or parting with possession. This is a general statement of law which ought to be read in the light of the lease agreement and the law governing the tenancy. There are cases where in the tenant sublets the premises or parts with possession in defiance of the terms of lease or the rent control legislation and in order to save himself from the peril of eviction brings into existence, a deed of partnership between him and his sub-lessee to act as a cloak on the reality of the transaction. The existence of deed of partnership between the tenant and the alleged sub-tenant would not preclude the landlord from bringing on record material and circumstances, by adducing evidence or by means of cross examination, making out a case of sub-letting or parting with possession or interest in tenancy premises by tenant in favour of a third person. The rule as to exclusion of oral by documentary evidence governs the parties to the deed in writing. A stranger to the docment is not bound by the terms of the document and is, therefore, not excluded from demonstrating the untrue or collusive nature of the document or the fraudulent or illegal purpose for which it was brought into being. An enquiry into reality of transaction is not excluded merely by availability of writing reciting the transaction....."

30. In yet another decision, a Three-Judge Bench of the apex Court in *Mahendra Saree Emporium (II) v. G.V. Srinivasa Murthy,* (2005) 1 SCC 481, while considering its earlier decisions, while dealing with a matter relating to subletting of premises within the meaning of Section 21(1)(f) of Karnataka Rent Control Act, 1961, observed as under:

"The term 'sub-let' is not defined in the Act - new or old. However, the definition of 'lease' can be adopted mutatis mutandis for defining 'sub-lease'. What is 'lease' between the owner of the property and his tenant becomes a sub-lease when entered into between the tenant and tenant of the tenant, the latter being sub-tenant qua the owner-landlord. A lease of immovable property as defined in Section 105 of the Transfer of Property Act, 1882 is a transfer of a right to enjoy such property made for a certain time for consideration of a price

> paid or promised. A transfer of a right to enjoy such property to the exclusion of all others during the term of the lease is sine qua non of a lease. A sub-lease would imply parting with by the tenant of a right to enjoy such property in favour of his sub-tenant. Different types of phraseology are employed by different State Legislatures making provision for eviction on the ground of sub-letting. Under Section 21(1)(f) of the Old Act, the phraseology employed is quite wide. It embraces within its scope sub-letting of the whole or part of the premises as also assignment or transfer in any other manner of the lessee's interest in the tenancy premises. The exact nature of transaction entered into or arrangement or understanding arrived at between the tenant and alleged sub-tenant may not be in the knowledge of the landlord and such transaction being unlawful would obviously be entered into in secrecy depriving the owner-landlord of the means of ascertaining the facts about the same. However, still, the Rent Control Legislation being protective for the tenant and eviction being not permissible except on the availability of ground therefor having been made out to the satisfaction of the Court or the Controller the burden of proving the availability of the ground is cast on the landlord, i.e. the one who seeks eviction……."

31. Thus, in the case of sub-letting, the onus lying on the landlord would stand discharged by adducing prima facie proof of the fact that the alleged sub-tenant was in exclusive possession of the premises or, to borrow the language of Section 105 of the Transfer of Property Act, was holding right to enjoy such property. As presumption of sub-letting may then be raised and would amount to proof unless rebutted.

32. In *Murlidhar v. Chuni Lal,* 1970 Ren CJ 922, the apex Court was dealing with a case where a shop was let out to a firm of the name of Chuni Lal Gherulal. The firm consisted of three partners, namely, Chuni Lal, Gherulal and Meghraj. This partnership closed and a new firm by the name of Meghraj Bansidhar commenced its business with partners Meghraj and Bansidhar. The tenant firm was sought to be evicted on the ground that the old firm and the new firm being two different legal entities, the occupation of the shop by the new firm amounted to sub-letting. This Court discarded the contention as "entirely without substance" and held that a partnership firm is not a legal entity' the firm name is only a compendious way of describing the partners of the firm. Therefore, occupation by a firm is only occupation by its partners. The two firms, old and new, had a common partner, namely, Meghraj, who continued to be in possession and it was fallacious to contend that earlier he was in possession in the capacity of partner of the old firm and later as a partner of the new firm. The landlord, in order to succeed, has to prove it as a fact that there was a sub-letting by his tenant to another firm. As the premises continued to be in possession of one of the original tenants, Meghraj, then by a mere change in the constitution of the firm of which Meghraj continued to be a partner, an inference as to sub-letting could not be drawn in the absence of further evidence having been adduced to establish sub-letting.

33. In *Helper Girdharbhai v. Saiyed Mohd. Mirasaheb Kadri,* (1987) 3 SCC 538, the tenant had entered into partnership and the firm was carrying on business in the tenancy premises. This Court held that if there was a partnership firm of which the appellant was a partner as a tenant, the same would not amount to sub-letting leading to forfeiture of the tenancy; for there cannot be a sub-letting unless the lessee parted with the legal possession. The mere fact that another person is allowed to use the premises while the lessee retains the legal possession is not enough to create a sub-lease. Thus, the thrust is, as laid down by this court, on finding out who is in legal possession of the premises. So long as legal possession remains with the tenant the mere factum of the tenant having entered into partnership for the purpose of carrying on the business in the tenancy premises would not amount to sub-letting.

34. In *Parvinder Singh (supra),* the apex Court, devised the test in these terms:

> ".....If the tenant is actively associated with the partnership business and retains the use and control over the tenancy premises with him, may be

along with the partners, the tenant may not be said to have parted with possession. However, if the user and control of the tenancy premises has been parted with and deed of partnership has been drawn up as an indirect method of collecting the consideration for creation of sub-tenancy or for providing a cloak or cover to conceal the transaction not permitted by law, the Court is not estopped from tearing the veil of partnership and finding out the real nature of transaction entered into between the tenant and the alleged sub-tenant."

35. In *Vaishakhi Ram and others v. Sanjeev Kuamr Bhatiani,* (2008) 14 SCC 356, the apex Court, in a case of subletting under Section 14(1)(b) of Delhi Rent Control Act, held:

> "A plain reading of this provision would show that if a tenant has sublet or assigned or otherwise parted with the possession of the whole or any part of the premises without obtaining the consent in writing of the landlord, he would be liable to be evicted from the said premises. That is to say, the following ingredients must be satisfied before an order of eviction can be passed on the ground of subletting: -
>
> (1) The tenant has sublet or assigned or parted with the possession of the whole or any part of the premises;
>
> (2) Such subletting or assigning or parting with the possession has been done without obtaining the consent in writing of the landlord."
>
> "It is well settled that the burden of proving sub-letting is on the landlord but if the landlord proves that the sub-tenant is in exclusive possession of the suit premises, then the onus is shifted to the tenant to prove that it was not a case of sub-letting."

36. In *Nirmal Kanta (Dead) through LRs v. Ashok Kumar and another,* (2008) 7 SCC 722, the Court held thus:

> "What constitutes sub-letting has repeatedly fallen for the consideration of this Court in various cases and it is now well-established that a sub-tenancy or a sub-letting comes into existence when the tenant inducts a third party/stranger to the landlord into the tenanted accommodation and parts with possession thereof wholly or in part in favour of such third party and puts him in exclusive possession thereof. The lessor and/or a landlord seeking eviction of a lessee or tenant alleging creation of a sub-tenancy has to prove such allegation by producing proper evidence to that effect. Once it is proved that the lessee and/or tenant has parted with exclusive possession of the demised premises for a monetary consideration, the creation of a sub-tenancy and/or the allegation of sub-letting stands established."

37. In support of findings returned by the lower Appellate Court, Mr. Bhupinder Gupta, learned Senior Advocate, invites attention of this Court to a decision rendered by the apex Court in *Kala and another versus Madho Parshad Vaidya,* (1998) 6 SCC 573, wherein it is held that burden of proof, of parting with the possession in favour of the third party, lies on the landlord and only after initial discharge thereof, onus would shift upon the tenant, explaining how, when and why possession came to be parted. The apex Court had an occasion to deal with identical facts, wherein the person to whom the premises allegedly came to be sublet, was only assisting the original tenant, in managing the affairs in the shop.

38. The aforesaid principles are applied to the instant facts.

39. It is an admitted fact that original tenant Kishori Lal died and as such tenancy devolved upon his legal heirs, i.e. wife Smt. Shakuntla Devi and three minor children, namely Rajesh, Amit and Ms Puja Devi.

40. For establishing the factum of sub-letting, learned Senior Counsel invites attention of this Court to the testimony of Padam Chand (RW-2), the person to whom, the shop allegedly stands sub-let.

41. Careful perusal of testimony of Padam Chand reveals that since inception of tenancy, he was working as an employee. However, with the death of the original tenant, for the reason that legal heirs were not in a position to manage the shop (being wife and minor children of the deceased tenant), he helped them run the business on profit sharing basis. This was only till such time, children attained majority, where after, they themselves and independently conducted the business. For all times, possession continued to remain with the tenants.

42. Further this witness has set up his independent business in a separate shop, adjoining to the tenanted premises. It is a matter of record that the original business of Radio and TV mechanic came to be changed to that of *Halwai* and thereafter that of a Gold Smith.

43. Hence, ingredients necessary to constitute element of subletting remain unestablished on record. Apart from the ocular evidence, there is nothing else to establish the plea of subletting.

44. Hence, for the aforesaid reasons, the petition only merits rejection, for it cannot be said that the impugned judgment dated 28.3.2007, passed by the lower Appellate Authority in Rent Civil Misc. Appeal No.1/K/2000, titled as *Smt. Shakuntla & others versus Smt. Urbashi (now deceased), through LRs,* is perverse or illegal, warranting interference by this Court.

45. Hence, the petition, without any merit, is dismissed. Pending application(s), if any, also stand disposed of.

Assistance rendered by Mr. Gaurav Gautam, Advocate, a new entrant at the Bar, is highly appreciable.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh ... Appellant

Versus

Bhime Ram and another ... Respondents

Cr. Appeal No. 491 of 2011
Reserved on: 13.12.2016
Date of decision: 13.01.2017

Indian Penal Code, 1860- Section 451, 323, 325, 302 read with Section 34- Deceased H was sleeping with his minor son A – H went out of the room between 10-11 P.M.- A heard the noise of quarrel – he went out and saw accused giving beatings to his father – accused R inflicted injury by stick- accused B gave fist blows to the deceased – A brought his father inside the room, where they went to sleep – A narrated the incident to his uncle – H was taken to hospital where he died - the accused were tried and acquitted by the Trial Court– held in appeal thatthe prosecution had examined close relatives of the deceased – testimony of the son of the accused is full of contradictions– prosecution witness admitted that A had told him that deceased had fallen in a state of intoxication – medical Officer admitted that the deceased was brought with the history of fall- the disclosure statement was not proved – Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-9 to 23)

Cases referred:

Mohammed Ankoos and Others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad, (2010) 1 Supreme Court Cases 94

State of Himachal Pradesh Vs. Kahan Chand, 2016 (1) Drugs Cases (Narcotics) 576

For the appellant: Mr. Vikram Thakur and Mr. Puneet Rajta, Deputy Advocate Generals.
For the respondents: Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this appeal, State has challenged judgment passed by the Court of learned Presiding Officer, Fast Track Court, Mandi, in Sessions Trial No. 73 of 2010 dated 19.07.2011, vide which, learned trial Court has acquitted the respondents/accused for commission of offences punishable under Sections 451, 323, 325 and 302 read with Section 34 of Indian Penal Code.

2. In brief, the case of the prosecution was that on 25.05.2010 deceased Hari Ram was sleeping in his house situated at village Jalla alongwith his minor son Amar Singh. Between 10-11 P.M., Hari Ram went out of the room to urinate and after sometime, Amar Singh heard noise of quarrel. Amar Singh accordingly got up and went out of the room and found that the accused persons were giving beatings to his father. As per prosecution, accused Roop Chand was armed with stick and he gave beatings to Hari Ram with that stick, whereas accused Bhime Ram gave beatings by inflicting fist blows to deceased Hari Ram. Further, as per prosecution, accused after beating Hari Ram left the spot. Amar Singh brought his father inside the room, where they went to sleep and in the morning of 26.05.2010, Amar Singh narrated the entire incident to his uncle Mani Ram. Thereafter, Mani Ram, Chuhru Ram and Jhabe Ram, arranged a vehicle of one Hira Singh and Hari Ram was taken to Primary Health Centre, Nagwain, from where he was referred to Civil Hospital. From Civil Hospital, Kullu, he was referred to IGMC, Shimla, where he died on 31.05.2010. Further, as per prosecution, police after receiving the information of the incident went to Civil Hospital, Kullu and moved an application Ext. PW17/D to the Medical Officer to seek his opinion for the purpose of recording the statement of Hari Ram but the Medical Officer opined that Hari Ram at the relevant time was not fit to make a statement. Pursuant to this, statement of Amar Singh was recorded under Section 154 Cr.P.C., on the basis of which, FIR No. 70/2010 was registered against the accused persons. After the death of Hari Ram on 31.05.2010 at 05.45 P.M., police visited IGMC, Shimla and prepared inquest report. The postmortem of the dead body was got conducted at IGMC, Shimla and report thereof was obtained by the police. As per the opinion of the team of the Medical Officers, the deceased had died due to traumatic brain injury. Accused Bhime Ram was arrested on 31.05.2010, whereas accused Roop Chand was arrested on 06.06.2010. During the course of investigation, Roop Chand while in custody made a disclosure statement Ext. PW9/A to the effect that he had concealed a danda in the bushes on the way leading from village Jalla to Phini. On the basis of the said disclosure statement, on 09.06.2010 danda Ext. P-1 was recovered and was taken into possession by the police. This danda was shown to the Medical Officer, who opined that the injuries on the person of deceased were possible by danda Ext. P-1. Further, as per prosecution, during the course of investigation, one piece of mattress Ext. P-3 and one shirt Ext. P-4, were produced by Amar Singh, which were accordingly taken into possession.

3. After the completion of investigation, challan was filed in the Court and as a prima facie case was found against the accused persons, they were charged for commission of offences punishable under Sections 451, 325 and 302 read with Section 34 of Indian Penal Code, to which they pleaded not guilty and claimed trial.

4. Learned trial Court on the basis of evidence adduced on record both ocular as well as documentary by the prosecution held that the prosecution was not able to prove the guilt of the accused persons beyond reasonable doubt. Learned trial Court found the statement of PW-2 Amar Singh not satisfactory. As per learned trial Court, there were inconsistencies in the

statement of PW-2 Amar Singh as well as contradictions when compared with the deposition of other prosecution witnesses. Learned trial Court also held that even the alleged recovery of Danda Ext. P-1 at the instance of accused Roop Chand was doubtful. It further held that as the alleged incident took place on 25.05.2010 between 10-11 P.M., there was no justification as to why report was lodged with the police on 28.05.2010 at 01.30 P.M. Learned trial Court held that delay in lodging the report was not satisfactorily explained by the prosecution. It was further held by learned trial Court that PW-1 Hira Singh had specifically stated that Amar Singh, Jhabe Ram and Chuhru Ram accompanied deceased to PHC Nagwain on 26.05.2010 hence report could have been easily lodged with the police on 26.05.2010 itself. Learned trial Court also held that Ext. PW15/B, MLC of Hari Ram, demonstrated that there was a note made in the same by the Medical Officer to the effect that patient brought by his relatives with alleged history of fall and later they said that he was also given beating by some one. Learned trial Court held that it was not understandable that if the accused persons had given beating to the deceased then why the relatives of the deceased including his son Amar Singh informed the Medical Officer that Hari Ram had sustained injuries by way of fall. It further held that it was also not understandable why Amar Singh who was accompanying Hari Ram, did not lodge report with the police immediately after the incident and he waited till 28.05.2010. It further held that if two views were possible, one pointing to the guilt of the accused and the other to the innocence of the accused, the view favourable to the accused, should be adopted. Learned trial Court also held that defence taken by the accused persons was that Hari Ram fell down from the verandah of his house while he had gone to pass urine, was both probable and believable, especially in view of the statement of PW-5 Mani Ram, who admitted in his cross-examination that Amar Singh disclosed to him in the morning on 26.05.2010 that while his father was going to pass urine during the night he had a sudden fall from the verandah. Learned trial Court also held that defence so taken by the accused also found support from the reply given by PW-2 in answer to the question put to him in the cross-examination wherein he admitted that on hearing cry of his father, he had gone to the spot and noticed that his father was lying on the ground floor in front of his house. On these basis, it was held by learned trial Court that the possibility of Hari Ram falling down from the verandah of his house and having sustained injuries due to said fall, could not be ruled out. Learned trial Court thus gave benefit of doubt to the accused and acquitted them of the offences for which they were charged.

5. Feeling aggrieved by the said judgment of acquittal, State has filed this appeal.

6. Mr. Vikram Thakur, learned Deputy Advocate General, has vehemently argued that the judgment of acquittal returned by learned trial Court was not sustainable in the eyes of law as learned trial Court while acquitting the accused erred in not appreciating that the prosecution had proved its case against the accused beyond reasonable doubt and prosecution witnesses had proved and corroborated the case of the prosecution on all material points. It was argued by Mr. Thakur that the reasonings returned by learned trial Court were manifestly unreasonable as learned trial Court failed to appreciate the evidence of material prosecution witnesses including PW-2 who was an eye witness in its correct perspective. Mr. Thakur further argued that learned trial Court erred in not appreciating that it stood proved on record by the testimony of PW-2 that the accused persons had enmity with the deceased and they had a motive to do away with the deceased. He also argued that the statement of PW-2 read with the statement of PW-20 clearly and categorically proved the guilt of the accused. On these basis, it was urged by Mr. Thakur that the judgment of acquittal passed by learned trial Court was liable to be set aside and the accused were liable to be convicted for the commission of offences for which they were charged.

7. On the other hand, Mr. G.R. Palsra, learned counsel for the respondents submitted that there was neither any perversity with the judgment passed by learned trial Court nor it could be said that the findings returned by learned trial Court were not borne out from the records of the case. It was argued by Mr. Palsra that after taking into consideration the entire evidence placed on record by the prosecution, learned trial Court had rightly held that the prosecution was not able to prove its case against the accused beyond reasonable doubt. Mr.

Palsra argued that the testimony of the prosecution witnesses was neither credible nor reliable. As per him, learned trial Court had taken into consideration the inconsistencies and contradictions in the statement of the so called eye witness PW-2 as well as the factum of the prosecution not being able to prove the recovery of the alleged Danda in the mode and manner in which the prosecution wanted the Court to believe. Mr. Palsra further argued that on the basis of the evidence produced on record by the prosecution, it could not be said that the prosecution was in fact able to prove its case against the accused beyond reasonable doubt and in these circumstances, the benefit of doubt returned in favour of the accused by learned trial Court could not be faulted with. Mr. Palsra accordingly argued that as there was no merit in the appeal, the same was liable to be dismissed.

8. We have heard learned counsel for the parties and have also gone through the records of the case as well as the judgment passed by learned trial Court.

9. In order to prove its case, prosecution in all examined 20 witnesses, whereas accused himself entered the witness box as DW-1.

10. Amar Singh, minor son of deceased Hari Ram, entered the witness box as PW-2. Before his statement was recorded by the Court, court questions were put to him by learned trial Court and on the basis of the answers which were given by the said witness to the court questions, learned trial Court came to the conclusion that the said witness was a good and competent witness.

11. PW-2 Amar Singh deposed in his examination-in-chief that on 25.05.2010 he and his father Hari Ram were at their house in village Jalla. Accused Roop Lal and Bhime Ram came to their verandah between 10-11 P.M. and started beating his father. He further deposed that accused Roop Lal gave beatings to his father with danda, whereas accused Bhime Ram gave him fist blows. He further stated that his father sustained injuries on his head, hand and foot and blood started oozing out of the wound from the head. He also stated that his father became unconscious and that he saw both the accused beating his father. This witness also deposed that thereafter the accused left the place of occurrence and in the morning he narrated the incident to Mani Ram, elder brother of his father and thereafter, his father was taken to PHC Nagwain, from where he was brought to Kullu hospital in a jeep. He also deposed that his maternal uncle Chuhru Ram, his Tau Mani Ram and Jaharu Ram also accompanied his father to PHC Nagwain and from there to Kullu Hospital. He further deposed that his father died due to the injuries inflicted upon him by the accused persons. He further stated that matter was reported to the police vide his statement Ext. PW2/A which bore his signatures. He also stated that from Kullu hospital his father was referred to I.G.M.C., Shimla, where his father died. He also stated that he could identify the danda with which his father was given blow. In his cross-examination, this witness deposed that his father was working as a mason and on 25.05.2010 his father was working as such in the house of one Surat Ram, resident of village Khyiyunu, which was at a distance of 15 minutes walk from their house. He further deposed that his father had returned from village Khiyunu at around 8.00 P.M. and it was dark at that time. He denied that his father had consumed 2-3 bottles of illicit liquor. He stated that he did not accompany his father to PHC Nagwain and thereafter to District hospital Kullu. He admitted it to be correct that on the next morning of the incident, he had disclosed about the incident to his maternal uncle Chuhru Ram as well as to Mani Ram and Jhabe Ram, brother of his father. He admitted that there was a small verandah outside the two rooms of his house towards front side. He also admitted it to be correct that there was no railing in that verandah and that the verandah was at a height of about 15-16 feet from lower level of the ground from the first storey. He further stated in his cross-examination that he brought his father from the ground of first flour to the upper storey by lifting him. He further stated that he helped him to stand and then he helped him to walk also. He admitted that there were stones scattered on the ground floor from where he had brought his father to the upper storey. He also stated that when the police visited their house after 2-3 days, he had shown the blood stains on the ground but the police did not lift the blood stains stone from the ground. He also stated that when he saw accused persons, he was

not asleep but was sitting in the room. He further stated that his father went outside the room to pass urine and when he heard cries of his father, he was lying on the ground in front of the ground floor room, thereafter he went to that place where his father had fallen. He also stated that the accused persons came to the spot when he had already reached there. He stated that he was not aware as to what was the dispute between his father and the accused. He stated that accused Roop Lal, resident of village Dhamar which was away from village Khiyunu. He admitted it to be correct that danda Ext. P-1 was kept in their house and it had no special identification mark. He also admitted that Ext. P-1 danda was taken by the police from their house. He also stated that he had not produced Ext. P-1 to the police but self-stated that the same was taken by the police from their house. Thereafter, he stated that accused had concealed danda Ext. P-1. He admitted it to be correct that he had signed Ext. PW1/A at the instance of police and he did not read the contents thereof.

12. Chuhru Ram entered the witness box as PW-4 and he deposed that deceased was his brother-in-law. On 26.05.2010 between 10-11 A.M., he received a message from Mani Ram, brother of deceased Hari Ram, who told him that Hari Ram was beaten by somebody and he was lying injured in his room at village Jalla. He further deposed that he saw Hari Ram, lying injured in the room and he was having injuries over his head, arm and leg. Blood was oozing out from the head and Hari Ram was lying unconscious. He also stated that he, Mani Ram and Jhabe Ram were present in the house of the deceased and Mani Ram called Hira Singh to bring his vehicle to take injured to PHC Nagwain. He further stated that he, Mani Ram and Jhabe Ram accompanied injured in the vehicle to PHC Nagwain, from where injured was referred to Kullu hospital by the Medical Officer and from Kullu hospital, injured was referred to I.G.M.C., Shimla but Hari Ram died in I.G.M.C., Shimla. He further stated that blood stains were there over the mattresses and shirt. Floor of the house was already washed and Amar Singh told him that the deceased was beaten by accused Roop Lal and Bhime Ram. In his cross-examination, this witness deposed that on the day when they left for Kullu, clothes of the deceased were already washed. He stated that he reached the house of the deceased at 10-11 A.M. and Mani Ram and Jhabe Ram were already there when he reached the house of the deceased. He also stated that Mani Ram gave him information through Amar Singh and distance between his house and the house of Mani Ram was 5-6 kilometers. This witness was confronted with the statement recorded with the police wherein it was not so recorded that he had received the message from Mani Ram. In his cross-examination, this witness admitted that there was no railing on the verandah which was in front of the two rooms of the second storey of the house of the deceased and the verandah was at the height of 15-16 feet. He denied the suggestion that Amar Singh had disclosed to him that on the fateful day at about 11.00 P.M. deceased got up from his bed and went to pass urine and from there he had fallen from the verandah to the ground of first floor.

13. PW-5 Mani Ram, brother of the deceased, deposed in Court that "on 25th in the summer season", Amar Singh son of deceased Hari Ram, came to him and told that accused Roop Singh and Bhime Ram had beaten Hari Ram. He further stated that when he reached the house of Hari Ram, he was lying on his bed and his head was bleeding. He further stated that he called Hira Singh alongwith vehicle and took Hari Ram to PHC Nagwain and then to Kullu. He further stated that deceased was referred to Shimla, where he died. In his cross-examination, he stated that Hari Ram and Bhime Ram had constructed their houses adjoining to each other but were living separately. Further, in his cross-examination, he admitted it to be correct that Amar Singh had told him that the deceased had consumed liquor and had reached his home at odd hours. He also admitted it to be correct that Amar Singh told him that Hari Ram wake up at about 11.00 P.M. and went out from the room for passing urine. He also admitted it to be correct that there was a small verandah outside the room where Hari Ram was sleeping and he also admitted it to be correct that while Hari Ram was passing urine, he had a sudden fall from the verandah, which was on the upper storey and Hari Ram fell down on the ground in front of lower storey room. He admitted it to be correct that Amar Singh told him that he heard cry of Hari Ram. He also admitted to be correct that Amar Singh told him that he helped his father and

brought him to his room and thereafter both of them slept in the room. This witness further deposed in his cross-examination that when the said facts were disclosed by Amar Singh to him, there were other persons namely Chuhru Ram, Jhabe Ram and Karam Singh, who had also come to see the injured. He further stated that Chuhru Ram was called by him. He also deposed in his cross-examination that firstly they took Hari Ram in the vehicle to PHC Nagwain and he also admitted it to be correct that they had told the Doctor that Hari Ram had fallen down and received injuries on his person. He admitted it to be correct that when they took the deceased to Kullu hospital, Doctor inquired from them as to why Hari Ram had received injuries and they told him that he had sustained injuries due to fall. He admitted it to be correct that Hari Ram remained admitted in Kullu hospital from 26.05.2010 to 30.05.2010 and thereafter, he was referred to I.G.M.C. Shimla.

14. The above witnesses discussed by us are all close relatives of the deceased. It is not disputed before us that the only eye witness of the alleged incident is Amar Singh PW-2, son of the deceased. Now, a perusal of the statement of this witness demonstrates that the same is full of contradictions and inconsistencies so as to be confidence inspiring. In his examination-in-chief, this witness has deposed that on the fateful day when he and his father were at their house in village Jalla, accused came to their verandah between 10-11 P.M. and started beating his father and while accused Roop Lal was beating his father with Danda, accused Bhime Ram was giving fist blow to him. He further deposed that as a result of the injuries so inflicted upon his father by the accused, his father became unconscious and thereafter accused left the place of occurrence. He further deposed that in the morning he narrated the incident to Mani Ram, elder brother of his father and thereafter, his father was taken to the hospital. In his cross-examination, this witness admitted that there was a small verandah outside the two rooms of his house, where he was sleeping with his father and there was no railing on the said verandah and the verandah was at a height of about 15-16 feet from lower level of the ground. It has come in his cross-examination that he brought his father from the ground floor by lifting him to the upper storey. He further stated that when he heard the cries of his father, his father was lying on the ground in front of the ground floor room and it is there that he went to bring his father. In his cross-examination, he has also stated that Danda Ext. P-1 was kept in their house and was taken by the police from their house.

15. Now, when we compare the statement of PW-2 with the statement of PW-5 Mani Ram, brother of deceased, we find lot of contradictions in the version of these two witnesses. PW-5 Mani Ram has stated in his cross-examination that Amar Singh had told him that deceased had consumed liquor and reached the house at odd hours. He also admitted that Amar Singh had told him that Amar Singh and deceased took their meal and thereafter they slept in the room and that Hari Ram wake up at around 11.00 P.M. and went out from the room for passing urine. This witness also admitted that there was a small verandah outside the room where deceased Hari Ram was sleeping. He also admitted that while Hari Ram was passing urine, he had a sudden fall from the verandah and he fell from the upper storey to the ground in front of the lower storey room. He admitted it to be correct that Amar Singh had told him that he heard cries of injured Hari Ram and thereafter, Amar Singh went down to the ground floor to lift Hari Ram and brought him to his room. He also admitted it to be correct that after the deceased was taken to PHC, Nagwain, in an injured condition, he told the Doctor that Hari Ram in fact had sustained injuries on account of fall. In continuation, a perusal of the statement of PW-4 Chuhru Ram, brother-in-law of the deceased, also discloses that this witness has also admitted that there was a small verandah in front of the two rooms on the second storey without any railing.

16. Dr. Satya Vrat Vaidya, who entered the witness box as PW-15, deposed that on 26.05.2010 he was posted as Medical Officer, PHC Nagwain and he examined one Hari Ram (deceased) who was brought to him by his relatives with alleged history of fall and later they said that he was beaten by someone. MLC issued by the said Doctor is on record as Ext. PW15/B, in which it is written that patient brought by his relatives with alleged history of fall and later they said that he was beaten by someone.

17. If the version of PW-2 Amar Singh is to be believed that on the fateful day when he and his father were at their house, accused persons came to their verandah and started beating the deceased who sustained fatal injuries as a result of the beatings so given to him by the accused, then it is not understood as to why he did not narrate the incident in the same manner to PW-5, his paternal uncle, who has deposed in the Court that PW-2 told him that the deceased had come home under the influence of liquor and at around 11.00 P.M. when he had gone out to urinate, he fell down from the verandah of the upper storey to the lower storey and sustained injuries. Not only this, inconsistencies in the deposition of PW-2 are also borne out from the fact that on one hand PW-2 has stated that the deceased was beaten by the accused on the verandah but thereafter he has deposed that after he heard cries of the deceased, he found him lying on the ground of the lower storey, from where he picked his father and brought to their home in the upper storey. It is also surprising that if in fact the deceased had received fatal injuries at the hands of the accused then why no hue and cry in this regard was immediately raised by his son PW-2 and why he did not inform any of his relatives who were residing in near vicinity or the police immediately about the incident. Besides this, it is a matter of record that though as per prosecution, the deceased was beaten by the accused on the night of 25.05.2010, however no FIR was lodged till 28.05.2010. No cogent explanation has come forth from the prosecution as to why at the relevant time when the deceased was taken to PHC, Nagwain, in an injured condition, it was not disclosed to the Doctor concerned that the deceased had suffered injuries on account of beatings given to him by the accused but the Doctor was informed that the deceased had sustained injuries on account of fall and the story of his being beaten by someone was introduced later on. All these factors create suspicion on the version of the prosecution and it is settled law that if version of the prosecution appear to be doubtful then benefit of doubt has to go to the accused.

18. Now, as per prosecution while in custody, accused Roop Chand made a disclosure statement under Section 27 of the Evidence Act Ext. PW9/A to the effect that he had hidden Danda with which he had beaten the deceased in bushes near a road leading to the house of Bhime Ram and it was on the basis of the said disclosure statement of the accused that weapon of offence was recovered. However, when we peruse the testimony of PW-2, in his cross-examination this witness deposed that weapon of offence Danda Ext. P-1 was taken by the police from the house of the deceased itself. This renders the entire story putforth by the prosecution about the recovery of the alleged weapon of offence to be falsified. It is not understood that which version of the prosecution should be believed i.e. whether the version that the recovery of the weapon of offence was made on the basis of disclosure statement made by the accused or what has come out in the deposition of PW-2, star witness of the prosecution. All these factors when taken together, create a serious doubt over the veracity of the case of the prosecution and in this view of the matter, it cannot be said that prosecution was able to prove its case against the accused beyond all reasonable doubt.

19. In our considered view, the testimonies of PW-2, PW-4 and PW-5, who otherwise are close relatives of the deceased and are interested witnesses in the case, are neither cogent nor reliable nor they appear to be trustworthy. Besides this, credibility of these witnesses has been impeached by the defence in their cross-examination and it will be dangerous to order conviction of the accused on the basis of the unreliable and shaky evidence of the said prosecution witnesses.

20. Besides this, the accused have the benefit of having been acquitted by learned trial Court. It has been held by Hon'ble Supreme Court in ***Mohammed Ankoos and Others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad, (2010) 1 Supreme Court Cases 94***

> *"12. This Court has, time and again, dealt with the scope of exercise of power by the Appellate Court against judgment of acquittal under Sections 378 and 386, Cr.P.C. It has been repeatedly held that if two views are possible, the Appellate Court should not ordinarily interfere with the judgment of acquittal.*

This Court has laid down that Appellate Court shall not reverse a judgment of acquittal because another view is possible to be taken. It is not necessary to multiply the decisions on the subject and reference to a later decision of this Court in Ghurey Lal v. State Of Uttar Pradesh1 shall suffice wherein this Court considered a long line of cases and held thus : (SCC p.477, paras 69 -70)

"69. The following principles emerge from the cases above:

1. The appellate court may review the evidence in appeals against acquittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.

2. The accused is presumed innocent until proven guilty. The accused possessed this presumption when (2008) 10 SCC 450 he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that the trial court was wrong.

70. In light of the above, the High Court and other appellate courts should follow the well-settled principles crystallised by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

(i) The trial court's conclusion with regard to the facts is palpably wrong;

(ii) The trial court's decision was based on an erroneous view of law;

(iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

(iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

(v) The trial court's judgment was manifestly unjust and unreasonable;

(vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the ballistic expert, etc.

(vii) This list is intended to be illustrative, not exhaustive.

2. The appellate court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached--one that leads to acquittal, the other to conviction--the High Courts/ appellate courts must rule in favour of the accused."

21. In ***State of Himachal Pradesh Vs. Kahan Chand, 2016 (1) Drugs Cases (Narcotics) 576***, a Coordinate Bench of this Court has held as under

"19. The accused has had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in Mohamed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94, it cannot be said that the Court below has not correctly appreciated the evidence on record or that acquittal of the accused has

resulted into travesty of justice. No ground for interference is called for. The present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged."

22. Therefore, in our considered view, it cannot be said that on the basis of evidence both oral as well as documentary prosecution had proved its case against the accused beyond reasonable doubt. A perusal of the judgment passed by learned trial Court also demonstrates that it has exhaustively taken into consideration the entire evidence produced on record by the prosecution and after appreciation of the same has held that the prosecution was not able to prove its case against the accused on the strength of evidence placed on record. We concur with the findings so returned by learned trial Court. The findings so returned by learned trial Court are neither perverse nor it can be said that the same are not borne out from the records of the case.

23. Therefore, in view of the above discussion, judgment of acquittal passed by learned trial Court is upheld, whereas the appeal filed by the State is dismissed being devoid of any merit. Bail bonds, if any, furnished by the accused are discharged.

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

The New India Assurance Co. Ltd. .....Appellant

Versus

Smt. Leela Devi and others .....Respondents.

FAO (MVA) No. 339 of 2012.
Date of decision: 13th January, 2017.

Motor Vehicles Act, 1988- Section 149- Driver had a licence to drive HTV and thus he possessed a valid and effective driving licence at the time of accident –MACT had rightly saddled the insurer with liability. (Para-10)

For the appellant: Mr. Praneet Gupta, Advocate.
For the respondents: Mr. Amit Jamwal, proxy counsel for respondents No. 1 and 2.
Nemo for respondents No. 3 and 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

This appeal is directed against the judgment and award dated 6.3.2012, passed by the Motor Accident Claims Tribunal Hamirpur, District Hamirpur, H.P. hereinafter referred to as "the Tribunal", for short, in MAC Petition No. 17 of 2010, titled *Leela Devi and another versus Wattan Thakur and others,* whereby compensation to the tune of Rs.3,34,000/- alongwith interest @ 7.5% per annum was awarded in favour of the claimants and insurer came to be saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Claimants, owner and driver have not questioned the impugned award on any ground, thus the same has attained the finality, so far as it relates to them.

3. Insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. Claimants have sought compensation by the medium of claim petition before the Tribunal as per the break-ups given therein, which was resisted by the respondents and following issues came to be framed.

1. *Whether the death of Arvind Kumar was caused due to rash and negligent driving of vehicle No. HP-22-9786 (Mahindra Pick-up van) by respondent No.2, as alleged? OPP.*
2. *If Issue No. 1 is proved in affirmative whether the petitioners/claimants are entitled to compensation. If so to what amount and from whom? OPP.*
3. *Whether the petition is not maintainable as alleged? OPR-3.*
4. *Whether the respondent No. 2 was not holding a valid and effective driving licence to drive the vehicle in question at the time of accident?OPR-2.*
5. *Whether the vehicle in question was being plied without valid and effective Registration Certificate- cum- fitness certificate and Route permit at the relevant time? OPR-3.*
6. *Whether the deceased was travelling as a gratuitous passenger at the relevant time in the vehicle in question? OPR-3.*
7. *Relief.*

5. Claimants have examined the witnesses and insurer has not examined any witness. Thus, the evidence led by the claimants have remained un-rebutted.

6. Learned counsel for the appellant argued; *(i) That the claimants have failed to prove the rash and negligent driving by the driver and;*

(ii) That the driver was not holding a valid and effective driving licence at the time of accident.

7. Both these points revolve around Issues No. 1 and 4. However, I deem it proper to deal with all the issues.

Issue No.1.

8. Claimants have led evidence to prove that the driver, namely, Purshotam Chand, has driven the offending vehicle bearing registration No. HP-22-9786 (Mahindra Pick-up van) rashly and negligently in which deceased Arvind Kumar sustained the injuries and succumbed to the same. It is apt to record herein that neither the driver nor the owner have questioned the said findings, how the insurer can question the said findings. There is no rebuttal to the evidence led by the claimants. The Tribunal has rightly determined Issue No.1. Thus, the findings returned by the Tribunal on Issue No.1 are upheld.

9. Before dealing with Issue No. 2, I deem it proper to deal with issue No. 4.

Issue No.4.

10. It was for the insurer to prove this issue, has not led any evidence thus, has failed to discharge the onus. The driver was having HTV licence at the time of accident which was valid and effective and how can it be said that the driver was not having a valid and effective driving licence at the time of accident. The Tribunal has rightly made the discussion in para 9 of the impugned award, needs no interference. Accordingly, the findings returned by the Tribunal on this issue are upheld.

Issues No. 3, 5 and 6.

11. It was for the insurer to lead evidence, has not led any evidence thus, has failed to discharge the onus. The Tribunal has rightly recorded the findings. Having said so, the insurer has failed to prove that the owner and driver have committed willful breach and accident was not outcome of rash and negligent driving by the driver. Thus, the findings returned by the Tribunal on these issues are upheld.

Issue No.2.

12. The insurer has not questioned the adequacy of compensation. Accordingly, the findings returned by the Tribunal on this issue are upheld.

13. Viewed thus, the appeal fails, is accordingly dismissed and the impugned award is upheld.

14. The Registry is directed to release the amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in their bank accounts, after proper verification.

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

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

Virender Singh ....Petitioner
Versus
State of H.P. and others ....Respondents.

CWP No. 2514 of 2016
Judgment reserved on: 10.01.2017
Date of Decision : January 13, 2017.

Constitution of India, 1950- Article 226- Petitioner was registered as class-B contractor and was eligible to submit tender upto Rs.50,00,000/- he submitted a tender for the construction of primary health center building at Nainidhar, which was rejected on the ground that petitioner is ineligible - aggrieved from the rejection, he filed the present writ petition- respondent pleaded that petitioner is not eligible to participate in e-tendering process pertaining to Class-D, he had failed to submit the work done of similar nature and list of machinery, tools and plants referred in form-8 - the petitioner is a diploma holder engineer and is eligible to submit the tender upto Rs.30 lacs – held, that petitioner has not amended the writ petition to assail the decision declaring him to be ineligible on the grounds referred in the writ petition- he has not challenged the rules declaring him to be ineligible – the petitioner is registered as class-B contractor and is not eligible to participate in e-tendering process pertaining to Class-D as per Enlistment Rules, 2015 – his bid was rightly rejected – petition dismissed. (Para-5 to 9)

Case referred:
Rajesh Kumar and others vs. State of H.P. and another & connected matter, 2016 (3) Him.L.R.(DB) 1425

For the Petitioner Mr. S. D. Gill, Advocate.
For the respondents Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma, Additional Advocate General, Mr. J.K.Verma and Mr. Kush Sharma, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This writ petition has been filed with the following prayer:

" It is, therefore, respectfully prayed that the present writ petition may kindly be allowed and appropriate writ, order or direction may kindly be issued to the respondent to award the work of : Construction of Primary Health Centre building at Nainidhar, Tehsil Shillai, District Sirmaur, H.P. to the petitioner as the petitioner is the successful bidder for the tender notice dated 22.6.2016 against tender ID

2707.2086, 216 / PWD-22382.3 HP, and the fresh tender notice dated 20.9.2016 for the same work may kindly be declared null and void, keeping in view the facts and circumstances stated in this petition and also in the interest of natural justice and law."

2. It is not in dispute that the petitioner was initially registered as Class-B contractor and entitled to submit the tender upto Rs. 10,00,000/- at the first instance. However, thereafter vide notification dated 26.5.2015 the Enlistment Rules, 1967 were amended. According to the petitioner, the fact that he was registered as Class-B contractor made him eligible to tender upto Rs. 50,00,000/- and, therefore, the rejection of his tender for the work of construction of Primary Health Centre building, Nainidhar, Tehsil Shillai, District Sirmaur, on the ground of his ineligibility is highly arbitrary, void, illegal, unconstitutional, capricious, beyond the confines of legitimacy and all reasonableness.

3. The respondents have filed the reply wherein it is stated that for the tender in question, there were as many as six participants including the petitioner. As regards the petitioner, his case has been rejected on the following grounds:

"(a) The bidder is registered as Class-B Contractor. The bidder registered as Class-B contractor are not eligible to participate in the e-tendering process pertaining to Class-D as per condition prescribed vide Govt. Notification No. PBW(B)22-1/2002 Shimla dated 26.03.2015 Rule No.1.8 as such found not eligible.

(b) The bidder has failed to submit the work done of similar nature and list of machinery, tools, plants, as referred in Form 8 of e-tendering.

(c) The bidder is diploma holder engineer in Civil Engineering. As per condition prescribed vide Govt. Notification No. PBW(B) 22-1/2002 Shimla dated 26.03.2015 Rule No. 1.8 he is eligible to tender only upto Rs. 30.00 lakh. Whereas the tender invited is costing to Rs. 42,95,606/- only. As such, the bidder is not eligible to participate in the e-tendering process. Hence found not eligible."

4. The petitioner has filed rejoinder wherein it is reiterated that once the petitioner has been classified as Class-B contractor, then he can always be awarded works upto Rs. 50,00,000/- whereas the work in question was costing only Rs. *42,95,606/-*.

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

5. At the outset, we may observe that the petitioner even after filing of the reply by the respondents has not cared to amend the petition and assail the decision of the respondents on the ground mentioned therein and has further not even questioned the Rules whereby he has become ineligible for the tender in question.

6. In addition to that the petitioner has also not placed on record the Enlistment Rules dated 26.5.2015. However, we have already dealt with these Rules in ***Rajesh Kumar and others*** vs. ***State of H.P. and another & connected matter, 2016 (3) Him.L.R.(DB) 1425*** and find that these Rules in substance permit a contractor to participate only in his class or in one class below his originally enlistment class. As a result of these, now 'A' class contractor can file bid for a work of more than Rs. 2 crores upto unlimited amount and can also participate in the tendering process of a work below Rs. 2 crores upto Rs. 80 lacs. Similarly, a 'B' class contractor is eligible to participate in tendering process of work between Rs. 80 lacs to Rs. 2 crores and can also participate in 'C' class category upto Rs. 30 lacs. Similarly, 'C' class contractor is eligible to make bid upto the work valuing Rs. 80 lacs and can also participate in 'D' class category works which are upto Rs. 30 lacs.

7. Adverting to the facts, it would be noticed that the petitioner was initially registered as Class-B contractor and, therefore, is not eligible to participate in the e-tendering

process pertaining to Class-D which is two categories below to his enlistment in terms of the Enlistment Rules, 2015. Furthermore, the petitioner is a diploma holder engineer in Civil Engineering and as per the Rule 1.8, he is eligible to tender only upto Rs. 30,00,000/-, whereas the tender invited in the instant case is costing Rs. 42,95,606/-

8. What necessitated the promulgation of the Enlistment Rules, 2015 has already been dealt by us in ***Rajesh Kumar's case*** (supra) in the following manner:-

> "3. It is also submitted that in the new Enlistment Rules the necessity for incorporating Rule 8.1 arose because of the monopoly amongst the Class 'A' and 'B' contractors which was affecting the rights of Class 'C' and 'D' contractors. The contractors in 'A' and 'B' class participated not only in the respective classes, but as well as in the lower classes and this had the following adverse effects:
>
> *"(i) The contractors of A & B class when execute the work of lower class also delay their work of respective class.*
>
> *(ii) There are numbers of contractors in Class C & D who can execute the work of their respective class but due to participation of class A & B contractors they are not getting the work of their class for which they are eligible. There are number of works in the State which could not even be awarded in time and the Department is receiving single tender in many cases. Hence, Rule 8.1 was added in new Enlistment Rules, 2015 so that the person enlisted in particular class could execute the work of his own class and one step below.*
>
> *(iii) The contractors who are working regularly in the Department and achieving their targets are not affected by the new Enlistment Rules."*

Thereafter, this Court upheld these conditions and observed as under:

> *"13. We entertain no doubt in our minds that all this has been done with the sole aim and objective to ensure that the big contractors now confine themselves to 'A' and 'B' class and do not barge into the contracts otherwise reserved for 'C' and 'D' class. This would not only bring about a healthy competition amongst the equals and would also ensure that these equals may also gain sufficient experience of work so that after gaining work done experience, they are also upgraded to higher class to minimize monopoly of 'A' and 'B' class contractors on work done basis.*
>
> *14. We cannot ignore the fact that the contractors belonging to 'C' and 'D' categories are mostly unemployed educated youth, who are unable to compete with the 'A' and 'B' contractors. Therefore, the aforesaid provision would atleast ensure that every enlisted category of contractor would only have to face a healthy competition as per his enlisted class thereby not only providing him an opportunity to earn his livelihood but would also provide him an opportunity to upgrade his class."*

9. In light of the aforesaid discussion, no fault can be found with the action of the respondents whereby they have rejected the bid of the petitioner on the ground of ineligibility. Consequently, there is no merit in this petition and the same is dismissed, so also the pending application(s), if any, leaving the parties to bear their own costs.

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